

ANDES

ADVOCACY NETWORK ON DESTITUTION

Living in Limbo

Forced Migrant Destitution in Europe



Jesuit Refugee Service Europe



Jesuit Refugee Service Europe

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This research is based on the previous report on destitute forced migrants: "We are dying silent"

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Executive Summary

This report describes the social and legal situation of forced migrants who came from countries outside the European Union¹ and are living in destitution in the following EU Member States: Belgium, Germany, Ireland, Italy, Malta, Portugal, Romania, Spain, Sweden and the United Kingdom. Annexes contain summaries of the situation in France, Slovenia and Ukraine.

The basis for the report is a definition of *destitution* as a situation of lack of means to meet basic needs such as shelter, food, health or education as a consequence of a State's policy which excludes certain migrants from enjoying basic rights and receiving official assistance or severely limits their access to such assistance and, simultaneously, deprives them of any effective opportunity to improve that situation, resulting in a continuing denial of the dignity of the person.

The report gives an insight into the meaning of destitution and its effects on migrants who suffer from it.

Destitution: A European Wide Phenomenon

Destitution is experienced by a wide variety of migrants with different legal backgrounds. The analysis among migrants in the selected countries identified diverse groups of migrants who have become victims of destitution. This can include migrants in the possession of residence rights.

With respect to the access to certain rights the situation is also quite diverse. In some countries, for instance, asylum seekers whose claims are pending have the right to access the formal labour market after a six months "waiting time". In other countries, the waiting period is one year. Again in other countries, asylum seekers must not work if they have appealed against a negative decision.

Despite this diversity, several common threads can be discerned throughout Europe. States have adopted laws and policies that to a large extent exclude certain groups of migrants from access to basic social rights. Destitute migrants have no or very limited access to public goods and services under law in terms of health care, employment, housing, financial support and material assistance such as food and clothing. Even if access to goods and services is guaranteed under law, it is often denied in practice due to complex administrative procedures, unclear laws and lack of

knowledge of the service providers. Furthermore, many destitute migrants who stay illegally on the territory fear detention and removal and for this reason do not try to gain State support.

Destitute migrants rely on charity for their survival; families, community members, religious organisations and NGOs provide support. NGOs and other civil society actors have taken up typical state tasks such as the provision of shelter, medical care and material assistance, including food, hygiene products and clothing.

Migrants become stuck in a downward spiral of destitution. It affects their physical and mental health. The risk of being pushed into depression or ending up on the streets is very high. For many destitute migrants return is no option. Human rights concerns, medical reasons, or practical reasons, such as the unwillingness of the embassy to provide the necessary travel documents prevent people from returning. National laws often recognise a very limited number of grounds upon which a third-country national may not be removed, but even within this framework no legal durable solution is offered (i.e. a residence permit with social rights).

The European Union must act

JRS Europe recalls that human rights apply to every person, regardless of nationality or legal status. These rights include: right to health care, right to adequate housing, right to a minimum subsistence, right to fair working conditions, and the right to education.

The policies of EU Member States are clearly violating these human rights of the affected migrants and cause severe social problems.

JRS appeals to governments of EU Member States to immediately change their policies in order to ensure that everyone has access to basic social rights such as housing, education, social assistance or work. The European Union, in turn, must develop stricter regulations forcing governments to guarantee access to those rights. In particular, the European Parliament is encouraged to set up an investigation into the situation of destitute forced migrants in the EU Member States and publicly take a firm stance on this issue.

¹ As the legal situation of EU citizens differs much from those of third country nationals, the report does not analyse the situation of the former group. It should be noted, however, that in some countries such as Ireland a large group of EU citizens also live in destitution.

Glossary

The following definitions apply to the terms used throughout the report:

asylum seeker

A third-country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken.²

destitution

A situation of lack of means to meet basic needs such as shelter, food, health or education as a consequence of a State's policy which excludes certain migrants from enjoying basic rights and receiving official assistance or severely limits their access to such assistance and, simultaneously, deprives them of any effective opportunity to improve that situation, resulting in a continuing denial of the dignity of the person.

emergency health care

Health care provided when in need of urgent medical assistance.

final decision on asylum status

A decision on whether the third-country national or stateless person be granted asylum status and one which is no longer subject to an effective remedy.³

forced migrant

A person who is living in a country without holding this country's citizenship and cannot return to the country of origin in safety and dignity because of reasons such as danger of political persecution or other human rights violations, danger for life or health, lack of travel documents, or lack of transport possibilities.

illegally staying third-country national⁴

Any person who is not a national of the country of stay and whose presence on the country's territory is regarded as an illegal stay because the person does not fulfil, or no longer fulfils

the conditions for stay or residence in that country.⁵

For the purpose of clarity JRS Europe has chosen to use the term "illegally staying third-country nationals" throughout the report when addressing the legal situation as this is the term used in official EU documents. JRS Europe, however, wants to stress the fact that it does not support the notions that are strongly conveyed by using such language: no one is illegal.⁶

irregular migrant

This report uses the term "irregular migrant" for illegally staying third-country nationals with the exception of rejected asylum seekers or third-country nationals within the asylum procedure whose stay on the territory is illegal. When a described situation concerns irregular migrants as well as rejected asylum seekers and/or asylum seekers with an illegal stay, this is explicitly mentioned.

primary health care

Health care provided in the community by medical practitioners who have first contact with patients.

regularisation

The act of giving legal residency to an illegally staying third-country national.

rejected asylum seeker

A third-country national or a stateless person who has made an application for asylum and against whom a final decision on asylum status has been reached.

removal/to remove

The execution of the obligation to return, namely the physical transportation out of the country.⁷

removal order

An administrative or judicial decision or act ordering the removal.

return/to return

The process of going back to one's country of origin, transit or another third-country, whether

² Cf. Article 2 (c) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States granting and withdrawing refugee status (Asylum Procedures Directive).

³ Cf. Articles 2 (d) and 39 of the Asylum Procedures Directive.

⁴ For the purpose of clarity JRS Europe has chosen to use the term "illegally staying third-country nationals" throughout the report when addressing the legal situation as this is the term used in official EU documents. JRS Europe, however, wants to stress the fact that it does not support the notions that are strongly conveyed by using such language: no one is illegal.

⁵ Cf. Article 3 (1), (2) of 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 (Returns Directive).

⁶ See Picum, "Undocumented Migrants Have Rights! – An Overview of the International Human Rights Framework" of March 2007, on page 5, with explanation why no reference should not be made to "illegal" migrants.

⁷ Cf. Article 3 (5) of the Returns Directive.

voluntary or enforced.⁸ Return is a very broad notion and includes removal from the territory.

secondary health care

Services provided by medical specialists who generally do not have first contact with patients (e.g. cardiologist, urologists, dermatologists).

toleration

A situation in which the State officially acknowledges that a removal order cannot be executed for the time being but does not provide the person concerned with a residence permit.

⁸ Cf. Article 3 (4) of the Returns Directive.

Introduction

Why a report on destitution of forced migrants?

All over Europe, offices of the Jesuit Refugee Service accompany migrants who for good reasons cannot return to countries of origin but are completely excluded from social services in the countries where they are living. These persons are living in limbo, in an impasse, without any perspective.

Little has been known about the social and legal realities of these destitute migrants. Who are they, what do their lives look like, how do they cope with this situation, why do they continue to stay in the country when living in extreme poverty, and what entitlements do they have under law? A clear picture of this phenomenon emerging across Europe is needed, in particular an answer to the question whether destitution of forced migrants really is a Europe-wide phenomenon, and what the similarities and differences in the various countries would be.

In 2006 – 2007 the Jesuit Refugee Service Europe conducted a study that gave first answers to these questions. The resulting report (“We Are Dying Silent”, published in 2008) showed for seven countries that there are large groups of people concerned (undocumented migrants, tolerated migrants, failed asylum seekers, etc.) who because of their non-status have no access or only limited access to health care, housing, education, accommodation and the labour market. The prolonged poverty leads to despair, withdrawal and depression. Human rights become dependent on legal status.

In the context of the Advocacy Network on Destitution of Forced Migrants in Europe (ANDES), again supported generously by the Network of European Foundations (NEF) under their European Programme for Integration and Migration (EPIM), JRS builds on the previous study. This completely revised and enhanced report shall give a voice to those who are often left unheard. Insight is given into what destitution means for those who suffer from it: how these migrants cope with destitution, how they are stuck in this situation and what effects it has on their daily lives and general well-being.

This report aims to make visible the phenomenon of migrants living in destitution across Europe and shows the links between destitution of migrants and the laws and policies adopted by national governments. The collected information demands a change in European and national laws and policies. The

ultimate aim of this report is to improve the lives of destitute migrants by providing relevant information to policy makers at the European and national levels.

How to use this report

This report is made up of the following three main parts: ten chapters on the social and legal situation of destitute forced migrants in the countries visited (Belgium, Germany, Ireland, Italy, Malta, Portugal, Romania, Spain, Sweden, and the United Kingdom), an analytical chapter creating a European picture of destitution and, lastly, a chapter in which the findings of the study are translated into JRS policy positions based on human rights law arguments. In annexes information can be found on several countries where our general question on the social and legal situation of destitute forced migrants was met with an answer that reflects a very particular context (Slovenia, Ukraine, and France).

This report can be used in three ways depending on the interest of the reader.

First, if the reader specifically wants to know about the situation of destitute migrants in a particular country, the country chapter can be examined. A detailed description is given of the social situation per dimension of destitution taking the stories of destitute migrants as a lead, supported by the information provided by national NGOs active in the field. The dimensions of destitution concern health care, work, financial support, housing, food and clothing and life planning. Each country chapter also provides legal background information of the researched destitute migrant groups as regards their rights in terms of residence and social rights, as well as a legal overview on relevant asylum status, the grounds upon which a third-country national may not be removed and the possible legal instruments which may be applied in such situations.

A second way to use this report is to read the analytical chapter on destitution as a Europe-wide phenomenon for cases where the reader has a specific interest in the aspects that make up destitution across Europe. The common threads at the European level have been distilled from the findings per country.

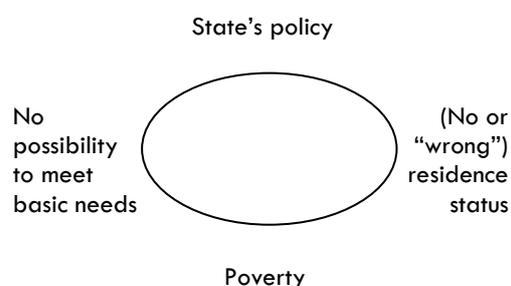
Thirdly, in case the reader wants to know how to tackle and address the issue of destitution in terms of advocacy and policy making s/he can be directed to JRS Europe’s positions in the final analytical chapter.

What is meant by “destitution”?

The origin of the term “destitution” lies in the Latin word “destituere” meaning, *inter alia*, “to abandon someone, to maroon someone”. Hence, in the literal sense of the word a destitute person is someone who is left without assistance in a precarious situation.

In our context, the definition has three elements:

- The lack of means: “Destitution describes lacking the means to meet basic needs of shelter, warmth, food, water and health.”⁹
- The consequence of a State’s policy: Laws and/or official authorities’ practices more or less systematically exclude certain groups of migrants because of their (lack of) residence status from access to services granted to citizens and other groups of migrants.
- No perspective of breaking the vicious cycle in the near future:



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

The methodology used for this report

In order to map the social and legal reality of migrants living in destitution within Europe, a social and a legal questionnaire was developed.

As part of our methodological instruments, open interview guidelines were developed to be used for interviews with destitute migrants, NGO representatives and JRS national staff members for exploration of the social reality of destitute migrants. The interview guidelines aimed at drawing a clear picture of the social

situations of destitute migrants and their most pressing needs in each country. As regards the interview guidelines for destitute migrants, an open approach was taken when conducting the interviews. Open questions were asked during the interview to avoid working with a preconceived reality and to guarantee that the interviewed migrant himself describes his social situation and indicates his major problems and most pressing needs in his life. The social questionnaire was in this respect comprised of the following thematic points: (i) the migration history and legal status (ii) open questions to identify major areas of concern in the life of the interviewed person (iii) more closely guided questions for areas of major concern to the interviewed person and the study. Before the interview with a destitute migrant took place, informed consent was sought either orally or in writing depending on the preference of the respective migrant.

The interview guidelines for the JRS national staff members and NGO representatives were developed to receive information about their perspectives on the issue of destitution of migrant groups within the respective country. Similar topics were addressed as in the interview guidelines for destitute migrants, and, additionally, specific questions were raised as regards their provision of goods and services to these destitute migrants.

For the purpose of identifying the legal situation in which destitute migrants find themselves, a legal questionnaire was developed to be filled in by local legal experts. The legal questionnaire is built up in three main areas: (i) status under asylum law (ii) laws on return of third-country nationals with focus on the legal grounds which form an obstacle to return and the legal responses, if any, by the State in such situations (iii) legal entitlements to access public goods and services in terms of employment, health care, housing, financial support and food support in kind depending on status. The initial two areas aim, firstly, to provide general legal background information relevant to cases of destitution, and secondly, to know if and in what way the State has recognised the various groups of destitute migrants under its laws. As regards the third area on legal entitlements, the social rights selected were those which have a potential to have an effect on the destitute situation.

Limitations of the study

The countries in which cases of destitution are examined are limited to where JRS has national offices, or, in the case of Spain, similarly working agencies are active. Consequently, not all countries within Europe are covered and the report is limited in its outreach. However, the distribution of JRS

⁹ Hannah Lewis, *Destitution in Leeds: the experiences of people seeking asylum and supporting agencies*. York 2007 (The Joseph Rowntree Charitable Trust), p. 11.

national offices includes a variety of factors that take into account different contexts in which destitution of the forcibly displaced occurs in Europe: various legal systems; various traditions of asylum legislation; various traditions of social security systems; various migration and immigration histories, including forced migration; and a geographical distribution across Central, Southern, and Western Europe with some cases from Eastern Europe.

Further, the conducted research was also limited to the cities where JRS has national offices. No interviews were conducted with destitute migrants who were living faraway from these cities. For this reason, the specific situation of living in destitution in rural areas is left unexamined.

Identifying and arranging access to destitute migrants took place through the national JRS offices or partner organisations. The overall majority of the destitute migrants interviewed are beneficiaries of JRS national offices, or else, they benefit from the services provided by other NGOs collaborating with JRS. The situation of those destitute migrants who do not receive any form of support from NGOs or other institutions or charity organisations might not be fully reflected in this report.

The editorial deadline of this report was February 1st, 2010. Until specified differently, information is as known on this day. In the same way, all website links have been checked on this day.

Case Studies in Belgium

1. Case Study

1.1. A Typical Case

– Jeff, male asylum seeker in appeal at the Council of State, from the Democratic Republic of Congo, 42 years old –

Jeff left the Democratic Republic of Congo in 1992, at the age of 28, with the aim of studying abroad. As the Democratic Republic of Congo (former Zaire) and Belgium have a common colonial history, he had the idea to study management in Belgium. Additionally, his family had personal contacts within Belgium. He migrated legally to Belgium with a student visa.

Jeff felt welcomed in Belgium. His first impressions were positive and he appreciated very much the democratic society and the higher living standards. During the first few years, he established a network of students and intellectuals. After three years in Belgium, he received his diploma in management and took up a second study in development and management.

Everything was going well for Jeff, until he started to have medical problems in 1999. He was having problems with his lung, which led to other medical problems. From that moment onwards he fell into a downward spiral. In 1999 he was unable to participate in the exams because of his illness. His student visa was dependent on study results. However, he was convinced that the immigration office would not withdraw his student visa since he could show a medical certificate stating that he was not able to sit the exams. Nevertheless, the immigration office withdrew his student visa.

From this moment Jeff was illegally staying in Belgium and found himself stuck in his situation. Jeff states: “I was unable to return to the DRC because of the unstable political situation and the outbreak of violence.” At that time, the DRC was shattered by civil war. The civil war and unstable political situation continued. For Jeff, who belongs to an ethnic tribe that was threatened, the return to Congo was impossible. Jeff was a refugee “sur place.”

Jeff managed to remain unnoticed by the Belgium authorities for the next 3 years. In 2002, he was caught by the police at the university and put into administrative detention for 4 months. During his stay at the detention centre, he was informed of the possibility of applying for asylum. The asylum authorities refused his asylum application. Jeff was released from detention because he reached the maximum period of detention. In addition, the Belgian authorities did not get the

necessary travel documents from the embassy of the DRC to remove him.

Upon his release he received an order to leave the territory within 5 days. At the same time, Jeff decided to appeal at the Council of State against the refusal of his asylum claim. Simultaneously, Jeff applied in 2002 for regularisation as a result of his medical condition. Jeff was still having serious problems with his lung.

Since the loss of his student visa, 7 years ago, Jeff has been living in a destitute situation with an insecure stay in Belgium, and suffering from an illness. He feels very frustrated about the past 7 years, as he could have finished his studies by now or developed himself in another way. According to Jeff: “I feel that my life is taken away. I do not see a chance to get back a normal life. I also want to start a family.” Jeff lost his private accommodation after he was released from detention. His former landlord confiscated all his belongings to put pressure on him to pay the rent for the four months he had been in detention. Jeff was not able to pay his debts. He ended up being homeless: most nights he slept at the railway station to be protected against rain and the cold weather.

Jeff is not allowed to take up employment in the formal labour market and also does not receive any form of financial support from the State. He copes with the situation with support from NGOs and other civil society actors providing food, clothing and medical treatment. Daily he visits a soup kitchen run by NGOs. According to Jeff, this gives him some structure and reference point during the day. He also tries to survive by taking up short-term jobs in the informal market. However, this does not provide him with enough money to meet his basic needs: he only earns around 15 Euro per day.

Jeff remains very depressed. He expected to be able to obtain a degree and return back to DRC. This did not happen. He feels very lonely. As he is not participating in any shared social activities during the day, as he used to while studying, he feels like he is being pushed outside of society. He has nothing left anymore: he carries all his personal belongings in a plastic bag. He tries to stay informed about politics. However, in many aspects Jeff has lost his self-esteem and is desperate about his situation. All his hopes rest on obtaining a residence permit to start his life again: “Everything depends on the decision of my applications. I am waiting to get an answer. I

am not very optimistic about my future but I can't do anything but wait."

1.2. Context of the Case

The story told by Jeff gives an insight into the elements of destitution that may apply to rejected asylum seekers who have appealed against the negative decision of the asylum authorities before the Council of State.¹⁰ Jeff's story is also similar to stories told by definitely rejected asylum seekers who have reasons to

apply for regularisation. Asylum seekers who have appealed at the Council of State are irregularly staying on the Belgium territory.

In Belgium interviews were also conducted with rejected asylum seekers and irregular migrants who have applied for regularisation. The factors which combine Jeff's case with the cases of other third-country nationals interviewed are: having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival, being socially excluded, the State's awareness of their presence on the territory, and having no way out of destitution. However, what makes the case of definitely rejected asylum seekers and irregular migrants distinct from asylum seekers in appeal to the Council of State is that they are left without any form of social support provided by the State. Asylum seekers in appeal at the Council of State have the right to receive continued social assistance (through housing in a reception centre). Yet, according to the NGOs spoken to, there are cases of asylum seekers in appeal who, due to their extreme fear of removal, do not benefit from their right to receive social assistance.

The stories told by the interviewees provide insight into the lives of third-country nationals living in abject poverty and left without any form of social support. Supplementary and background information was provided by various NGOs working directly with these destitute groups. On this basis, several common elements can be discerned which are typical for third-country nationals in a similar position.

The following general elements can be taken from Jeff's case that create, shape and sustain destitution.

No or limited entitlements leading to the inability to meet basic needs

Jeff does not receive any social support and is living on the streets. He does have access to health care and frequently visits a doctor. Jeff is not allowed to access the formal labour market and is forced to occasionally take up irregular employment.

Asylum seekers who appeal at the Council of State¹¹ against a negative decision reached by the asylum authorities have, in principle, a right to material assistance such as housing, food and other material essentials. However, material assistance is only provided if the asylum seeker in appeal during the admissibility phase resides at a designated reception centre. For some of these asylum seekers, the fear of removal is so great as a result of their illegal stay on the territory that they are prevented from staying at a reception

¹⁰ If a foreigner applies for asylum in Belgium, his/her application will be registered by the Foreigners Office (in original language *Office des Etrangers / Dienst Vreemdelingenzaken*) who, as a first step, will examine whether Belgium is responsible for examining the application under Dublin II rules. If this is the case, the Foreigners Office transmits the application to the General Commissariat for Refugees and Stateless Persons (hereinafter referred to as "CGRA", in original language: *Commissariat général aux réfugiés et apatrides/ Commissariaat-generaal voor de vluchtelingen en de staatlozen*). The CGRA is entrusted with deciding upon an asylum claim at the first instance, and a special administrative tribunal, the Council for Foreigners' Disputes (hereinafter referred to as "CCE" in original language: *Conseil du contentieux des étrangers/Raad voor Vreemdelingenbetwistingen*) is entrusted with the examination of appeal against CGRA decisions. CCE decisions can be appealed to the Council of State (in original language: *Conseil d'Etat/Raad van State*) that is the higher administrative court. Since June 2007, the procedure at the Council of State has changed in foreigners affairs: first a "filter procedure" (quick decision on the admissibility of the appeal), and if accepted the Council of State will decide on the merits of the appeal. This new "filter" procedure on admissibility has as a clear objective to reduce the duration of the appeal before the Council of State. The Law obliges the council of State to decide about the admissibility of the appeal within 8 days. Only a small percentage of the appeals are successful at the stage of admissibility. This reform has thus induced a sharp decrease in the number of rejected asylum seekers who will remain a long time in the situation of appeal at the Council of State. Moreover asylum seekers may be fined if the appeal is considered by the Council of State as being abusive: this measure has a deterrent effect. The appeal at the Council of State has no suspensive effect: it means that asylum seekers in appeal to the Council will be illegally staying at the territory and subject to removal.

Before June 2007, the asylum procedure was divided into an admissibility and a determination phase. The first decision on an asylum claim was taken by the Foreigners Office which examined whether an asylum claim could be declared admissible; the CGRA examined the case in the second instance and appeal could be made to the Council of State. In the determination phase the CGRA examined the asylum claim on its merits and decisions could be appealed to the Permanent Refugee Appeals Commission (in original language: *Commission Permanente de Recours des Réfugiés/ Vaste Beroepscommissie voor Vluchtelingen*) in the second instance and final appeal to the Council of State. At the beginning of 2009, a good number of asylum seekers who introduced an appeal at the Council of State in the framework of the former asylum procedure, have still not received a final decision. For example, as of 30 September 2008, 3973 persons who had introduced an appeal at the Council of State within the former procedure were still hosted in reception centre for asylum seekers. By comparison only 304 persons having appealed to the Council of State in the new procedure were hosted in reception centres.

¹¹ The Council of State is the Supreme Administrative Court of Belgium.

centre and benefiting from state support. Thus, in practice they miss out on social support. Asylum seekers in appeal to the Council of State, as long as they remain in the designated reception centre, do have the right to access health care in a similar way as asylum seekers who are in an earlier phase of the asylum procedure. However, asylum seekers in appeal at the Council of State are not entitled to take up employment in the formal labour market.

Reliance on charity for survival

Jeff is sleeping at the railway station. He visits NGOs for food, clothing and medical treatment.

Some of the asylum seekers in appeal to the Council of State during the admissibility phase have such a high fear of return that they do not exercise their right to material assistance and are forced to rely almost entirely on charity for survival. Some manage to find an irregular job, but this is often not enough to meet all the basic needs. They rely on their social networks, family and NGOs for their survival. The material support concerns housing, food, clothing, and medical services.

Social Exclusion

For Jeff his social life changed abruptly when he lost his residence status. From that moment on he had to live a hidden life. From being a student, Jeff ended up in detention and then on the streets. Jeff is not allowed to access the formal labour market and has little social contacts any more. His contacts are limited to NGO workers and homeless people.

Destitute asylum seekers in appeal at the Council of State become very isolated from Belgian society. From first being in the asylum procedure with a legal status, they end up in an irregular situation. In several cases fear of the authorities prevents them from claiming their entitlements to continued support. Asylum seekers in appeal to the Council of State are not entitled to access the formal labour market. This leads to even greater exclusion from society.

The State's awareness of their presence on the territory

Jeff had been detained for four months. During this period the Belgian authorities did not obtain a "laissez passer" necessary to organise his forced return to the DRC. Jeff has appealed to the Council of State against the refusal of the administrative authorities to admit his asylum claim. Additionally, he also applied for regularisation. He is thus still within the Belgian system.

Asylum seekers who have appealed against the negative decision of the asylum authorities have made themselves known to the authorities

by submitting their appeal. They are within the asylum system and the Belgian authorities are aware of their presence on the territory. Under Belgian law an appeal at the Council of State does not have suspensive effect. This means that these asylum seekers are subject to removal.

No way out of destitution

Jeff feels stuck in his destitute situation. Not only does he have no financial means to take care of himself, he also feels very vulnerable because of his irregular status. Jeff cannot return to the DRC, not only because of the unstable situation and threat of persecution but also because he feels that his medical situation prevents him from returning.

Several asylum seekers with an appeal at the Council of State are forced into destitution because of their irregular status. Returning to their home countries is not an option for them. Some of these asylum seekers in appeal have a fear of ill treatment upon return, which is shown by the fact that they would rather live in insecure housing conditions or on the streets than be in a reception centre and at risk of removal. It should be noted again that this group of asylum seekers considers that despite their irregular status they are still within the asylum procedure. They still have the expectation that their claims to asylum will ultimately be accepted and protection will be offered. Return in such a situation is not a viable option for them.

2. Comparable Cases of Destitution

Applicants for regularisation: finally rejected asylum seekers and irregular migrants

During the country visit to Belgium, interviews were also conducted with definitely rejected asylum seekers and irregular migrants who requested regularisation under Belgian law.¹² The fact that they applied for regularisation does not alter their status. In other words, their stay on the Belgium territory remains illegal. The reasons why regularisation has been requested differ, from medical reasons, to practical reasons such as the respective embassy's lack of cooperation.

The destitute situation of rejected asylum seekers and irregular migrants who applied for regularisation is comparable in some aspects to cases of asylum seekers who have lodged an appeal at the Council of State. However, their legal situation is worse since they do not have the right to receive any kind of social support from the state. Yet, they are also bound by the same common five elements; having no or limited legal entitlements leading to the inability to meet basic needs, reliance on

¹² Articles 9bis and 9ter of Law 15/12/1980.

charity for survival, being socially excluded, the State's awareness of their presence on the territory, and having no way out of destitution. The differences in the social and legal situation specific for this group, compared with asylum seekers in appeal, will be discussed accordingly.

Limited entitlements leading to the inability to meet basic needs

Similar to asylum seekers with an appeal pending at the Council of State, the stay of definitely rejected asylum seekers and irregular migrants who applied for regularisation remains irregular. The fact that they have applied for regularisation does not alter their status or confer them with certain entitlements. Asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants who applied for asylum are not entitled to access the formal labour market. Compared to asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants have more restricted access to health care. This is limited to "urgent medical care." Furthermore, an important difference is that in principle definitely rejected asylum seekers and irregular migrants do not have any rights to receive material assistance. The right for definitely rejected asylum seekers to receive social support such as housing and food ceases when the period given to leave the territory has expired. However the law foresees 4 situations where reception (housing and food) may be pursued¹³. These are: 1) medical reasons (in this case the foreigner must produce a medical certificate and the proof that he asked regularisation for medical reasons (art. 9ter of Law 15/12/1980); 2) other reasons of absolute necessity¹⁴; 3) family unity (right to stay with the husband/wife, partner, parents or children who do still have the right to reception within the asylum procedure); 4) during the preparation of voluntary return.

Irregular migrants are generally not eligible for social support. One exception is definitely rejected asylum seekers and irregular migrants with children: they are entitled to remain in reception centres. However, given the fact that fear of detention and removal is so high, some do not to exercise this right in practice. The

extremely limited entitlements under Belgium law result in the situation that definitely rejected asylum seekers and irregular migrants who have applied for regularisation are sometimes unable to meet their basic needs themselves.

Reliance on charity for survival

Since definitely rejected asylum seekers and irregular migrants who applied for regularisation are not entitled to receive any kind of material or financial assistance, their reliance on charity for survival is higher when compared with asylum seekers in appeal to the Council of State. A large number of this group reside in reception centres. Some of them who appealed to the Council of State in the framework of the former asylum procedure even receive financial support.

Social Exclusion

The level of social exclusion for this group is similar to that experienced by asylum seekers who lodged an appeal at the Council of State. However, some irregular migrants who found themselves in an irregular situation from the beginning of their stay in Belgium were already isolated from society.

The State's awareness of their presence on the territory

By submitting a request for regularisation, definitely rejected asylum seekers and irregular migrants are known to the Belgian authorities.

No way out of destitution

Definitely rejected asylum seekers and irregular migrants sometimes live in abject poverty and are desperate about the situation they find themselves in. Their only hope for a change for the better is that their request for regularisation will be recognised. Yet these procedures can take several years, during which they are subject to removal. Many rejected asylum seekers are afraid of ill treatment upon return. Applicants for regularisation may have various reasons why they are unable to return and want to stay in Belgium, these reasons – as recognised by case law – may be: medical reasons, the practical impossibility of return (i.e. of a factual or administrative nature), special ties with Belgium, statelessness or being the victim of human trafficking.

3. Relevant Status under Asylum Law

This section will provide a short description of the relevant asylum status under Belgium law. This is useful in providing general legal background information for cases of asylum seekers in appeal to the Council of State,

¹³ Article 7 of Law 12/01/2007 on reception of asylum seekers and other categories of foreigners.

¹⁴ Instructions given by Fedasil (the federal agency responsible for the reception of asylum seekers) released on 23 January 2008 foresees the following cases of absolute necessity: 1) when the foreigner asked a prolongation of the order to removal in view of finishing the school year; 2) lack of documents necessary for the return; 3) statelessness; 4) from the 7th month of pregnancy; 5) the foreigner who asked for regularisation on the basis that he/she is the parent of a Belgian child

rejected asylum seekers and irregular migrants who applied for regularisation.¹⁵

3.1 Relevant Asylum Laws

The most relevant regulations on asylum in Belgium are contained in the “Law of 15/12/1980 concerning the access to the territory, the residence, the settling and the removal of foreigners”¹⁶ (often referred to as the Belgian Foreigners Act).

3.2 Asylum status

Belgium offers three forms of protection: refugee status, subsidiary protection and temporary protection.

*Recognised Refugee*¹⁷

The regular refugee status¹⁸ is issued in accordance with Art. 1 A (2) of the 1951 Refugee Convention which has been incorporated in Article 48/3 of the Belgian Foreigners Act.

Persons under Subsidiary Protection

This form of protection was introduced in October 2006 and can be issued to third-country nationals or stateless persons who do not qualify for refugee status, who cannot benefit from Art. 9ter of the Belgian Foreigners Act and for whom there are well founded reasons to believe that, in the case of returning to the country of origin, respectively to the country where he/she has his habitual residence, he/she will be exposed to a serious risk, and who cannot or, due to this risk, obtain the protection of that country. The following serious risks are recognised:

- death penalty or execution
- torture or inhuman or degrading treatment or punishment
- serious threat to a person’s life by reason of indiscriminate violence in situations of international or internal armed conflict.¹⁹

Persons under Temporary Protection

Temporary protection may be offered under Belgian law to third-country nationals who are granted temporary protection on the basis of a resolution by the EU Council pursuant to EU

Directive 2001/55/EC.²⁰ The instrument of temporary protection is regulated in Art. 57/29 to 57/36 of the Belgian Foreigners Act.

Persons to be authorised to stay because of serious medical reasons (Art. 9ter)

According to Art. 9ter of the Belgian Foreigners Act, the foreigner who suffers from “an illness which constitutes a real risk to his life or his physical integrity or a real risk of inhuman or degrading treatment should there not be an adequate treatment in his country of origin or his country of residence” can apply for an authorization of residence.

The procedure has two phases. First is the admissibility test: The Aliens Office checks if the person has an identity document, no criminal record, and if the file is complete. In the second phase, a doctor will enquire as to the seriousness of the illness and the possibility of receiving adequate medical treatment in the country of origin. During the admissibility phase, the “9ter applicant” has right to reside in a reception centre. If his application is declared admissible, he will be given an “attestation of matriculation” which is a precarious permit of residence (to be renewed every 3 months) but which entitles the applicant to receive social assistance from the Social Welfare Office.

4. Removal of Illegally Staying Third-Country Nationals: Obstacles, Practice and Solutions

This section briefly discusses the recognised obstacles to removal in Belgian law, the possible legal solutions in such cases and the implementation of the laws on return in practice.

4.1 Grounds for Non-Removal

Besides the grounds for non-removal that lead to refugee status, subsidiary or temporary protection, the Belgium administrative practice recognises on a discretionary basis other obstacles to removal that prevent the third-country national from leaving Belgium. Discretion is left to the authorities to decide whether these obstacles lead to a prolonged stay or residence status.

The following practical obstacles are recognised:

- Lack of required travel documents
- No (safe) travel route to country of origin

¹⁵ Legal questionnaires were completed by legal experts from Caritas international Belgium, Centre pour l'égalité des chances et la lutte contre le racisme, and the Vlaams Minderheden Centrum (VMC).

¹⁶ Original language: Loi du 15/12/1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers. The last change to this law were brought by the Law 15/09/2006 and entered into force in June 2007.

¹⁷ Original language: Réfugié reconnu.

¹⁸ Articles 48 to 49/2 of Law 15/12/1980.

¹⁹ Article 48/4 of Law 15/12/1980.

²⁰ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

- Unsafe country of origin (i.e. existence of international or internal conflict).

Other obstacles identified under Article 21 of the Law 15/12/1980 and Article 7 of the Law 12/01/2007 on reception of asylum seekers and several Circulars, of which the most important ones are:

- School enrolment: Section 2 of Circular letter of 29/04/2003 related to the removal of families with children enrolled younger than age 18 – Intervention of the police services in schools²¹
- Third-country nationals who are the non-separated spouse of a Belgian man or woman²²; and, related to this, family ties with a Belgian child or partner: Circular letter related to approval of authorisation of residence on the basis of cohabitation within the scope of a permanent relationship, 30/09/2006²³
- A third-country national who is the caretaker of a child legally residing in Belgium²⁴

4.2 Legal Solutions in case of Obstacles to Removal

Short and medium term legal solutions: Suspension of removal

An illegally staying third-country national on Belgium territory who received a removal order can apply for a prolongation of the removal order: a so-called “Suspension of Removal.” This instrument is only used in exceptional circumstances and is not explicitly communicated. It is a matter of practice and at the discretion of the authorities. This instrument could be used in cases where third-country nationals cannot be removed due to the existence of temporary obstacles such as medical problems and lack of necessary documents that are expected to be provided shortly. Suspension of the removal order bestows few rights: the assurance of non-removal before the date given and the right to receive financial or material assistance. The duration of the suspension of the removal order depends on the individual case. It ranges from one to three months.

Long term legal solution: Residence permit under exceptional circumstances

Under Article 9bis of Law 15/12/1980, a third-country national is offered the possibility of regularisation by means of a residence permit under exceptional circumstances. The issuance of such a residence permit is at the discretion of the relevant authorities: no automatic right is derived from it. Exceptional circumstances must exist where it is impossible or extremely difficult for the third-country national to return to his/her country of origin. Examples of exceptional circumstances already identified in the Belgian case law are: practical impossibility to return (i.e. of a factual or administrative nature), statelessness, those who are victims of a long asylum procedure (i.e. generally 4 years, or 3 years for families with children between 6 and 18 attending school), special ties with Belgium or a Belgian citizen, and the third-country national being a victim of human trafficking. Additional criteria have only recently been established upon which a residence permit might be issued on the grounds of exceptional circumstances.²⁵

Assessing the request for regularisation is done without the applicant present. The duration of the whole procedure ranges from between 1 and 2 years, but certain applicants must wait up to 3 years. In principle, the request for regularisation does not affect the legal status of the applicant. Thus, illegally staying third-country nationals who have requested regularisation are still subject to removal. The period for which such a residence permit is issued can either be date limited or of an indefinite timescale. Most of the time, the residence permit is limited in duration and assorted with conditions (re employment, formation, identification ...). If these conditions are fulfilled, then the residence permit is prolonged.

5. Dimensions of destitution

This section will give a detailed overview of what it means to be destitute for asylum seekers who have appealed against a decision reached upon their asylum claim and illegally

²¹ Original language: Point 2 de la Circulaire du 29/04/2003 relative à l'éloignement des familles avec enfant(s) scolarisé(s) de moins de 18 ans – Intervention des services de police dans les écoles.

²² Article 21(3) of Law 15/12/1980.

²³ Original language: Circulaire relative à l'octroi d'une autorisation de séjour sur la base de la cohabitation dans le cadre d'une relation durable du 30/09/2006.

²⁴ Article 21(2) of Law 15/12/1980.

²⁵ In March 2008 the founding agreement of the new government foresaw that a circular letter would make public the criteria the administration should follow for regularising undocumented migrants who have developed strong ties with Belgium. For a long time, despite a lot of pressure from civil society and the undocumented migrants themselves, no circular was published, and many applications which would be possibly successful under the new rule were dismissed. Only more than one year later, on 19 July 2009, the parties supporting a new government (“Van Rumpoy II”) agreed finally on a set of new, but rather narrow criteria (*Instruction relative à l'application de l'ancien article 9,3 et de l'article 9bis de la loi sur les étrangers*). See www.dofi.fgov.be/fr/Instructions_9_3.pdf. The Council of State, however, has rescinded these instructions by decision of 11 Dec. 2009 on the ground that there was no sufficient legal basis for them in the relevant laws. At the moment, decisions are made on a case-to-case basis.

staying third-country nationals who have applied for regularisation. It is based upon information provided by the interviewed persons from the focus group, as well as additional information provided by JRS Belgium and other NGOs.²⁶

5.1 Health

"I am depressed and I don't know when my problems will be solved. I have lung problems. I feel fragile. It is winter and I am sleeping in the streets. I go to Médecins Sans Frontières to ask for help."

– male asylum seeker in appeal at the Council of State, from the Democratic Republic of Congo, 42 years old –

Access to health care

Asylum seekers who have appealed against a negative decision on their claim have access to health care through the reception centre or the Social Welfare Office²⁷ where they are registered.²⁸ In theory, these asylum seekers can still benefit from public health insurance and can access health services on an equal footing to Belgian citizens. In cases where the Social Welfare Office did not register an asylum seeker for public health insurance, medical treatment may be received upon approval by the Social Welfare Office or reception centre. In these situations an agreement of payment is reached with the medical care provider. These procedures are very complex and obstacles exist in practice.²⁹

Rejected asylum seekers and irregular migrants, including those who have applied for regularisation,³⁰ have the right to receive "urgent medical care" according to Royal Decree of 12 December 1996.³¹ Urgent medical care can be both of a preventive or curative nature and can be given in ambulant care or at the hospital. The exact meaning of the term leaves room for discussion. However, it is ultimately the medical staff that decides whether medical care is needed and urgent. Examples of urgent medical care are: an operation, childbirth or examinations necessary for diagnosis. Irregular migrants are entitled to

receive urgent medical care free of charge in case they have insufficient financial resources. In principle, accessing other health treatments requires payment.

In cases where a doctor provides medical care to an irregular migrant, the costs can be reimbursed through a complex administrative procedure at the Social Welfare Centre. The medical care provider is required to issue a "Certificate of Urgent Medical Care" to the irregular migrant that is necessary for a repayment of the medical costs by the Social Welfare Centre. Normally, the irregular migrant first has to obtain such a medical certificate from the doctor and give it to the Social Welfare Office before medical treatment is received. Only in urgent cases can the certificate be obtained after the medical treatment has been received. The irregular migrant has to hand over such a medical certificate to the Social Welfare Office which decides upon the agreement of payment between the Centre and the medical care provider. Article 4 of the same Royal Decree stipulates that the information stated in the medical certificates is confidential and will only be used for the purpose of reimbursing the costs and never for other purposes such as the disclosure of identity to the relevant authorities. In addition, medical professionals are bound by their professional discretion.³²

Generally, health insurance is required to access medical services without payment. Irregular migrants are in principle not eligible for public health insurance. In theory, irregular migrants can also seek insurance through a private insurance company, but given the high costs involved this is not a real possibility.

Barriers to access health care

The findings show that although asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants who have applied for regularisation have certain rights to access health care, the exercise of this right is often denied in practice. As identified in the interviews, the main obstacles to receiving medical treatment are:

Lack of information among third-country nationals and medical staff

The Belgian system of reimbursement of medical treatment is very complex. Many third-country nationals who could obtain medical assistance do not exercise their right to medical care, simply because they do not know about the possibility. These persons often go to

²⁶ Legal questionnaires were completed by legal experts from Caritas international Belgium, Centre pour l'égalité des chances et la lutte contre le racisme, and the Vlaams Minderheden Centrum (VMC).

²⁷ Original language: OCMW (Openbaar Centrum voor Maatschappelijk Welzijn) / CPAS (Centre Public d'Action Sociale).

²⁸ Pursuant to the Organic Law of 8 July 1976 on Public Social Welfare Centres.

²⁹ For more information see the next section "Barriers to access health care."

³⁰ In accordance with Articles 9bis and 9ter of Law 15/12/1980.

³¹ Original language: Arrêté royal relatif à l'aide médicale urgente octroyée par les centres publics d'aide sociale aux étrangers qui séjournent illégalement dans le Royaume (M.B. 12 Décembre 1996).

³² The NGOs spoken to did not know of any cases where the medical staff did disclose the identity of irregular migrants to the immigration authorities.

NGOs, such as Médecins du Monde³³ (hereinafter referred to as MDM) who offer free medical treatment, although they might be entitled to have the costs of medical treatment covered by the Social Welfare Office or the reception centre. There is a lack of knowledge both on the side of the third-country national and on the side of many doctors who do not think the current health system for third-country nationals is transparent and who do not know what their respective roles are.³⁴

Complex administrative procedures and differences in application

Individual Social Welfare Offices apply the healthcare rules differently. This is another obstacle that limits access to health care for third-country nationals. According to MSF, the implementation of rules on health care for third-country nationals varies not only from city to city, but also from district to district within a given city. Brussels has 19 different districts and the application of the law differs depending on which Social Welfare Office processes the request. These differences are caused by the level of autonomy left to the Social Welfare Centre and the use of vague terms and notions in the legislation (for example the lack of definition of the term “urgent medical care”). Therefore, access to health care not only depends on entitlements under law but also on the internal organisation and policy of the respective Social Welfare Centre. According to MSF, one Social Welfare Centre may issue a “health certificate” valid for three months listing the General Practitioners and pharmacists that can be consulted, while another Social Welfare Centre does not provide any information about which health providers may be consulted, leaving the third-country national at a loss.

MSF reports on the illogical structure of the current system: rejected asylum seekers and irregular migrants have first to consult a doctor to prove that they are ill and in need of medical care in order to get a medical certificate to be given to the Social Welfare Office. After that, they visit the doctor again for treatment.

The way the relevant legislation is implemented differently by each Social Welfare Centre is also an issue of concern for the doctor providing the service. Before actually providing the medical treatment, the doctor himself has to find out which Social Welfare Centre is responsible and the exact legal status of the patient. As the procedure is time consuming, some doctors prefer to provide a free consultation or treatment. MSF noted that the failure of the public health system to provide healthcare to third-country nationals is often felt by the medical practitioners.

Duration of the administrative procedure

Another issue of concern is the duration of the administrative procedure. It takes a long time for the Social Welfare Centre to get all the necessary relevant information to decide whether or not, and to which extent, the third-country national in question qualifies for medical assistance. During this process a doctor and a social worker are involved in determining the medical need as well as the social and legal status. If the Social Welfare Centre does not issue a health certificate allowing medical treatment for a certain period of time, the request for reimbursement has to be done for every single consultation.

Health Condition

Asylum seekers in appeal to the Council of State who are residing outside the reception centres, definitely rejected asylum seekers and irregular migrants who applied for regularisation have great difficulties in maintaining a healthy lifestyle. In 2006 MSF was very concerned about the living conditions of these groups because of the impact it has on their health³⁵. MSF referred to shelter, food and working conditions as the most important factors. In particular those who have no secure and fixed housing are vulnerable to certain diseases and a deteriorating health condition.

Destitution leads in some cases to malnutrition, which weakens the physical condition severely. Furthermore, asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants who are engaged in irregular working activities are exposed to unhealthy and unsafe working situations.

According to MSF, access to the health care system for third-country nationals does not promote the prevention of illness. Irregular migrants, asylum seekers in appeal and definitely rejected asylum seekers in precarious situations are more likely to negate the first symptoms of a disease to avoid the opaque and bureaucratic public health care system. This delay in seeking medical aid has negative

³³ Information on Médecins du monde (MDM) may be found on www.medecinsdumonde.be. Until September 2007, Médecins Sans Frontières (MSF), an international humanitarian aid organisation that provides emergency medical assistance to populations in danger in more than 70 countries, was offering free medical care at MSF clinics in Antwerp, Brussels and Liège. At the beginning of 2009, the free clinic in Liège has been closed, the one in Brussels has been taken over by MDM and the one in Antwerp will be soon handed over to MDM.

³⁴ For this reason, MSF ran a project aimed at informing the general practitioners of the term “Urgent Medical Care” and the related regulations.

³⁵ The observations made by MSF in 2006 are still accurate regarding the situation of destitutes in 2009.

consequences in treating the disease. Furthermore, the costs of medical treatment normally increase, e.g. the cost of treating the first symptoms of diabetes is much lower than the cost of treating complications at a later stage. Examples given by the interviewees were: lung problems, heart problems and HIV. Some of them received treatment in the hospital, while others received health care through NGOs.

Another crucial aspect is the mental health condition of the destitute asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants. Several of the interviewees reported feeling depressed and desperate about their situation: they found it difficult to forget about their problems. The uncertainty of legal status and stay in the country, combined with long term poor living conditions, causes psychological stress. Some asylum seekers in appeal and rejected asylum seekers also suffer mental health problems caused by traumatic experiences in their country of origin. According to Caritas International,³⁶ the mental health problems range from sleeping disorders, hallucinations, depression and Post-traumatic Stress Disorder. CIRÉ³⁷ emphasises that many asylum seekers in appeal and rejected asylum seekers suffer psychological stress due to traumatising events in their country of origin, such as rape, torture and violent and abrupt separation from family members. Many become passive about their situation and are unable to fight for themselves.

Medical Care provided by NGOs

Due to limited health care access and the existence of practical barriers, several NGOs provide free medical treatment to irregular

staying asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants. MDM is one of these NGOs providing medical services to persons in need. Although Belgian citizens also benefit from their service, up to 80% of the patients are irregular migrants, rejected asylum seekers and asylum seekers awaiting the outcome of their appeal. The service provided by MDM ranges from direct basic medical care to indirect services, such as the provision of information on access to health care.

5.2 Housing

"I was moving around a lot at friends' places. Sometimes I also slept for a night at a shelter facility of an NGO. And now...now I am homeless, so to say."

– male irregular migrant who applied for asylum, from Morocco, 24 years old –

Right to Housing

Asylum seekers who have appealed to the Council of State against the negative decision reached by the authorities have the right to material assistance, including the right to stay in a reception centre.³⁸ The appeal to the Council of State does not have suspensive effect. According to the NGOs spoken to, some of the asylum seekers in appeal to the Council of State fear detention and removal when they reside in a reception centre and therefore seek alternatives.

Rejected asylum seekers are entitled to remain in a reception centre until the order for removal has expired.³⁹ Generally, after this time their right to material support - including housing – ceases, regardless of whether the rejected asylum seekers actually have left the territory. There are several exceptions in which the right to housing for definitively rejected asylum seekers may be prolonged. These have been mentioned above.⁴⁰

As a general rule, irregular migrants have no right to public housing. However, an exception is made for irregular migrants and rejected asylum seekers with children younger than 18, who are unable to supply the necessary material care for their children by themselves.

³⁶ The Belgian link of Caritas International, which is a worldwide network of 162 Christian organisations that together are active in 200 countries. Caritas International helps victims of war, natural disasters and poverty in their own country or in flight. The organisation provides the necessary material and immaterial aid, without distinction based on religion, philosophical or political conviction. In Belgium, the tasks of the organisation include: social accompaniment of asylum seekers and foreigners, small-scale reception of asylum seekers during the admissibility phase of their asylum claim, care for unaccompanied minors and voluntary return and reintegration in the country of origin.

³⁷ Coördination et Initiatives pour et avec les Réfugiés et Étrangers (CIRÉ), established in 1954, is an association with pluralist associations members who reflect and act in a concerted way on questions related to the problems of asylum applicants, refugees and irregular migrants. The objectives of the association are inter alia to reinforce the rights of these persons and to take care that the Belgium policies are in conformity with the human rights principles and to regard the migrants as active citizens. These objectives aim at defending the rights of asylum applicants and refugees, and touch upon asylum procedure, with detention and return policy, the reception of the asylum applicants and the regularisations of stay. The pushing forward of these objectives is done through political action and/or sensitising the public opinion and the political world.

³⁸ The right to social assistance for asylum seekers, including housing, is laid down in the Law of 12 January 2007 on Reception of asylum seekers and other categories of foreigners. In original language: Loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers.

³⁹ Or, in cases where the authorities have decided upon a prolongation of the removal order after the given date. The final decision reached by the authorities in the determination phase does not, as such, terminate the right to material support: the issuance of a removal order is required.

⁴⁰ See above: "Limited entitlements leading to the inability to meet basic need" under 2. Comparable cases of destitution.

They have the right to material assistance, which includes access to public accommodation.⁴¹ According to the interviewed NGOs, however, many families are in practice afraid of exercising this right as they fear disclosing themselves to the authorities and therefore risking removal. Thus, many families in an irregular situation do not make use of the reception facilities.

As regards private accommodation, some form of protection is offered to irregular migrants. Pursuant to Article 77bis and 77quarter of the Law of 15 December 1980, it is punishable for landlords to abuse the vulnerable situation of irregular migrants. Nevertheless, irregular migrants often do not exercise their rights under this provision and do not file a lawsuit because they fear revealing their legal status to the authorities.

Sleeping Arrangements

The sleeping arrangements of several of the interviewees proved to be very insecure. Some of them reported benefiting from shelter provided by NGOs or charity organisations. Others were left homeless. The main survival strategy identified during the interviews was the reliance on a network of social relations, such as friends, family and ethnic or faith communities. One irregular migrant reported to have lived the past four years either with his girlfriend or with friends in the possession of a residence permit. From time to time, he also stayed at the shelter facility of an NGO. He was reluctant to stay at the facility because there were a number of persons with alcohol problems staying there and the atmosphere was tense, but had no other option left. Another interviewee had experienced two years of irregular stay in Belgium between two different asylum applications. During this period he could stay in his former, regular student room thanks to his personal relationship with staff working at the university. He reports that he never felt safe during this period and that he was always ready to abscond. He says: "I have been detained for one month during my irregular stay. This experience showed me how fragile my situation was". Yet, his more or less permanent housing situation allowed him to stay within his "student environment" and to try to live a normal life. Another interviewee reported residing at a railway station during the night. One of the interviewees indicated

that it is difficult to find private housing: often landlords refuse to rent him accommodation due to his irregular status.

Access to shelter

The shelter facilities offered by the NGOs in Brussels are very limited. Due to a lack of capacity, some shelter facilities establish certain requirements for access, such as legal status. In particular public dormitories for homeless people often deny access to third-country nationals with an irregular stay as the costs have to be justified to receive reimbursement from the state. In 2006, MSF reported that destitute asylum seekers in appeal, rejected asylum seekers and irregular migrants often only get access to shelter after they advocated for their placement to the respective organisation. Further, the shelter provided is only temporary and does not meet the needs of those who have been living for several years in destitution without the possibility of arranging their own housing.

Effects of insecure sleeping arrangements

Insecure sleeping arrangements and homelessness have negative effects on the physical and mental health condition. The former results from the exposure to all kind of weather conditions, lack of sleep and the inability to maintain hygienic standards that may lead to respiratory diseases and deterioration of the general physical condition. Concerning mental health, the unstable sleeping situation results in a high level of anxiety, feelings of insecurity and desperation. Often, as the homeless interviewees conveyed, their self-esteem is so low that they cannot find a way out of their situation without help from outside, and remain rather passive looking for short-term solutions to their day-to-day survival.

5.3 Food and Clothing

"My parents do not get any support. Sometimes my father goes to get some food parcels. We try to spend as little money as possible."

– Female asylum seeker who applied for regularisation, from Albania, 22 years old –

Asylum seekers in appeal to the Council of State against a decision reached by the asylum authorities have the right to receive financial support or material assistance, including food. Material assistance is only provided on the condition that the asylum seekers in appeal reside in designated reception centres. This continued right to social assistance has been recognised by the Belgian Court of Arbitration.⁴² Yet, based upon the information provided by the NGOs, there are cases of

⁴¹ Article 57 of the Organic Law of 8 July 1976 on Public Social Welfare Centres and Royal Decree of 24/06/2004 related to the conditions and provisions for granting material support to a minor third-country national who stays with his parents illegally in the Kingdom (In original language: Arrêté royal du 24 juin 2004 visant à fixer les conditions et modalités pour l'octroi d'une aide matérielle à un étranger mineur qui séjourne avec ses parents illégalement dans le Royaume).

⁴² See Judgment of the Court of Arbitration, no. 43/98 of 22/4/1998.

asylum seekers in appeal at the Council of State who do not exercise their right to stay in reception centres due to the fear of return. In this way they also miss out on food supplies and other material essentials.

Definitively rejected asylum seekers and irregular migrants are generally not entitled to material assistance, including food. However, irregular migrants and rejected asylum seekers with children under 18 are entitled to reside in reception centres and receive material support, including food and clothing. Fear of detention and removal means many families do not make use of this possibility and have to rely on alternatives for food.

Generally, irregular migrants and rejected asylum seekers fall through the social "safety net" and rely almost entirely on NGOs and other civil society actors, friends or public soup kitchens in order to meet their basic food and clothing needs. One example of a soup kitchen is "Mother Teresa," where destitute people can receive food twice a day. These services are provided regardless of status. Similarly, other organisations, such as L'Olivier⁴³ give clothes to those in need. Most of the interviewees had already used one of these informal strategies in cases of need. For some it is the only way to survive and to meet their basic needs without violating the law through illegal employment or stealing. All of the interviewees expressed a desire to be able to take care of themselves through working and earning a living on their own.

5.4 Work

"No one of my family is allowed to work legally. My father works in construction and my mother within the cleaning sector. Me, I am working since I am 16 years old. I have an official contract as a student, but I work every day, which is much more than the official working hours."

⁴³ The Society of Saint-Vincent de Paul comprises of 850,000 volunteers worldwide. In Belgium they number 3,500, divided among 360 local groups called 'Conferences'. The 'Olivier' is a specialised centre whose goal is to bring help to third-country nationals, be they refugees or displaced persons, whatever their status in Belgium or in their country of origin. Their desire is to listen to, to come to know and to befriend these marginalised and misunderstood people. The "Olivier" is also committed to looking and going further, working 'upstream' to promote a fairer and more consistent asylum system. The "Olivier" provides the following services: documentation, training and advice centre, a service providing information on developing countries, free legal service, food parcels, kitchen offering cold meals, relief fund, launderette, literacy classes, removals and donation collection service, provision of furniture, clothing, bric-a-brac and kitchen equipment, health care and medicine, caring and personal listening service, long term community proximity support for refugee families, and strengthening the system of vincentian networks.

– Female asylum seeker who applied for regularisation, from Albania, 22 years old –

Right to access the formal labour market

Asylum seekers in appeal to the Council of State, rejected asylum seekers and irregular migrants are not allowed to work. An exception is made for minors who are fulfilling an apprenticeship as part of their education. Another exception is the category of irregular migrants who are awaiting the decision upon regularisation in the context of the regularisation campaign of 22/12/1999: they may be issued with a provisional work permit⁴⁴.

Exploitation

Exploitation is a widespread phenomenon within the informal labour market. Asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants are particularly vulnerable. Many of them fear return to the country of origin for different reasons and this means they are not always capable of standing up for themselves. Furthermore, there are those among these groups of third-country nationals who have mental health problems due to traumatic experiences in their country of origin or their destitute and insecure situation in Belgium.

5.5 Life planning

"Nothing positive has happened to me so far in Belgium. I am very sad about everything. I am very sick. I have HIV and also heart problems. Also my child is getting health problems. The authorities do not really listen to me. Every day I am in fear that I will be removed."

– Male rejected asylum seeker who applied for regularisation, from the Former Yugoslavia, 44 years old –

Living a life in destitution for asylum seekers in appeal, definitely rejected asylum seeker and irregular migrants is characterised by a strong feeling of having no element of choice to leave their situation behind. All interviewees reported that their only way out of destitution would be obtaining residence and a work permit. Some interviewees stated that the loss of a legal status was for them the starting point of living in abject poverty. The loss of residence rights is accompanied by the fear of detention and removal to the country of origin. Although for asylum seekers who have appealed at the Council of State the loss of residence rights is not accompanied by the loss of the right to material or financial assistance, some of them are prevented from continuing to benefit from this material assistance because their fear of removal is so high that staying at a public accommodation centre is no option.

⁴⁴ Nowadays only a few dozen persons remain in this situation.

For asylum seekers in appeal, definitely rejected asylum seekers and irregular migrants who applied for regularisation, different reasons may exist why return to the country of origin is not an option, even if this results in destitution and a struggle for survival in Belgium. Asylum seekers in appeal to the Council of State, even though their stay is not allowed, are still within the asylum process; the Belgium state has not yet reached a final decision whether they are in need of protection. These asylum seekers claimed protection when entering Belgium and have legitimate reasons to remain in the territory until a final decision has been reached. Many rejected asylum seekers and asylum seekers in appeal are afraid to return to their country of origin: they perceive themselves as refugees and fear persecution upon return. This is illustrated by the fact that, according to the NGOs spoken too, a number of asylum seekers in appeal do not make use of the reception centres because of this fear, even though entitled to do so. Applicants for a regularisation to stay – definitely rejected asylum seekers, asylum seekers in appeal or irregular migrants – all have reasons for their request, including long asylum procedure, medical reasons, special ties with Belgium or Belgium citizens, or the practical impossibility of removal. Most of them would face extreme hardship upon return given the fact that the majority of them have been staying in the Belgian territory for long periods of time. According to the NGOs consulted, predominant reasons for not returning to the respective country of origin are: fear of persecution upon return, an unstable political regime and the outbreak of violence, medical reasons such as the lack of medical facilities necessary for treatment of disease, and practical reasons, such as missing travel documents or identification papers. In addition, those third-country nationals whose children have been born in Belgium want to give their children a future in the country.

All interviewees expressed feeling stuck in a situation without any better alternative. The majority of the interviewees perceive themselves as forced to live in such circumstances. Some have an extreme fear of being returned because of persecution, while others stated that their respective embassies refused to issue the necessary travel documents. For the interviewed asylum seekers in appeal at the Council of State great disbelief existed about the fact that their stay was irregular even though they were still within the asylum procedure, and at the same time living in absolute poverty. They expected to be offered some form of international protection. Rejected asylum seekers and irregular migrants who applied for regularisation are subject to

removal and have no social support, yet no decision has been reached upon the validity of their claims.

Living a life in destitution

Asylum seekers in appeal to the Council of State, definitely rejected asylum seekers and irregular migrants live on the margins of society: not only in financial terms but also concerning their social integration. Financially they find themselves in a precarious situation because they are mostly engaged in the informal market or living on very limited social assistance, sometimes only provided as service in kind. The dependency on their social network or on statutory support mechanisms is hard to accept for those destitute migrants who want to live an autonomous life. Many of them are highly educated and able to earn a living if they would be given the chance to do so. The ongoing dependency on other people often causes cases of depression and lack of self-esteem.

Furthermore, integration into Belgium society is hindered by the lack of work and other social activities that normally constitute a daily routine. There are various degrees of exclusion, however, and the extent of exclusion depends on many factors such as educational background, health, age, or the ability to speak one of the national languages. Exclusion is less for young people who either followed the normal school education in Belgium or studied regularly for some years at university. Through these activities they are able to maintain a network of friends despite the difficulty of living with an uncertain legal status. Most of the interviewees reported spending their day at home, watching TV if they have one and doing nothing all day. Many reported staying inside as much as possible: they live “hidden” lives since they fear the authorities. Most of the interviewees reported feeling bored and useless.

It is a very difficult situation for them and they feel more and more stuck without seeing a way out. One female applicant for regularisation stated that she was highly frustrated about having to repeat her story to different institutions and social actors (e.g. doctors) without seeing any change in her actual situation. According to JRS Belgium, destitute irregular migrants and definitely rejected asylum seekers only make short-term plans for the future and focus their daily life on resolving the actual pressing problems of the moment. In fact they are waiting for this situation to change. They feel that this decision is in the hands of the Belgian authorities. One interviewee reported that even if he could now take an educational course he would not do so. He would not want to invest in a “dream”,

which could suddenly be destroyed by a forced removal. The need to escape the insecure living situation becomes more and more the focal point of life. One migrant says: "I am desperate to arrange my documents. I cannot make any decision by myself. I am just waiting for an answer. I am every day afraid to be sent back home".

Many of the interviewees are desperate about time passing without any improvement or hope of improvement in their situation. One male migrant is very pessimistic, fearing that he will never be able to build up a family as long as the situation does not change. He describes the loss of his residence status as a loss of who he was and his prospects. For the majority, the uncertainty of legal status and the lack of a transparent procedure cause anxiety and depression. Feelings of bitterness accompany their descriptions about their current situation.

6. Conclusions and Recommendations

6.1 Inconsistencies and flaws in the State's law, policies and practice resulting in destitution

Access to Health Care

1. The extent of the legal entitlements to health care depends on the legal background of the third-country national: those within the asylum procedure have broader access to health care than rejected asylum seekers and irregular migrants.
2. The Belgium health system has complex administrative procedures and the local Social Welfare Offices implement the rules differently. Access to health care therefore differs depending on where the third-country national is located. Access to health care is often denied in practice due to long administrative procedures, lack of knowledge among medical staff and third-country nationals and differences in implementation.

Asylum and social support:

3. Asylum seekers who have appealed at the Council of State against a negative decision reached by the authorities are entitled to receive continued material assistance from the State when residing in public reception centres. However, for some asylum seekers the fact that they are subject to removal causes such a high fear that prevents them from exercising their rights to this assistance.
4. Rejected asylum seekers and irregular migrants who have applied for regularisation are in principle not entitled to receive material assistance. This is only

offered to families with young children. Because of the fear of removal some families are afraid to stay in public reception centres and for this reason do not enjoy material support.

Return:

5. Asylum seekers in appeal to the Council of State are illegally staying on the territory and therefore subject to removal, although they are still within the asylum procedure.

6.2 Consequences of the State's law, policies and practices

For asylum seekers in appeal at the Council of State, definitely rejected asylum seekers and irregular migrants who applied for regularisation:

1. These third-country nationals face a downward spiral of destitution. Living in destitution at the margins of society weakens the mental and physical health condition. The uncertainty of legal status and poor living conditions are the main factors.
2. Many asylum seekers in appeal at the Council of State, definitely rejected asylum seekers and irregular migrants who have applied for regularisation are either not entitled to state support or cannot access the mechanisms to receive state support. This results in a reliance on charity to meet basic needs. Furthermore, some end up on the streets.
3. Many homeless third-country national become isolated from society. They do not participate in society, and, because of their illegal stay, feel the need to hide and avoid social contacts as much as possible.

For society:

4. The services provided by civil society actors, such as NGOs and religious institutes, are essential for the survival of destitute third-country nationals who do not receive any form of state support. They carry out typical state-functions and their tasks include the provision of food supplies, housing and medical care in order to combat destitution as much as possible.

6.3 Recommendations

Access to services:

1. Full access to medical care regardless of status, and simplification and uniformity of the administrative procedures in particular with respect to the reimbursement of the cost of medical care.
2. Improvement in the provision of information regarding legal entitlements to

services such as health care, housing and social welfare. The information should be provided to the beneficiaries as well as to the different professionals working in these fields.

Residence rights:

3. Granting of residence rights to asylum seekers who have appealed at the Council of State during the entire procedure. During this procedure there should be not only a guarantee of the continued right to social assistance, but also the right to access the formal labour market should be given to those asylum seekers.

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Case Studies in Germany

1. Case Study

1.1. A typical case

– Omar, male, holder of a toleration, 38 years old –

Omar has been living in Germany for one year. He was forced to flee Sudan following the outbreak of violence. He was unable to bring along his two children: they are still living in Sudan.

When Omar arrived in Berlin he asked a woman on the street where he could apply for asylum. The woman told him to go to the police. Instead of being transferred to the responsible authorities he was put in detention where he officially applied for asylum. His claim was rejected by the Federal Agency for Migration and Refugees. He was held in detention for two and a half months. Omar felt lost in the asylum procedures in Germany. He was not well-informed of his rights. He stated that a pastor whom he met in the detention centre assisted him with his appeal against the negative asylum decision reached by the administrative authorities. The pastor informed him however only after the proceedings had taken place that his claim for asylum had been rejected in appeal.

Later Omar was released from detention and his removal from the German territory was temporarily suspended. In other words, he received a toleration because the authorities were unable to remove him. Omar did not know the exact reasons why he was not removed. At the time of the interview, Omar was housed in a shared accommodation centre in Berlin. He had to share his room with two other strangers.

Omar's health condition is concerning. During his stay in the detention centre, his already weak health condition worsened. Omar suffers from Hepatitis. During his period in detention he was brought to the hospital for an operation. Although Omar was still in pain and bleeding, the hospital sent him back to the detention centre. Omar was very upset and dissatisfied with the treatment he received in the hospital. According to Omar, "they did not care about me at all." At the time of the interview, Omar's health condition was still very weak. He sometimes visited a doctor, which was possible as he received a "medical assistance card" from the Social Welfare Office. His doctor ordered him to follow a special diet because of his medical condition. However, he needed vouchers to purchase this food, which were not issued for several weeks.

When Omar was initially granted a toleration he received regular financial support from the State. However, all his financial support has been cut off since June 2006. He stays in public housing and receives food vouchers. Omar does not understand why the financial support he received was stopped. The official reason is that the authorities do not believe he sufficiently tried to obtain a Sudanese passport or any other document allowing his return. He lives without any cash, which is very hard for him. He explained that because he has no money to buy clothes, he visits NGOs who give him clothes. The fact that Omar has no money means he is unable to make use of public transport. The only support he receives from the State authorities is a ticket which allows him to visit the hospital. Omar is forced to travel by foot. Given his bad health, he is unable to walk long distances.

Omar says he is very unhappy with his situation, he feels his life has ended. He has no rights in Germany and nothing to do, but he cannot return to Sudan. Omar explains "I cannot go to school or take up any employment. I do not want to do anything illegal, like stealing or working in the informal labour market. I do not know what to do, I need something to live on." Omar says he did not choose to be in this situation and feels left out. He has no real friends and has nothing to do all day, except visit the hospital and watch TV.

Due to his toleration, Omar is not allowed to leave the administrative area in which he is residing. In this respect, Omar says: "This duty to stay in the administrative area feels like I am brought from a small prison to a bigger one." Omar expressed that he just wants to have a normal life.

1.2. Context of the Case

The story told by Omar is illustrative of third-country nationals who are staying in Germany and are in the possession of a "temporary suspension of removal" also known as "toleration". Omar's case is typical of rejected asylum seekers and irregular migrants who are not in the process of being removed by the German authorities because obstacles to removal in fact or law exist. With the use of Omar's case as an example, the specific destitute situation of rejected asylum seekers and irregular migrants in the possession of a temporary suspension of removal will be examined in more detail below.

The factors which connect Omar's case with the cases of other third-country nationals interviewed are: having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival, being socially excluded, the State's awareness of their presence on the territory, and having no way out of destitution. The stories told by the interviewees provide an insight to the lives of third-country nationals living in absolute poverty with little or no social support. Supplementary and background information was provided by various NGOs working directly with these destitute groups. On this basis, several common elements can be discerned which are typical for third-country nationals in a similar position:

No or limited legal entitlements leading to the inability to meet basic needs

Omar's stay on the territory is tolerated because the authorities were unable to remove him. He is entitled to stay in public housing and receive food. However, the relevant authorities suddenly terminated the financial support he received. During his tolerated stay, Omar was able to visit a doctor because he received approval to do so by the Social Welfare Office.

Third-country nationals whose removal has been temporarily suspended can stay on the German territory, and the law perceives this stay to be illegal but not a criminal act. The suspension of removal is documented in a so-called toleration. The same rights or entitlements enjoyed by German nationals or holders of a residence permit are not directly attached to this. Instead, holders of tolerations may receive social benefits in accordance with the Asylum Seekers' Social Benefits Act, which include food, housing and pocket money. Yet the social allowances received are minimal, 30% lower than those for German citizens. Social benefits may also be reduced to an absolute minimum. Access to health care is limited to treatment necessary for acute illness and pain; other treatment can be offered on a discretionary basis.

Reliance on charity for survival

When the authorities terminated Omar's financial support, he was left without any money. He is unable to meet all his basic needs and visits NGOs for clothing and shoes.

Many holders of tolerations live in abject poverty, in particular those whose social support has been reduced to a bare minimum following the decision of the administrative authorities. Many rely on NGOs to provide material essentials such as tickets for public transport and clothing. Furthermore, holders of tolerations have limited access to health care.

As a result they turn to NGOs specialised in health care to meet their medical needs, although the health care provided is limited and cannot serve as a replacement for the public health care system.

Social exclusion

Omar feels abandoned by the German state and believes that he misses out on a lot. He is prohibited from accessing the formal labour market, which is a barrier to participation in society. He has no real friend and few activities to fill his day.

Holders of tolerations live on the margins of society. The social exclusion is particularly harmful for those who have been in the possession of a toleration for many years. As access to the employment market is limited, few are successful in finding work and becoming active in society. Some of the holders of tolerations have limited social contacts and many are extremely bored during the day.

The State's awareness of their presence on territory

Omar had been detained even before he could apply for asylum. He was released from detention and issued with a toleration because the State authorities were unable to remove him. Omar is registered at the administrative authorities and is still subject to removal.

Holders of tolerations are known to the administrative authorities responsible for removal. In practice, temporary suspension of removal is prolonged many times by the authorities.

No way out of destitution

Omar is stuck in his situation of destitution and sees no way out. The German authorities acknowledge that he is unable to return to Sudan but he is left without a residence permit in Germany. He has been living with a toleration for many years, without any improvement in his social or legal situation. His living conditions deteriorated significantly once his financial support was terminated. He feels his years spend living under toleration are wasted and that the receipt of a residence permit is key to rebuilding his life.

Large numbers of holders of tolerations have been living in this limbo situation for many years, and their suspension of removal has been prolonged many times as a result of obstacles in fact or law. Although German law offers the possibility of issuing a residence permit after 18 months,⁴⁵ this instrument is rarely used in practice. Holders of tolerations live in constant fear of being removed. Among

⁴⁵ Section 25(5) of the Residence Act

the rejected asylum seekers with a toleration, many fear persecution upon return.

2. Relevant Status under Asylum and Foreigners law

This section will provide a short and broad overview of the relevant status under German law. This is useful for providing general legal background information for cases of holders of tolerations.

2.1. Asylum Laws

The most relevant German laws on asylum are

- Art. 16a of the German Constitution,⁴⁶
- Residence Act,⁴⁷
- Asylum Procedure Act⁴⁸
- Qualification Directive 2004/83/EC⁴⁹

2.2. Asylum Status

Under its asylum laws Germany offers protection in the following situations:

Residence on Humanitarian Grounds

Pursuant to Section 25 of the Residence Act, a residence permit on the basis of protection needs shall be granted if one of the following conditions applies:

- The third-country national is recognised as being *entitled to asylum*:⁵⁰ The right to asylum is enshrined in Article 16a (1) of the German Constitution stipulating: “Politically persecuted persons enjoy the right to asylum”⁵¹ It continues to exist alongside Germany’s obligations under international law, especially the 1951

Refugee Convention and the European Convention on Human Rights.

- Risk of a breach with the *principle of non-refoulement* in case of removal of third-country nationals:⁵² A third-country national is entitled to a residence permit on humanitarian grounds if her/his removal would only be possible to “a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political opinion.” Additionally, risks to a person’s life, body or liberty solely on account of their sex may also constitute persecution. The persecution may emanate from the State, quasi-State structures or non-state actors under certain conditions.⁵³
- Subsidiary protection:⁵⁴ For reason of subsidiary protection, removal of a third-country national may not be possible if they face a concrete threat of torture, imposition of the death penalty, danger to life and limb or liberty⁵⁵ or removal is inadmissible under the terms of the European Convention for Human Rights.⁵⁶

*Residence permit for temporary protection*⁵⁷

A residence permit shall be granted to a third-country national who is granted temporary protection on the basis of a resolution by the EU Council pursuant to Directive 2001/55/EC and who declared his willingness to be admitted into Germany.

3. Removal of Illegally Staying Third-Country Nationals: Obstacles, Practice and Solutions

3.1. Grounds for Non-Removal

The Residence Act is the main law regulating the return of third-country nationals.⁵⁸ In Germany, the grounds upon which removal is not possible are closely linked to the entitlements of residence rights.

Apart from those already mentioned, other grounds for non-removal identified in the Residence Act are:

- Violation of rights under the German Constitution (legal prohibition of removal;

⁴⁶ Original language: Grundgesetz für die Bundesrepublik Deutschland (GG).

⁴⁷ Original language: Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern (Aufenthaltsgesetz - AufenthG)

⁴⁸ Original language: Asylverfahrensgesetz (AsylVfG)

⁴⁹ EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. This Qualification Directive is as much directly applicable as referred to in national law, especially in Section 60 of the Residence Act.

⁵⁰ Section 25 (1) of the Residence Act

⁵¹ The concept of political persecution has been developed since 1949 by the courts, in particular the Federal Constitutional Court. Its core elements are: (i) Human dignity is protected, based upon the conviction that no State has the right to harm or endanger the life, health or personal freedom of an individual for reasons of political opinion, religion or characteristics inherent to his or her unique identity, (ii) For being perceived as political persecution an action must (a) both constitute an intentional violation of individual rights and be of sufficient intensity as to cut off the individual from the larger community, and (b) be serious enough to violate human dignity in excess of that generally faced by other residents of the same country.

⁵² Section 25 (2) of the Residence Act

⁵³ Section 60(1) of the Residence Act in conjunction with the Qualification Directive.

⁵⁴ Section 25(3) of the Residence Act

⁵⁵ Medical reasons may be of such a serious nature as to amount to this ground.

⁵⁶ The cases are listed in Section 60(2), (3), (5) and (7) of the Residence Act.

⁵⁷ Section 24 of the Residence Act

⁵⁸ In particular Section 58, 60 and 60a of the Residence Act

for example protection of human dignity or of marriage or family life).⁵⁹

- Medical reasons (including cases in which the danger arises because of the person's ties to Germany, for example psychological treatment which should not be interrupted).⁶⁰
- Lack of required travel documents (factual prohibition of removal).⁶¹
- Humanitarian or personal grounds (discretionary).⁶²

3.2. Legal solutions when there are obstacles to removal

The legal solutions when there are obstacles to removal, other than those which give rise to the right of asylum or subsidiary protection, are:

*Temporary suspension of removal*⁶³

Germany has introduced a specific status for third-country nationals who cannot be removed: they are 'tolerated', i.e. they receive a 'temporary suspension of removal'.⁶⁴ However, the third-country national whose removal is suspended remains under the obligation to leave Germany.⁶⁵ The removal of a third-country national shall be suspended for as long as removal is impossible in fact or in law and no residence permit is granted.

The relevant authority decides on a case by case basis whether removal shall be suspended and the person given a residence permit or a toleration. Usually, a toleration is issued for about three months and can be renewed indefinitely.

Additionally, a Land Minister of Interior can order a group of third-country nationals to be issued with residence permits or at least to be "tolerated".⁶⁶ If this decree is to be valid for more than six months, the Land Minister needs the agreement of the Federal Minister for Home Affairs.

*Residence permit for a temporary stay on the basis of urgent humanitarian personal grounds or substantial public interests*⁶⁷

A residence permit *may* be issued for a temporary stay if continued presence on the territory is necessary on urgent humanitarian or personal grounds or due to a substantial public interest. A residence permit may be extended

if departure from the territory constitutes exceptional hardship for the third-country national due to special circumstances pertaining to the individual case concerned.⁶⁸

*Residence permit in case of factual or legal obstacles of a long-term character*⁶⁹

A residence permit *may* be granted if removal is impossible in fact or in law and the obstacle to removal is not likely to be eliminated in the foreseeable future. Such a residence permit must be issued if removal has been suspended for more than 18 months AND the third-country national is prevented from leaving the Federal territory through no fault of his or her own. Fault on the part of the third-country national applies in particular if he or she provides false information, deceives the authorities with regard to his or her identity or nationality or fails to meet reasonable demands to eliminate the obstacles to departure.⁷⁰

"Hardship cases"

In accordance with Section 23a of the Residence Act, a residence permit may be granted in specific humanitarian cases, even if the foreigner concerned is forcibly required to leave the country. To this end, a request must be submitted to the Hardship Commission which then appeals to the supreme Land authority to issue a residence permit to the foreigner. Its decisions are discretionary, since there is no claim obliging the Hardship Commission to submit such a request or requiring the competent Land authority to grant a residence permit.

"Regularisation"

In November 2006, the Laender Ministers of Interior agreed on the issue of residence permits to holders of tolerations if the persons in question meet some very strict conditions. Additionally, in March 2007, the coalition partners CDU/CSU and SPD reached a compromise with respect to the "regularisation" of holders of tolerations who have been living in this limbo for many years without the possibility of removal. Subsequently, Sections 104a and b were inserted in the Residence Act containing the following conditions for the granting of a residence permit to holders of tolerations:

⁵⁹ Section 60a(2) of the Residence Act

⁶⁰ Section 25(4) and Section 60a(2) of the Residence Act

⁶¹ Section 60a(2) of the Residence Act

⁶² Section 60(4) of the Residence Act

⁶³ Section 60a of the Residence Act

⁶⁴ Original language: Vorübergehende Aussetzung der Abschiebung (Duldung)

⁶⁵ Section 60a(4) of the Residence Act

⁶⁶ Sections 23 (1) and 60a (1) of the Residence Act.

⁶⁷ Section 25(4) of the Residence Act

⁶⁸ Pursuant to Section 26(1) of the Residence Act, such a residence permit may be issued and extended for a maximum period of three years, but no longer than 6 months when it is issued on the basis of urgent humanitarian or personal grounds or due to substantial interests.

⁶⁹ Section 25(5) of the Residence Act

⁷⁰ Pursuant to Section 26(1) of the Residence Act, such a residence permit may be issued and extended for a maximum period of three years, but no longer than 6 months when the third-country national has not been legally residing in the Federal territory for at least 18 months.

Foreigners whose removal has been suspended and who have lived in Germany for at least eight years, or at least six years if living in a household with one or more minor children, as of 1 July 2007, who demonstrate an active willingness to integrate, are housed in conditions of sufficient living space, possess adequate oral German skills, are law-abiding and have not knowingly deceived the foreigners authorities will initially be granted a temporary right of residence, to expire on 31 December 2009, and equal access to the labour market, in order that they may earn their own living without having to claim public assistance.

After 31 December 2009, the residence permit will be renewed only if there is factual evidence indicating that the foreigner in question can earn his/her own living and if he/she demonstrates that he/she was in employment for most of the preceding period.

If they show a high level of integration into German society, children of foreigners will be granted an independent right of residence under less stringent conditions (Section 104b of the Residence Act), if their parents had to leave Germany because they did not receive a residence permit or did not have it extended, because they intentionally misled the foreigners authority with regard to any circumstances relevant under residence regulations, or committed a crime.

It is expected that only a small number of holders of toleration would qualify for regularisation, since these conditions are very strict.

4. Dimensions of destitution

This section will provide a detailed overview of what it means to be destitute for holders of tolerations or for completely undocumented migrants in Germany. This is based on information provided by the interviewed persons from the focus group, as well as additional information provided by JRS Germany and other NGOs.

4.1 Health

“The uncertainty of their stay in Germany has a negative impact on the mental health of holders of tolerations”

– view expressed by Büro für medizinische Flüchtlingshilfe –

Access to Health Care

The right to health care for third-country nationals in possession of a temporary suspension of removal and illegally staying third-country nationals without any documents is regulated in Section 4 and 6 of the Asylum Seekers’ Social Benefits Act. The Act makes a

distinction between a right to medical treatment and that which is granted at the discretion of the relevant authorities. A right to receive the necessary medical aid and assistance, regardless of status, exists in cases of “acute illness and pain.”⁷¹ For the treatment of acute illnesses and pains the necessary medical and dental treatment includes the supply of medicine and dressing material and other benefits which are necessary for convalescence, recovery of illnesses and their latent symptoms. “In deciding what is ‘acute’, reference is usually made to medical usage according to which ‘acute’ is opposite to ‘chronic’, explains JRS Germany. “An acute illness or pain is occurring suddenly and / or progressing rapidly and a chronic illness is progressing, developing slowly.” The treatment of chronic diseases over a longer period of time is excluded.

Furthermore, the provision of other medical benefits at the discretion of the relevant authorities “can be provided, especially if they are imperative to secure health [or] are necessary to meet special requirements of children”.⁷² According to JRS Germany, “Usually there are three criteria for interpretation of ‘imperative to secure health’ as referred to in the law: (i) if a medical specialist has certified at length and in detail that the medical treatment in question is really necessary; (ii) if the patient has been provided by the authorities with a residence permit allowing her/him to stay long enough for the treatment to have real positive effect; (iii) and if there are no cheaper methods of treatment.”

Barriers to accessing health care

Three barriers exist which might lead to a denial of the right to health care in practice: finance of the health care and administrative procedures, the general duty to denounce illegally staying third-country nationals by public servants and the existence of language barriers.

Financing health care

Holders of tolerations and irregular migrants are generally not eligible for the regular public health insurance. However, the Social Welfare Office would, in some cases, pay the cost of the treatment for acute illness and pain. In practice, this implies that the individual officer, who does not have a medical background, has to decide whether to issue a “medical assistance card.”⁷³ The social welfare officer therefore has not only to decide on the extent and type of illness but also on the nature of the symptoms (acute, painful). The procedure of issuing a health insurance

⁷¹ Section 4 of the Asylum Seekers’ Social Benefits Act

⁷² Section 6 of the Asylum Seekers’ Social Benefits Act

⁷³ In German: “Krankenschein”

certificate is very bureaucratic and the processing of a request takes time. Time is a precious for persons who suffer from 'acute' symptoms. Given the fact that medical services are very expensive, paying for treatment by the holder of a toleration or illegally staying third-country national is not a viable option. There are exceptional circumstances where payment is not required. These include cases of infectious diseases, and pre and postnatal care for those in possession of a toleration. Local public health institutions provide anonymous health care for those suffering from sexually transmitted diseases and other transmittable diseases such as Tuberculosis. In cases where a hospital has provided medical treatment free of charge to illegally staying third-country nationals, reimbursement can be requested from the Social Welfare Office. The interviewed NGOs active in the medical field all believe that access to health care has become a matter of discretion and sustainable medical treatment is therefore not guaranteed.

Duty to denounce illegally staying third-country nationals

Under German law, a general duty exists for public authorities to forward information to the relevant authorities if they obtain knowledge of the stay of a third-country national in contravention of the law.⁷⁴ This concerns in particular (i) the presence of a third-country national without a residence permit or toleration, (ii) any breach of a territorial restriction, or (iii) any other ground for removal. However, only information that had been obtained while performing the relevant tasks of the public authority needs to be forwarded.⁷⁵ Consequently, medical staff do not have to forward this information.⁷⁶ Yet at the same time, much confusion exists among the medical staff as to whether this duty to denounce applies to them. Notably, when reimbursement is sought from the Social Welfare Office for the costs of medical treatment to illegally staying third-country nationals, information about the illegally staying third-country national is forwarded to the authorities. Further, to access financed medical care, illegally staying third-country nationals have to approach a Social Welfare Office and disclose their status. Civil servants working at the Social Welfare Office have a duty to denounce an illegally staying third-country national to the relevant authorities. To overcome these problems and to ensure that irregular migrants also have access to health services, two *Laender* (Berlin and Bremen) as

well as several other cities (e.g. Frankfurt am Main and Munich) have taken initiatives for developing relevant models (the government of the Land of Berlin discusses issuing an "anonymous medical assistance card").⁷⁷

Language problems

A final factor that can hinder adequate medical treatment is the language problem on the side of the third-country national. In practice the problems are solved by a person who speaks both languages accompanying the patient, or by the arrangement of volunteer translators. The Büro für medizinische Flüchtlingshilfe⁷⁸ assesses that this could raise problems of trust between doctor and patient, especially because 'informal translators' are often members of the family.

Health conditions

Due to the way the German health system is arranged, holders of tolerations and irregular migrants only seek medical assistance in the later stages of their illness. One explanation is that they only have the right to health care in cases of acute illness or pain. For irregular migrants there is also the fear that the medical staff will disclose their identity to the relevant authorities. According to Bundesarbeitsgruppe Gesundheit und Illegalität⁷⁹, "This results in a more severe course of disease, which tends to become chronic. As there will be more intensive health care necessary, in some cases even a prolonged stay in hospital, the costs of the health care increase. When recognition and treatment of infectious diseases is not early enough, there emerges danger for the public health." Holders of tolerations and irregular migrants who suffer from chronic diseases become victims of the German health system. Often their chronic diseases are not considered to be "acute illness and pain" and therefore receive no medical treatment. Holders of toleration and irregular migrants with mental health problems often do not receive medical treatment due to the limited access to health care. This is a concern given that many holders of tolerations and irregular migrants suffer from mental health problems as a result of the uncertainty of their stay and their destitute

⁷⁴ See Section 86 (2) of the Residence Act

⁷⁵ See Nr. 87.0.5 of the Administrative Regulations for the implementation of the Residence Act (Allgemeine Verwaltungsvorschriften zum Aufenthaltsgesetz)

⁷⁶ See Nr. 88.2.4.0 of the Administrative Regulations.

⁷⁷ In German: "anonymer Krankenschein"; cf. Berliner Zeitung, 25 Febr. 2008: "Anonymer Krankenschein für 'Illegale'".

⁷⁸ The "Büro für medizinische Flüchtlingshilfe" is a network of several offices throughout Germany, including Berlin. The Berlin office was founded 10 years ago. It runs weekly consultation hours for migrants, including holders of tolerations, with the help of 30 volunteers. The focus of the Berlin office is medical screening, referral to medical institutions with whom they have made special agreements and public relations.

⁷⁹ The "Bundesarbeitsgruppe Gesundheit und Illegalität" is an informal network of several NGOs and Church agencies working on questions of providing health services to irregular migrants.

situation. The high levels of stress to which both groups are exposed causes psychosomatic problems such as back pain and headaches, sleeping disorders and depressions. The destitute situation and living in limbo for many years can lead to serious mental health problems.

Special concern is raised for pregnant women without any kind of status. Although they are entitled to pre-natal care, many do not seek medical care due to their fear of authorities. As a result, they do not receive all the care needed. According to Büro für Medizinische Flüchtlingshilfe, for those irregular pregnant women who do seek contact with medical services, some women opt for abortion as a result of their uncertain living and housing conditions.

The Büro für Medizinische Flüchtlingshilfe is concerned about the working conditions of their clients, which can have a negative impact on their health. Irregular migrants are prone to take up irregular work which exposes them to unhealthy and dangerous working conditions. Irregular migrants are not medically insured in the case of accident. According to an expert of the Malteser Migrantenmedizin⁸⁰, living conditions are also an important factor for the maintenance of general health. Homelessness in particular influences the health condition negatively. Homelessness emerges in most cases from unemployment. Living on the streets exposes people to severe weather conditions, and makes access to public services, including health services, more difficult because of the lack of a postal address. Homelessness implies irregular and insufficient food, leading in some cases to malnutrition. Furthermore, proper clothing is essential when living on the streets, and this is not always available. Thus, the provision of housing is key to maintaining good health.

Health care provided by NGOs

Due to limited access and the existence of barriers, many holders of toleration and irregular migrants seek alternative medical care when in need. NGOs, such as Büro für medizinische Flüchtlingshilfe or the Malteser Migrantenmedizin, have stepped in to meet the medical needs of those who are, to a large extent, excluded by the regular public health system. The Büro für medizinische Flüchtlingshilfe serves as an intermediary office and refers holders of a toleration and irregular migrants to doctors who are willing to participate in their network. The Büro agrees to financial arrangements with the doctors and

⁸⁰ The Malteser Migrantenmedizin was established in 2001 by the Order of Malta in Germany and is an NGO that provides medical services to persons without health insurance, including holders of tolerations.

hospitals in their network or, alternatively, they bear the costs themselves. According to this organisation, church-financed hospitals are more likely to treat irregular migrants due to the differing ways they are financed. As mental health care provision can be long-term, it is hard to find psychiatrists who are willing to become part of the network and accept the financial burden.

Health care provided by NGOs is limited and unable to meet all the medical needs of the groups concerned. The German Institute for Human Rights⁸¹ describes the limitations that are inherent in the alternative structure of medical care: "First and foremost, medical care provided by NGOs is limited in its financial resources. Therefore, there is no all-embracing service and no overall geographical coverage. Services are concentrated in cities and often offer only basic medical care. Secondly, the work of the NGOs relies on the cooperation of other key actors such as hospitals or doctors, which limits their scope of action fundamentally." The German Institute for Human Rights considers the reliance on alternative ways of accessing health care as a structural deficit in practice.

4.2 Housing/Shelter

"I have to share a room with two people I never met before."

– A male holder of a toleration from Sudan, 38 years old –

Right to housing

Holders of tolerations are eligible for housing offered by the State.⁸² This is similar to the housing offered to asylum seekers. During the first three months when asylum has been requested, asylum seekers can be placed in a reception centre.⁸³ If the asylum procedure takes longer than three months, asylum seekers are as a general rule placed in shared accommodation facilities. Holders of tolerations are also placed in these shared accommodation centres, which municipal authorities are usually in charge of. Holders of tolerations do not have the right to move out of

⁸¹ The German Institute for Human Rights (Deutsches Institut für Menschenrechte) provides information about human rights issues in Germany and in other countries. Its intention is to contribute to the prevention of human rights violations and to the promotion and protection of human rights. The various functions of the institute include information and documentation, research, policy advice and human rights education within Germany. The Institute was founded in March 2001 following an unanimous decision by the German Bundestag of December 7, 2000.

⁸² See Section 1 of the Asylum Seekers' Social Benefit Act.

⁸³ The most important laws regulating the reception of asylum seekers are the Asylum Procedure Act and the Asylum Seekers' Social Benefit Act. In executing these federal laws, the *Länder* are responsible for the details of the reception of asylum seekers.

the shared accommodation centre. It is based on the discretion of the relevant authority to decide whether in exceptional circumstances a holder of a toleration can reside in private accommodation: the general public interest is balanced against the private interest of the holder of a toleration. Many holders of toleration are in such a legal situation for many years, some even for 5 years or more, and they are forced to stay in shared accommodation centres.

In theory, illegally staying third-country nationals without a toleration are also entitled to housing.⁸⁴ However, as public servants have a duty to report illegally staying third-country nationals⁸⁵, claiming these entitlements will ultimately lead to detention and removal.

Housing arrangements

A great number of persons with a toleration live in State-run shared accommodation facilities. The living conditions in the shared accommodation centres differ from centre to centre and the quality of housing depends largely on the management. Some of these facilities try to offer as much freedom to the residents as possible, whereas other centres have installed strict monitoring mechanisms. According to JRS Germany, the imposition of strict monitoring measures might create social tensions among the residents and conflicts of a violent nature might occur. The interviewees who stayed in the shared accommodation centres were dissatisfied with the living conditions because they had to share their rooms and generally did not feel free. They would prefer to live in private accommodation but were not allowed to do so. Only one interviewee was allowed to rent private accommodation and managed to find private accommodation himself.

As explained above, irregular migrants seek housing arrangements other than public housing. They either rely on existing ethnic communities or friends for private housing. According to OASE Pankow,⁸⁶ irregular migrants and holders of tolerations renting private accommodation are prone to

exploitation by landlords. Owners of housing aware of the precarious situation of these persons try to rent out low quality housing for high rents. Some landlords also refuse to rent out housing to them. It is very likely that irregular migrants are unsuccessful in finding private accommodation or do not have the financial resources: they end up living on the streets. According to Malteser Migrantenmedizin, homeless people, including irregular migrants, can access emergency housing on a temporary basis.

4.3 Food/Clothing

“The situation is problematic for holders of tolerations who stay in a shared accommodation centre and who are in need of special food due to their medical situation or medical beliefs. This cannot always be provided.”

– view expressed by JRS Germany -

Holders of tolerations are entitled to benefits in accordance with the Asylum Seekers' Social Benefit Act. Pursuant to this Act, services aimed at meeting the needs of residents of shared accommodation centres are provided in kind, including food and clothing.⁸⁷ Residents of an accommodation centre are normally provided with full board service. According to JRS Germany, this can become problematic if food is not accepted due to cultural differences or medical reasons. One of the interviewees reported that although a doctor prescribed him a special diet it took several weeks before he was handed a chip card. With this 'electronic voucher' he can now buy his individual food but is restricted to specific shops far away where this card is accepted.

The access to food for irregular migrants largely depends on their financial resources. In cases where an irregular migrant is successful in taking up paid employment, the wages would allow him to buy food. If an irregular migrant is unable to meet his basic food and clothing needs there are two strategies to deal with this situation. One option is to get support for food from people in their closer network who are in a better social and economic situation. Another option is to approach NGOs and other civil society actors. For example, the Malteser Migrantenmedizin gives clothes and baby articles to those in needs, which they receive from donations. The Malteser Migrantenmedizin reported that the majority of these donations go to homeless migrants.

4.4 Social Welfare

“I think the system is created like that to make people go home”.

⁸⁴ Sections 1 and 3 of the Asylum Seekers' Social Benefit Act.

⁸⁵ Section 86 (2) of the Residence Act.

⁸⁶ OASE Pankow was set up as a result of the initiative of the residents of the Pankow district of Berlin to help foreign citizens in the area. The centre opened in February 1992 and soon became a reference point for immigrants both from Pankow and other areas of Berlin and Brandenburg. The aim of the association is to promote the rights of migrants in social, economic, legal and family questions. Special attention is given to children, young adults, women and the disabled. OASE Pankow attempts to help these persons to minimise the psychological stress of integration and protect their cultural identity. The centre is open to all migrants and operates as an information point and reception centre offering advice on legal and social issues.

⁸⁷ Section 3 of the Asylum Seekers' Social Benefits Act.

– A male holder of a toleration from Afghanistan, 23 years old –

Right to Social Welfare

Holders of toleration receive social benefits in accordance with the Asylum Seekers' Social Benefits Act. In addition to benefits provided in kind, such as food, housing and sanitary items, financial support should also be also given by the State.⁸⁸ The total allowances are about 30% less than the social welfare received by German citizens. Every resident of a shared accommodation is entitled to receive some pocket money: up to 14 years of age it amounts to 20 Euros per month and from the age of 15 the monthly contribution is 40 Euros.⁸⁹ Special financial arrangements are made for those who are staying outside the centres.⁹⁰ In accordance with the Social Security Act,⁹¹ holders of tolerations are excluded from all other benefits, such as unemployment assistance. Only if holders of tolerations have received benefits under Section 3 of the Asylum Seekers Benefits Act for more than 48 months, and are not perceived as having influenced the period of stay by abusing the law, will they start to receive benefits according to the more generous regime under the Social Security Code XII.⁹²

Irregular migrants could in principle apply for social benefits⁹³, but in practice are prevented from doing so because they would have to disclose their presence to the Social Welfare Offices who, in turn, are under a duty to report them to the relevant authorities.⁹⁴ Consequently, they are forced to take up irregular employment or rely on NGOs, existing communities or friends in order to meet their basic requirements for housing, clothes and food.

Cessation of social benefits

The Asylum Seekers' Social Benefits Act has a restriction clause⁹⁵ according to which the social benefits can be reduced to an absolute minimum in cases where the Social Welfare Office considers the following situations to apply: (1) the claiming of social benefits was the overall motivation to come to Germany; (2) the person in question is prevented from leaving the Germany through a fault of his or her own. Application of this provision can result in the cancellation of financial support, housing, food or medical services. It is disputed to what extent services can be cancelled; usually in

those cases the benefits consist only of food and shelter without any extra money. According to JRS Germany, the recent practice of some Social Welfare Offices has been "sandwich and transport ticket." The philosophy behind this is that the indispensable minimum for a third-country national, who has been given an enforceable order for expulsion, is everything he needs for a journey (food and ticket). This practice has been stopped by some decisions of the Courts and now in general the indispensable minimum is interpreted as comprising of food and shelter. Nevertheless, according to JRS Germany, "Social sanctions are used to influence the behaviour of the people."

Another problematic aspect is the wide range of discretion given to the Social Welfare Office to decide to restrict social benefits. One interviewee stated that, "Allowances given by the Social Welfare Office vary from person to person. Nobody understands why there is that much difference." One interviewee whose financial support was terminated was unaware of the reason for this decision.

4.5 Education

Under the German federal system, education falls under the jurisdiction of the "Länder". Hence, access to school for children of foreign families is regulated by the "Länder" and there is no common policy. Usually, children of asylum seekers under their recognition procedure are able to attend school. With regard to children of families without a residence status, there is much legal uncertainty. The main problems arise when it comes to the questions of a) whether a formal right to school attendance or even a compulsory education exist for these children; and b) if a school principal or the administration of the school need report the irregular situation of a certain family.

The Laender interpretations of in whose cases education is compulsory, or at least whether a right to school attendance exists, differ a lot. Most Laender generally say that it depends on the legal stay in Germany. On the other hand, in accordance with some Laender constitutions, such as the one of Northrhine-Westphalia, every child – without any additional condition – has the right to education and formation. Consequently, after some years of discussion, the Northrhine-Westphalian Minister for Schools and Advanced Training, in cooperation with the Minister of Interior, ruled in March 2008 that schools must accept all children applying for inscription irrespective of their residence status.⁹⁶ Unfortunately, most other Laender do not have any similar regulation.

⁸⁸ Section 3 of the Asylum Seekers' Social Benefits Act.

⁸⁹ Section 3(1) of the Asylum Seekers' Social Benefits Act.

⁹⁰ Section 3(2) of the Asylum Seekers' Social Benefits Act.

⁹¹ In Original language: Sozialgesetzbuch (SGB).

⁹² Section 2 of the Asylum Seekers' Social Benefits Act.

⁹³ Section 1 of the Asylum Seekers' Social Benefits Act.

⁹⁴ Section 86 (2) of the Residence Act.

⁹⁵ Section 1a of the Asylum Seekers' Social Benefits Act.

⁹⁶ Decree of 27 March 2008, 222.2.02.02.02 Nr. 60733/07; see also "Antwort der Landesregierung auf

Above we have already discussed the problem that German law stipulates a general duty for public authorities to forward information to the relevant authorities if they obtain knowledge of the stay of a third-country national in contravention of the law. A principal or an administration of a public school is such a public authority. On the one hand there is the danger that they see themselves forced to report a family who has no residence status. On the other hand, this reporting would contravene their professional duties of educating and forming. Hence, in some Laender it is already regulated that school principals and administrations are exempt from the denouncement duty.⁹⁷ Whereas the law has not been changed, the Administrative Regulations on the Implementation of the Residence Act⁹⁸ that came into force as of November 2009, now stipulates that principals and administrations of schools are exempted from the reporting duty.

4.6 Work

“I do want to work and take care of myself because I am a healthy man.”

– A male holder of a toleration from Georgia, 32 years old –

Right to access the formal labour market

Holders of tolerations are prohibited from accessing the formal labour market during the first year after the issue of such a toleration. After the first year a right to employment exists only in cases where the Federal Employment Agency has granted its approval in accordance with the subsidiary principle: a work permit is only issued in cases where it has been satisfied that no German citizens, EU citizens or other third-country nationals with a residence permit were available to do the job for which a work permit has been requested.⁹⁹ According to JRS Germany, this means that most holders of tolerations are not able to find work. The issuance of a work permit is also required in cases of an apprenticeship. In particular, unaccompanied minors are unable to follow an apprenticeship if a work permit is denied, says OASE Pankow.

die Kleine Anfrage des Abgeordneten Michael-Ezzo Solf, Landtagsdrucksache 14/9019, 21.4.2009”.

⁹⁷ See, e. g., the above mentioned decree of the Minister for Schools and Advanced Training of Northrhine-Westphalia of 27 March 2008; and the Information Circular issued by the Berlin Senator for Education, Sciences and Research on 12. November 2009.

⁹⁸ No. 87.0.5 of the *Allgemeine Verwaltungsvorschriften zum Aufenthaltsgesetz*.

⁹⁹ See Section 39 of the Residence Act in conjunction with Section 10 of the Employment Procedure Ordinance (*Beschäftigungsverfahrensverordnung - BeschVerfV*). The subsidiary principle is not applicable if the person is staying in Germany for four years with a residence permit, an asylum seeker's registration card or a toleration.

Requests for a work permit are also denied if it is believed the holder of the toleration entered Germany with the purpose of receiving benefits under the Asylum Seekers' Benefit Act or the third-country national is prevented from leaving the Federal territory through a fault of his or her own (e.g. false information regarding identity or nationality).¹⁰⁰ Whether such an assumption exists is based upon the discretion of the relevant authorities. JRS Germany raised criticism as to how the authorities reached their decisions: “During the procedure for social benefits at the Social Welfare Office they are asked to fill in questionnaires with question like: How do you want to live here? Usually people answer “Social Welfare”, as they know that they are not allowed to work and therefore are in need of social assistance. But this answer is used to assume the person in question entered Germany in order to live on welfare.” Oase Pankow adds that the result of the limited access to the labour market is that many holders of tolerations are forced to take up irregular employment.

Illegally staying third-country nationals without any form of status are prohibited from working legally.

Motives to find work

All of the interviewees expressed a desire to work in order to guarantee an income which meets their basic needs for housing, clothing, food and transport, without being dependent on either statutory support mechanisms or on the support of their network. Not being able to work can have serious psychological effects such as depression, low self-esteem and feelings of uselessness. One interviewee with an irregular job emphasised that his work structures his daily life. Being without work could eventually lead to homelessness, if no public housing is provided.

Success in finding work

Due to the subsidiary principle applied for holders of tolerations, very few are issued with a work permit and thus legally entitled to work. The *Katholisches Forum Leben in der Illegalität*¹⁰¹ noted that a number of holders of tolerations and irregular migrants excluded from the legal labour market are very vulnerable and living in absolute poverty. Some of them try to find a job in the illegal market which, however, is not always easy. To access the illegal labour market is almost

¹⁰⁰ See Section 11 of the Employment Procedure Ordinance.

¹⁰¹ The “*Katholisches Forum Leben in der Illegalität*” is a coalition under the auspices of the German Conference of Catholic Bishops. Members are: Catholic Office in Berlin, JRS Germany, Malteser Germany, Caritas Germany. The forum was founded in 2004 and provides lobby work and campaigns to improve the life of irregular migrants in Germany.

impossible for those persons in particular who are traumatised as a result of events in their countries of origin and persons with physical disabilities, illness or elderly persons.

Holders of tolerations or irregular migrants who are part of a wide ethnic community find work more easily through their networks. Equally persons who are well trained and skilled find stable – and better paid – work more easily.

Type of work and salary

Most of the interviewees managed to organise short-term work once in a while. Sectors in which the interviewees were active were: construction, cleaning, catering and transport. One interviewee who has well-developed language skills and also has some computer skills managed to take up long-term employment with various companies. This interviewee expressed his confidence and satisfaction with his survival strategy. “I take my own decisions and I am in control over my life. The less help I need from other people the better”.

Exploitation

Holders of tolerations and irregular migrants risk exploitation if they take up irregular work. Examples of exploitation include low wages or even non-payment for the work done. Given the fact that several of them have experienced traumatic experiences in their countries of origin or are traumatised by detention in Germany, these persons are extremely vulnerable and prone to being exploited. The Katholisches Forum Leben in der Illegalität reports that although irregular migrants engaged in irregular work are, by law, insured through the Employers Liability Insurance Association¹⁰² it is very unlikely that the exploited worker would exercise his rights and initiate proceedings. Due to uncertainty as to whether the courts competent in this field have the duty to forward information to the relevant authorities¹⁰³, the exploited persons do not enforce their rights.

4.7 Freedom of Movement

“I would really like to have a paper to travel. With this obligation to stay within this area I feel like I was brought from a smaller prison to a bigger one. I am not free.”

– A male holder of a toleration from Sudan, 38 years old –

What all interviewees perceived as a very negative factor affecting all aspects of their personal life was the imposed restriction of movement within Germany. Pursuant to Section 61(1) of the Residence Act, holders of

tolerations have an obligation to stay within the Land in which they are residing. The Section states that the stay of a third-country national who is under the obligation to leave the territory¹⁰⁴ “shall be restricted in geographical terms to the territory of the Land concerned. Further conditions and requirements may be imposed.” Such further requirement may be that the confined geographical area concerns not the Land but is limited to the administrative district in which the person concerned is residing. A holder of a toleration is required to ask for permission every single time he needs to leave the geographical area to which he is confined for a specific purpose.

This restriction upon movement, especially limited to the administrative district, has a negative impact on daily life and may impose an obstacle for finding stable employment, establishing social contacts or following leisure activities. The effects of this restriction depend to some extent on what the administrative district has to offer in terms of employment, services and societal activity. This is particularly the case when the holder of a toleration finds himself in such a situation for a long period of time. The prohibition from leaving the designated geographical area further reduces the chance to find work since the labour market is geographically limited.

4.8 Life Planning

“Without papers I do not have a chance to have a normal life.”

– A male holder of a toleration from Georgia, 32 years old –

Prisoners of destitution

A significant number of holders of tolerations live in limbo for many years. Some have even been staying in Germany in such a situation for more than 5 years. Being in a tolerated situation for a long time creates particular hardships and a lack of future perspective. By suspending the removal the German states acknowledges that obstacles to return of a factual or legal nature exist.¹⁰⁵ The grant of a toleration does not provide for a legal residence status or any direct rights: it only offers toleration to stay on the territory. Under German law, legal possibilities to issue a residence permit after a certain period of time spent in toleration do exist. However, there are a number of bureaucratic and legal obstacles when implementing this provision. Holders of tolerations live in constant fear that they will be removed to their countries of origin. Toleration does not remove the third-country national's obligation to leave Germany. In cases where

¹⁰² In original language: Berufsgenossenschaft.

¹⁰³ In accordance with Section 86 (2) of the Residence Act.

¹⁰⁴ Holders of tolerations are still under the obligation to leave the territory.

¹⁰⁵ Section 60a of the Residence Act.

the authorities decide that the obstacles to return have ceased, the holder of a toleration can be removed without any further procedure.¹⁰⁶

According to the NGOs interviewed, many holders of tolerations, in particular those who are rejected asylum seekers, are afraid of persecution if returned to their countries of origin. One interviewee had to flee from Sudan and has extreme fear that he would be returned and then be in danger for his life. In a number of cases, removal is suspended for practical reasons such as the lack of travel documents or identification papers. One interviewee reported that the Georgian embassy persistently refuses to issue him with a passport and is unwilling to take him back. The German authorities have detained him but later had to release him on these grounds. Issued with a toleration, he has been living in Germany for more than 7 years now. The interviewees were very desperate about their situation.

Living a life in destitution

What is particular for holders of tolerations is that for long periods of time they are left with very limited rights and entitlements. This creates a high level of dependency on statutory mechanisms and charity for the survival. Basic minimum services are provided for short-term periods of time. Holders of tolerations live in poverty and only receive the very minimum level of services which are rarely enough to meet their basic needs. Those in particular whose social benefits have been reduced face extreme hardship. The German system is drawn up to exclude these persons from society, yet at the same time it is officially recognised that holders of tolerations are unable to leave the country. Entitlements under law are limited and may be reduced without any clear decision-making process. The exclusion policy of Germany is particularly evident with respect of the right to access the formal labour market: only if no German, EU or legally staying third-country national is willing to do a particular job is a holder of a toleration allowed to fill this position. In practice, many holders of tolerations do not receive a work permit and thus are unable to participate in society. The interviewees reported feeling extremely bored during the day: they pass the time with others in a similar situation or watch TV, which helps them to learn German as a substitute to German language courses. As a result of their exclusion from society, many holders of toleration and irregular migrants feel lonely and left out. The policy of the German state affects the private lives of the holders of toleration and limits the establishment of social

contacts and relationships. One interviewee explains: "I have no real friends because people are only interested in you when you have a residence status. Getting in contact with women in particular is very difficult; establishing a relationship with a woman is very hard."

All of the interviewees believe that a residence permit would be the solution to most of their problems. Without a right of residence they were unable to plan their future and develop future goals. They are focused on their legal status and the things they *could* do with a residence permit. In particular for young persons with a toleration, the lack of residence rights stands in the way of access to training activities and development of necessary working skills. One young male interviewee states: "I feel bored. I would like to work or start an apprenticeship. I also would like to have a driving license. But you see, the procedures are always very difficult and the people do not always accept a 'toleration status.'" Other interviewees were concerned about their situation and felt like they were 'standing still'. One interviewee stated: "I would like to integrate into German society by attending German language courses and work, because I must live here. But the German state does not give me a chance. My life is not infinite and my chances for a normal life are getting smaller and smaller, especially my chance to build up a family."

5 Conclusions and Recommendations

5.1 Consequences of the State's laws, policies and practice

For holders of a "toleration" and irregular migrants

1. No or limited access to health care. The general health condition weakens over time and medical problems are not adequately treated.
2. Being forced into destitution with no way out can lead to severe mental health problems, loss of purpose in life and low self-esteem.
3. Many holders of a "toleration" are provided with only basic support (food and shelter).
4. Holders of a "toleration" are usually not allowed to work in the formal labour market.

For society

5. NGOs provide typical State tasks, such as the provision of medical care, in order to minimise the effects of destitution. In some cases, the services of the NGOs are essential for survival. The NGOs also take

¹⁰⁶ Section 60a (3), (5) of the Residence Act.

up this role for holders of a “toleration” who do receive some form of state support, but this is not sufficient for subsistence.

6. Destitute holders of a “toleration” are socially excluded and, because they are prohibited from accessing the formal labour market, they are faced with high barriers to participate in and contribute to society. Society does not benefit from their skills.
7. The creation of growing number of “third-class citizens” staying in Germany for long periods while not being removed.

5.2 Recommendations

In general

1. The relevant laws must be reformed so all third-country nationals can enjoy their basic rights (to food, shelter, medical treatment, education, etc.) without regard to their legal status.

Medical care

2. Free and full access to healthcare in all cases throughout the entire stay of the person in Germany.

Social Support

3. Social support should be given to all persons in need irrespective of their legal status for the length of time they cannot be returned, or they should be given the right to access the formal labour market in order to support themselves.
4. Financial support should be given in place of vouchers.

Residence Rights

5. If a third-country national cannot be returned for a certain period (e.g. three months) he should be provided with a residence permit so that he can organise his integration into German society. This would replace the current “toleration”.

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Case Studies in Ireland

1. Case Study

1.1 A typical case

Abdul Zulfacar¹⁰⁷ is a man from Afghanistan, born in 1973. In 2005 he came to Ireland and applied for asylum on the grounds of having been detained and maltreated in Afghanistan because of his political activities.

Upon arrival in Ireland, he was placed in a direct provision accommodation facility in Cork where he stayed for about three years. During this time, he suffered depression and post-traumatic stress disorder, brought on by his ordeals in Afghanistan. He was placed on medication and also spent three weeks in a hospital.

After an incident in the Cork accommodation facility of which Abdul was accused of having caused (which he denies), he was transferred to another facility in County Limerick. The hostel there was about a forty-five minutes walk to the next village and Abdul felt very isolated. He was still having his mental health problems, could not get on with the hostel's manager and felt threatened and attacked by other residents. Letters of complaint and requests for a new transfer were never answered by the responsible authorities. A visit to the Dublin office of the Irish Reception and Integration Agency (RIA)¹⁰⁸ proved fruitless.

In exchange, the agency accused him of having been involved in "several incidents of violent and threatening behaviour" and refused him accommodation. Consequently, Abdul was also refused assistance by the Community Welfare Officer since, as an asylum seeker he fell outside the Officer's responsibility. Abdul was left homeless. At night he slept on the floor of a factory in Dublin. Some NGOs gave him a little assistance but could not provide him with accommodation. Abdul was homeless for a three months period in total.

Finally, the Irish Refugee Council referred Abdul to a solicitor who issued High Court proceedings challenging the Minister's refusal to accommodate him. The State offered a settlement out of court which was accepted and allowed Abdul new access to accommodation.

It should be noted that Abdul has recently been recognised as a refugee.

1.2 The context of the case

Abdul's case is not unique. As his solicitor explains,¹⁰⁹ there are quite a number of asylum seekers in Ireland who are accused of "violent and threatening behaviour", thrown out of their accommodation centres and refused assistance by the Reception and Integration Agency. Since they do not meet the "Habitual Residence Condition"¹¹⁰ they are consequently also denied assistance by the Community Welfare Officers. As they are not allowed to work, they lack the necessary means for their living and find themselves in deep poverty and homelessness. Asylum seekers sometimes also face problems with their accommodation in the direct provision centres.

Other migrants are often also denied assistance because of a failure to meet the "Habitual Residence Condition". They can even include EU-citizens. Ms Berkeley recalled the case of a German national who had been living in Ireland for years and developed strong ties to the country. But he had not been officially employed, working instead as a volunteer with a community in Dublin where he received everything he needed for his subsistence. When, because of internal problems, he had to leave the community he was refused social assistance by the welfare authorities because of not having been officially employed and therefore, in the eyes of the officers, not meeting the "Habitual Residence Condition".

Asylum seekers who still live in their accommodation centres under the "Direct Provision" regime also face a very difficult situation. In an English language class held in the Jesuits' Belvedere College (Dublin) by Sr. Eleanor O'Brien RLR, Language Acquisition Officer of JRS Ireland, we met Said,¹¹¹ an asylum seeker from Iran, who had been a university student before fleeing from persecution. He has been in the asylum procedure for three years; his application for leave to remain is still pending. Said is living in a Direct Provision Centre in Dublin with full board and only €19.10 per week personal allowance. He is not allowed to work. Out of the little cash he receives he cannot pay for public transport tickets and therefore walks a long way to language class and other appointments. He often feels depressed

¹⁰⁷ Not his real name.

¹⁰⁸ The Reception and Integration Agency (RIA) was established on 2 April 2001, operates under the aegis of the Department of Justice, Equality and Law Reform, and is responsible for coordinating, inter alia, the provision of services to asylum seekers. See www.ria.gov.ie.

¹⁰⁹ Ms Karen Berkeley of Brophy Solicitors, Dublin, interviewed on 2 December 2009 (hereinafter referred to as "Berkeley interview"). A case similar to the one of Abdul was described in Victor Posudnevsky, *No Way Out. Metro Eireann*, 23 October 2008, at p. 10.

¹¹⁰ Which will be explained in detail in section 2.3.

¹¹¹ Not his real name. We met Said on 3 December 2009.

because of not being allowed to work and hence is only “killing the time” in libraries or meeting friends. Depression also results from the uncertainty about his future.

2. The relevant law

2.1 Protection Status under Irish Asylum Law

The law on asylum in Ireland (as of November 2006) is outlined in the Refugee Act 1996 as amended (hereinafter referred to as ‘the Refugee Act’).¹¹² Also relevant are some provisions of the Immigration Act 2003 (hereinafter referred to as “the Immigration Act”). Under Irish law, the most important protection statuses are ‘Refugee’, ‘Leave to Remain’, and ‘Subsidiary Protection’. Related to protection are also the provisions on Family Reunification.

Refugee Status

Section 2 of the Refugee Act follows the definition of ‘refugee’ given in the 1951 Geneva Convention. Hence, refugee status is granted to any person who meets the criteria of Art. 1 A (2) of the 1951 Convention and is not to be excluded from protection.¹¹³ Section 1 of the Refugee Act stipulates that “membership of a particular social group” includes membership of a trade union, and

membership of a group of persons whose defining characteristic is their belonging to the female or male sex or having a particular sexual orientation. Family members of a person with refugee status may also be granted the right to reside on Irish territory.¹¹⁴

Subsidiary Protection

Subsidiary Protection Status was introduced in 2006 by the European Community (Eligibility for Protection) Regulations 2006 (hereinafter referred to as ‘Protection Regulations’).¹¹⁵ Under the Protection Regulations, application for subsidiary protection may be made by a person who is not a national of a Member State, who does not qualify as a refugee and in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in the Regulations and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.¹¹⁶

“Serious harm” is defined as including (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹¹⁷ Under the 2006 Regulations, an applicant for subsidiary protection must have first applied for refugee status.¹¹⁸

Leave to Remain

Permission for leave to remain on humanitarian or other grounds may be granted by the Minister for Justice, Equality and Law Reform¹¹⁹ if the applicant is adjudged to meet one of the criteria listed in Section 3(6) of the Immigration Act. Applicants for leave to remain are usually asylum seekers who have been refused refugee

¹¹² The Refugee Act 1996 came into force on 20 November 2000 and has been amended by Section 11.1 of the Immigration Act 1999, Section 9 of Illegal Immigrants (Trafficking) Act 2000 and Section 7 of the Immigration Act 2003.

On 24 January 2008 the Minister for Justice, Equality and Law Reform presented an Immigration, Residence and Protection Bill 2008 to the National Parliament (the Oireachtas). On 11 November 2009 the Select Committee on Justice, Equality, Defence and Women’s Rights of the House of Representatives (the Dáil Éireann) completed their inspection of the Bill and proposed several amendments (the Bill as amended by the committee can be accessed at www.oireachtas.ie/documents/bills28/bills/2008/0208/b02a08d.pdf). The Bill replaces, inter alia, the Refugee Act and is likely to amend the asylum system significantly.

¹¹³ According to Section 2 of the Refugee Act a person is excluded who:

- Is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance,
- is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country,
- there are serious grounds for considering that he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,
- has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
- has been guilty of acts contrary to the purposes and principles of the United Nations.

A note on language: If here and elsewhere in our this chapter reference is made to “the State”, it always refers to the Irish State or Republic of Ireland.

¹¹⁴ Section 18 of the Refugee Act 1996.

¹¹⁵ The Regulations came into force on 10 October 2006.

¹¹⁶ Pursuant to Regulation 13 a person is excluded from subsidiary protection “where there are serious reasons for considering that he or she

- has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- has committed a serious crime;
- has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations; or
- constitutes a danger to the community or to the security of the State”.

¹¹⁷ Regulation 2 of the Protection Regulations.

¹¹⁸ In accordance to the Immigration, Residence and Protection Bill there will be no requirement to have first applied for asylum. It is proposed that there will be a single procedure to handle all protection claims.

¹¹⁹ Hereinafter referred to as “Minister/Department of Justice”.

status. Any person who has been notified in accordance with the Immigration Act that the Minister intends to make an order that they be removed from the State may make representations setting out the reasons why they should be allowed to remain and the Minister will consider these representations.

Family Reunification

Under family reunification, spouses and dependent family members of people who are granted refugee status, residence or leave to remain may be allowed to reside in Ireland.

2.2 The “Immigration Stamps”

The different immigration statuses are shown by “Immigration Stamps”. For enjoyment of certain rights in Ireland, which of these six immigration stamp a migrant holds can be very important. The following is an overview taken from the website of the Irish Naturalisation and Immigration Service:¹²⁰

Main Immigration Stamps	Main categories of Persons permitted to be in the State
<p>STAMP 1 This person is permitted to remain in Ireland on the conditions that the holder does not enter employment unless the employer has obtained a permit, does not engage in any business or profession without the permission of the Minister for Justice and does not remain later than a specified date.</p>	<p>Non-EEA¹²¹ national issued with a work permit Non-EEA national issued with a Green Card Permit Non-EEA national who have been granted permission to operate a business in the State Working Holiday Authorisation holder</p>
<p>STAMP 1A This person is permitted to remain in Ireland for the purpose of full time training with a named body until a specified date. Other employment is not allowed.</p>	<p>Non-EEA national studying accountancy</p>
<p>STAMP NUMBER 2 This person is permitted to remain in Ireland to pursue a course of studies on condition that the holder does not engage in any business or profession other than casual employment (defined as 20 hours per week during school term and up to 40 hours per week during school holidays) and does not remain later than a specified date. Also the person has no recourse to public funds unless otherwise provided.</p>	<p>Non-EEA national attending a full time course of study</p>

¹²⁰ See <http://www.inis.gov.ie/en/INIS/Pages/Stamps>.

¹²¹ The EEA is the European Economic Area and consists of all EU Member States, plus Norway, Liechtenstein and Iceland.

<p>STAMP NUMBER 2A This person is permitted to remain in Ireland to pursue a course of studies on condition that the holder does not enter employment, does not engage in any business or profession, has no recourse to public funds and does not remain later than a specified date.</p>	<p>Non-EEA national attending course of study not recognised by the Department of Education and Science</p>
<p>STAMP NUMBER 3 This person is permitted to remain in Ireland on conditions that the holder does not enter employment, does not engage in any business or profession and does not remain later than a specified date.</p>	<p>Non-EEA visitor Non-EEA retired person of independent means Non-EEA Minister of Religion and Member of Religious Order Non-EEA spouse or dependant of employment permit holder</p>
<p>STAMP NUMBER 4 This person is permitted to remain in Ireland until a specified date.</p>	<p>Non-EEA family member of EEA citizen Non-EEA spouse of Irish citizen Refugee Non-EEA person granted family reunification under the Refugee Act 1996 Programme refugee Non-EEA parent of Irish citizen child where parent was granted permission to remain in the State Non-EEA family member of EU citizen where family member qualifies under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006.</p>

2.3 Law regulating social welfare and the “Habitual Residence Condition”

The social welfare system in Ireland is divided into three main types of payments. These are:

- Social insurance payments
- Means tested payments
- Universal payments.

The system is governed by a wide range of Acts, Statutory Instruments and Operational Guidelines. With all social welfare payments, a claimant must satisfy specific personal circumstances which are set out in the rules for each scheme.

As a general rule, since May 2004, claimants must be *habitually resident* to qualify for social assistance payments in Ireland. Section 246 subsections 1 and 4 of the Social Welfare Consolidation Act 2005¹²² provides that:

“(1) ... it shall be presumed, until the contrary is shown, that a person is not habitually resident in the State at the date of the making of the application concerned unless the person has

¹²² As amended by Section 30 of the Social Welfare and Pensions Act 2007.

been present in the State or any other part of the Common Travel Area¹²³ for a continuous period of 2 years ending on that date. (...)

(4) Notwithstanding the presumption in subsection (1), a deciding officer or the Executive, when determining whether a person is habitually resident in the State, shall take into consideration all the circumstances of the case including, in particular, the following:

- (a) the length and continuity of residence in the State or in any other particular country;
- (b) the length and purpose of any absence from the State;
- (c) the nature and pattern of the person's employment;
- (d) the person's main centre of interest; and
- (e) the future intentions of the person concerned as they appear from all the circumstances."

The Department of Social and Family Affairs issued Guidelines for Deciding Officers on the determination of Habitual Residence in June 2008.¹²⁴ Following a series of nine cases taken by the Free Legal Advice Centres (FLAC), reviewed by the Chief Appeals Officer of the Social Welfare Appeals Office, it was held that the law did not exclude asylum seekers as an entire category of persons who could not satisfy the HRC. Each of the appellants was an asylum seeker or person seeking humanitarian leave to remain and in three of the cases, the appellant had been supported by another organisation at the initial appeal stage. The Chief Appeals Officer found that each case had to be decided on its own individual circumstances.¹²⁵

The interpretation of the HRC has varied since 2004. In recent years, EU citizens from the ten accession states have been particularly affected. After discussions with the EU Commission who raised doubts on the rule's compliance with EU law, the Irish Department of Social and Family Affairs ordered any EU and EEA individual in "genuine and effective employment" to be regarded as habitually resident.¹²⁶ On the other hand, EU/EEA citizens

who have not yet entered the labour market but are seeking jobs are not considered as "workers" and therefore still excluded from payments if not meeting HRC criteria.¹²⁷ This can even happen to people who grew up in Ireland but went away and have returned.

In December 2009, the Irish Parliament passed a Bill amending the Social Welfare Acts. In accordance with Section 15 of the Bill, asylum or subsidiary protection seekers during the entire procedure, as well as any migrant staying in Ireland without a residence permit, are blanketly excluded from receiving social assistance payments.¹²⁸

rejected their claim." (Email message to the author dated 5 Jan. 2010.)

¹²⁷ See "Away from home and homeless. Quantification and profile of EU10 Nationals using homeless services and recommendations to address their needs." By Emmet Bergin and Tanya Lalor, TSA Consultancy, for the Homeless Agency. Dublin 2006, at p. 63.

¹²⁸ Section 15 of the Social Welfare and Pensions (No 2) Bill 2009 amends Section 246 of the Principal Act by inserting the following subsections after subsection (4):

"(5) Notwithstanding subsections (1) to (4) and subject to subsection (9), a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.

(6) The following persons shall, for the purpose of subsection (5), be taken to have a right to reside in the State:

(a) an Irish citizen under the Irish Nationality and Citizenship Acts 1956 to 2004;

(b) a person who has a right to enter and reside in the State under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), the European Communities (Aliens) Regulations 1977 (S.I. No. 393 of 1977) or the European Communities (Right of Residence for Non-Economically Active Persons) Regulations 1997 (S.I. No. 57 of 1997);

(c) a person in respect of whom a declaration within the meaning of section 17 of the Act of 1996 is in force;

(d) a member of the family of a refugee, or a dependent member of the family of a refugee, in respect of whom permission has been granted to enter and reside in the State under, and in accordance with, section 18(3)(a) or, as the case may be, section 18(4)(a) of the Act of 1996;

(e) a programme refugee within the meaning of section 24 of the Act of 1996;

(f) a person who has been granted permission to remain in the State under Regulation 4(4) of the Regulations of 2006;

(g) a person who has been granted permission to enter, and reside in, the State under Regulation 16(3)(a) or 16(4)(a) of the Regulations of 2006 by the Minister for Justice, Equality and Law Reform;

(h) a person whose presence in the State is in accordance with a permission to be in the State given by or on behalf of the Minister for Justice, Equality and Law Reform under and in accordance with section 4 or 5 of the Immigration Act 2004.

(7) The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act:

(a) a person who has made an application under section 8 of the Act of 1996 and where the Minister for Justice, Equality and Law Reform has not yet made a decision as to whether a declaration under section 17 of the Act of 1996 will be given in respect of such application;

(b) a person in respect of whom an application for subsidiary protection has been made under Regulation 4 of the Regulations of 2006 and where a determination

¹²³ The Common Travel Area consists of Ireland, the United Kingdom (including Northern Ireland), the Channel Islands and the Isle of Man.

¹²⁴ See the text of the guidelines at www.welfare.ie/EN/OperationalGuidelines/Pages/habres.aspx

¹²⁵ For more information on the HRC and a briefing note on these decisions and the amendments to the legislation see <http://www.flac.ie/campaigns/current/campaign-for-fairness-in-social-welfare-decisions-on-hrc/>

¹²⁶ Nevertheless, Joe O'Brien (Crosscare) noted that there are major issues with the implementation of this order. "Particularly since the recession deciding officers have not been applying this consistently. Our Housing and Welfare service has dealt with many EU citizens who subsequently proved they were in 'genuine and effective employment' (with our help) after an officer had initially

If the person concerned is perceived as not meeting the HRC criteria, s/he will not receive any benefit payments and can even be denied access to emergency accommodation.¹²⁹

Asylum seekers do not take part in the general social welfare system. The Irish Reception and Integration Agency (RIA) is responsible for their supply. It should be noted that Ireland has made use of a reservation to the EU Treaty and opted out of the Directive on Minimum Standards for the Reception of Asylum Seekers.¹³⁰

under that Regulation has not yet been made 5 in respect of such application;

(c) a person who has been notified under section 3(3)(a) of the Immigration Act 1999 that the Minister for Justice, Equality and Law Reform proposes to make a deportation order, whether or not that person has made representations under section 3(3)(b) of that Act, and where the Minister for Justice, Equality and Law Reform has not yet made a decision as to whether a deportation order is to be made in respect of such person;

(d) a person who has made an application under section 8 of the Act of 1996 which has been refused by the Minister for Justice, Equality and Law Reform;

(e) a person in respect of whom an application for subsidiary protection has been made under Regulation 20 (4) of the Regulations of 2006 and a determination has been made that the person is not eligible for subsidiary protection under the Regulations of 2006;

(f) a person in respect of whom a deportation order has been made under section 3(1) of the Immigration Act 1999.

(8) For the purpose of this Act, where a person —

(a) is given a declaration that he or she is a refugee under section 17 of the Act of 1996,

(b) is granted permission to enter and remain in the State under section 18(3)(a) or 18(4)(a) of the Act of 1996,

(c) is granted permission to remain in the State under Regulation 4(4) of the Regulations of 2006,

(d) is granted permission to enter and reside in the State under Regulation 16(3)(a) or 16(4)(a) of the Regulations of 2006, or

(e) is granted permission to remain in the State under and in accordance with the Immigration Act 1999 or the Immigration Act 2004,

he or she shall not be regarded as being habitually resident in the State for any period before the date on which the declaration referred to in paragraph (a) was given or the permission referred to in paragraph (b), (c), (d) or (e), was granted.

(9) Notwithstanding that a person has, or is taken to have in accordance with subsection (6), a right to reside in the State the determination as to whether that person is habitually resident in the State shall be made in accordance with subsections (1) and (4)."

¹²⁹ Information from Sinead McGinley and Eoin O'Broin, Focus Ireland, interviewed in Dublin on 1 December 2009 (hereinafter referred to as "McGinley/O'Broin interview"); also from Berkeley interview.

¹³⁰ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Ireland has opted out using the reservation laid down in the Protocol on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice (now in the annex to the Lisbon Treaty).

2.4 Non-Removal of Illegally Staying Third-Country Nationals: Grounds and solutions

Section 3 of the Immigration Act¹³¹ provides some reasons for non-removal from Ireland:

Subsection 1 refers to the principle of non-refoulement as enshrined in Section 5 of the Refugee Act, which repeats Art. 33 of the 1951 Refugee Convention. In this context, subsection 2 clarifies that a person's freedom shall be regarded as being threatened if, *inter alia*, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).

Additionally, Subsection 6 lists the factors which the Minister for Justice must consider before deciding to remove a third-country national, or, reversely, he can use as grounds for granting leave to remain:

1. the age of the person;
2. the duration of the person's residence in the State;
3. the family and domestic circumstances of the person;
4. the nature of the person's connection with the State, if any;
5. the employment (including self-employment) record of the person;
6. the employment (including self-employment) prospects of the person;
7. the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
8. humanitarian considerations;
9. any representations duly made by or on behalf of the person;
10. the common good and
11. considerations of national security and public policy.

It should be noted that consideration of these grounds is left to the discretion of the Minister and they do not give any enforceable entitlements to the migrants concerned.

In practice, the wide range of discretion often results in migrants' reluctance to apply for social welfare even if they are in need of assistance, as there is reason to fear that even a short-time dependency on welfare can later have a damaging impact on an application for leave to remain, long-term residence or

¹³¹ The regulations on removal are likely to be significantly amended under the proposed Immigration, Residence and Protection Bill.

citizenship. The general political opinion in Ireland is that Irish citizenship, for instance, is a privilege rather than a right.¹³²

Leave to Remain and Subsidiary Protection

A person who is subject to a removal order may apply for leave to remain on the grounds that they may suffer torture or other ill-treatment on return to their country of origin. Since October 2006 they may also apply for subsidiary protection on the basis that they face the risk of serious harm within the terms of the regulations if they are removed from the country.

Regularisation: Leave to remain for non-national parents of Irish born children

In accordance with the Nationality and Citizenship Act 2004, since 1 January 2005, children born in Ireland to third-country nationals are no longer entitled to Irish citizenship unless one of their parents has lawfully resided in Ireland for at least three out of the four years preceding the child's birth.

On 15 January 2005, the Minister for Justice announced new procedures for the consideration of applications for leave to remain for third-country nationals who were parents of Irish born children. The closing date for applications was 31 March 2005: almost 18,000 applications were received and some 17,000 applicants were given leave to remain for an initial period of two years. It should be noted that after 2005, the Government has not made any provision in relation to the residence rights of those whose children qualify for citizenship. If today a child is born in Ireland whose parents meet the criteria for their child's entitlement to citizenship, there is no straightforward provision to apply for their residence on the basis of parentage.

Regularisation scheme for migrant workers

In October 2009, the government introduced a regularisation scheme for migrant workers who had had an employment permit and subsequently become undocumented through no fault of their own (i.e. through the action or inaction of their employer).¹³³ The closing date for applications was 31 December 2009. The MRCI has long been campaigning for a mechanism to be put in place for migrant workers who entered the country as work permit holders and subsequently become undocumented through reasons beyond their control. It called for such a mechanism to be permanently in place, since the way the

employment permits and immigration policies are designed will always lead to people becoming undocumented. The government introduced a time bound, three months regularisation scheme instead of an ongoing mechanism. While MRCI welcomed the scheme, they still believe that an ongoing mechanism is needed. The consequences of the regularisation scheme and whether the government decides to continue with a permanent system remains to be seen.

3. Dimensions of destitution – Asylum seekers

3.1 The asylum procedure

In 2008, the Irish authorities received a total of 3,866 applications for refugee status. This is a 3% decrease in applications compared to 2007 and is the lowest annual number of applications since 1997. Between January and October 2009, the number of applications was even lower and totaled 2,354.

The refugee recognition rate is also very low in Ireland.¹³⁴ In 2008, the Office of the Refugee Applications Commissioner (ORAC) recommended granting refugee status in 6.4% of all cases. 8.4% were deemed inadmissible under the Dublin II Regulation. 85.4% of all applications were refused. About 88% of ORAC's recommendations which were submitted to the next level, the Refugee Appeals Tribunal, were upheld by the Tribunal in 2008. Only 12% of appeals were successful. In October 2009, ORAC completed a total of 327 cases. In 8 of them, the Office recommended the applicant be declared a refugee (2.45%). In 42 other cases, the application was inadmissible under the Dublin II Regulation. In 277 cases, applications were recommended for refusal (84.7%).

Upon arrival in Ireland, an asylum seeker has an initial interview conducted by an immigration officer or an ORAC official.¹³⁵ The applicant is asked to fill out an application form and briefly set out the details of the claim. Once the application is thereby lodged, the asylum seeker is requested to fill out another, more detailed questionnaire within seven or

¹³² Interview with Fidèle Mutwarasibo, Immigration Council of Ireland, Dublin, 30 November 2009 (hereinafter referred to as "Mutwarasibo interview").

¹³³ See the details of the scheme at www.inis.gov.ie/en/INIS/Pages/Undocumented_Worker_s_Scheme

¹³⁴ The following numbers are taken from ORAC's website at www.orac.ie, and from the Refugee Appeals Tribunal's Annual Report 2008, p.37.

¹³⁵ The following is based on information in: Elizabeth O'Rourke, "Frontloading": The Case for Legal Resources at the Early Stages of the Asylum Process." Working Notes (ed. by the Jesuit Centre for Faith and Justice in Dublin), issue 62, November 2009, pp. 16-23; Brian Barrington, The Single Protection Procedure. A Chance for Change. Ed. by the Irish Refugee Council. Dublin 2008, pp. 19-20 (hereinafter referred to as "Barrington, Chance"); and the website of Citizens Information Ireland www.citizensinformation.ie/categories/moving-country/asylum-seekers-and-refugees.

eight working days. Later, s/he is invited to a substantive interview carried out by an ORAC caseworker and with the assistance of an interpreter. The applicant can be assisted by a legal representative. A written record of the interview, together with the record of the initial interview, the filled in questionnaires and any other relevant documentation, form the basis upon which the caseworker prepares a report for the Refugee Appeals Commissioner, which must be signed off by a higher official. Based on this, the Refugee Applications Commissioner must recommend to the Minister of Justice either that refugee status be granted or the application refused.

If the Refugee Applications Commissioner recommends the refusal of the application because it was withdrawn or is deemed to be withdrawn, there is no appeal against such recommendation. An appeal can be lodged with the Refugee Appeals Tribunal (RAT)¹³⁶ against the recommendation of denying refugee status on other grounds. If the RAT's decision is positive, the applicant receives a declaration as a refugee by the Minister of Justice subject to considerations of national security or public order. On a negative decision of the RAT, the Minister may refuse to give a declaration as a refugee and make arrangements for the applicant's removal from Ireland.

Only judicial review can be sought against a negative decision of the RAT, not a decision of a court of justice on the case's merits. This opportunity is therefore rarely used. In accordance with a written answer by the Minister of Justice to a question of Deputy Denis Naughten, 344 judicial reviews against decisions of the Refugee Appeals Tribunal had been taken in the year 2008, of which 181 were successful. From 1st January to 7th July 2009, 39 judicial reviews out of a total of 151 were successful.¹³⁷

¹³⁶ "RAT was established as an independent mechanism to process asylum appeals from the ORAC, but has been criticised for a number of reasons, among them lack of publicity and alleged bias on the part of board members, who are paid by the number of cases processed. The draft Immigration, Residence and Protection Bill provides for the establishment of a new and independent Protection Review Tribunal in place of the RAT. The new body would be required to improve transparency and consistency, and may have full-time members. It may also publish selected decisions based on their general relevance." (Report by the Council of Europe's Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Ireland, 26 - 30 November 2007. CommDH (2008)9, Strasbourg, 30 April 2008 – hereinafter referred to as "Hammarberg Report" - at para. 100).

¹³⁷ The minister added: "New judicial reviews taken against the RAT include cases in which the Tribunal was not the primary respondent. Successful judicial reviews are those in which there was a judgement or ruling in the year indicated. They may also relate to cases lodged in previous years. Successful judicial reviews include cases

Instead of judicial review, the asylum seeker has four options:

- To make representations to the Minister within 15 working days setting out humanitarian reasons for leave to remain.
- To leave Ireland before the Minister decides the matter and inform the Minister in writing of the arrangements having been made for this purpose.
- To consent to the making of the deportation order within 15 working days.
- To apply for "subsidiary protection".¹³⁸

On the direction of the Minister, certain categories of asylum applications, including those from nationals of "safe countries of origin", are dealt with as a priority, i.e. in an accelerated procedure.

Deportation orders issued by the Minister for Justice are carried out by the Garda National Immigration Bureau (GNIB).

In general, NGOs raise the concern that the asylum procedure is not transparent and deciding officers have too much discretionary power. Decisions are described as being rather subjective.¹³⁹

During the asylum procedure, an applicant cannot also apply for Irish citizenship.

3.2 Dispersal and Direct Provision

After having lodged their applications for asylum, asylum seekers are offered accommodation in one of currently two reception centres in Dublin for a short period of time. During this period, asylum seekers are given access to health, legal and welfare services.

Under the policy of dispersal of asylum seekers, applicants are then relocated to an accommodation centre. In accordance with the Reception and Integration Agency (RIA)¹⁴⁰ there is currently a total of 48 Direct Provision Centres throughout 19 counties; only 7 of these centres are State-owned. Additionally, 4 Self-Catering Centres are located in Dublin, Co. Cork, Co. Louth, and Co. Roscommon. Only a few of these 52 centres are State-owned; most

settled, at any stage, by the Tribunal." See www.kildarestreet.com/wrans/?id=2009-07-09.2382.0.

¹³⁸ The Immigration, Residence and Protection Bill will introduce a single procedure for the determination of all forms of protection applications including those for subsidiary protection. See the details in Brian Barrington, Change.

¹³⁹ Interview with Monika Anne Brennan and Emma Flaherty, Refugee Information Service, Dublin, 2 December 2009 (hereinafter referred to as "Brennan/Flaherty interview").

¹⁴⁰ Reception and Integration Agency, Report October 2009, pp. 14, 20; accessible on www.ria.gov.ie.

are commercial. They consist of hotels, guesthouses (B&B), hostels, former convents or nursing homes, one Mobile Home Site, and several System Built Facilities. In October 2009, the vast majority of asylum seekers were staying for over 36 months in direct provision centres.

Asylum seekers are not given any choice with regard to the location of the centre to which they are dispersed. They are required to remain in the centre while their application for asylum is being considered, if they are subject to a removal order or while awaiting a decision on an application for leave to remain. They can only move out of the centre with permission from RIA. Failure to remain in the centre is an offence with a penalty as specified in section 9(7) of the Refugee Act and may result in the asylum application being deemed to be withdrawn or being refused.

“Direct provision” in the accommodation centres means full board, i.e. the cost of three meals per day, heat, light, laundry, etc. are directly paid by the State. Residents are not allowed to prepare their own meals. They may have to share their bedroom and bathroom facilities with other asylum seekers. Usually there is a set of house rules the residents must comply with.¹⁴¹

In addition to “direct provision”, asylum seekers receive only a weekly personal allowance of €19.10 per adult and €9.60 per child. These sums have never been increased since they were introduced in the year 2000¹⁴²

Usually, asylum seekers are granted clothing allowances twice a year but these are not automatic payments and are given at the discretion of the Community Welfare Officer. Asylum seekers can also apply for the Back to School Clothing and Footwear Allowance for any school going children. There have been instances where these payments have not been granted, usually when the CWO believes the asylum seeker has other means. Applications can be made for additional payments in the case of Exceptional Needs Payments (under the Supplementary Welfare Allowance system) but are rarely granted. Hence the applicants have to cover all costs such as transportation, books, phone calls, etc. from this small allowance.

Living in direct provision has a certain impact on both physical and mental health. When there is no self-catering, the question of access to a nutritionally adequate diet is of particular importance. NGOs regularly receive complaints about food in the centres.¹⁴³ Even the Irish Health Service Executive (HSE) has raised

concerns that Direct Provision Centres do not offer quality, culturally appropriate food.¹⁴⁴

The obligation to live in certain centres without permission to work may also compound mental health, with boredom, depression, sense of isolation and loss of self-esteem commonly reported symptoms, especially when this restriction extends over a long period.

Compounding the problems is a general lack of private space especially where families are accommodated, and a lack of personal autonomy.¹⁴⁵

There are several complaints about a lack of qualified, trained staff such as social workers in the centres,¹⁴⁶ and in some cases about staff attitudes to the residents. In other cases staff members do even more than foreseen in their job descriptions. But in general, a manager of, e.g., a privately owned hotel that is used as a Direct Provision Centre cannot be expected to have knowledge and experience of addressing cultural, mental or similar problems.

Children living in direct provision must bear an especially heavy burden. In the words of the Irish Children’s Rights Alliance and Integrating Ireland: “Direct provision, comprising of institutional communal centres, is not well designed for, nor supportive, of children or parenting. Children cannot have a normal childhood living for a prolonged period of time in an institutional setting. Questions have also been raised about the adequacy of direct provision to meet the medical, nutritional,

¹⁴⁴ See for further reference Health Service Executive (HSE), National Intercultural Health Strategy 2007 – 2012. Dublin 2008, p. 42.

¹⁴⁵ “The Commissioner visited Kinsale Road Accommodation centre near Cork airport and spoke to staff members and residents in private. The facility is relatively new, and offers good conditions, including on-site basic medical care. There were, however, no apartments available for families with children; each family shared one room, which resulted in very limited private space. Civil Society representatives have informed the Commissioner that this is a general problem in Irish reception centres. Reports from independent inspectors engaged by the RIA also indicate that deficiencies exist in certain centres, such as lack of recreational facilities, overcrowding and problems of safety. The Irish authorities have informed the Commissioner that the safety concerns raised in the inspection reports had been addressed subsequently by proprietors. (...) While acknowledging that the facility visited is, in general, of a good standard, the Commissioner is concerned about the current state of accommodation for families and of the deficiencies reported by independent inspectors. The Commissioner is also concerned about the low degree of personal autonomy asylum-seekers may retain throughout the process, knowing that it can take three to five years to have an asylum application determined.” (Hammarberg-Report at paras. 107-108.)

¹⁴⁶ Interviews with Joe O’Brien, Crosscare Migrants Project, Dublin, on 1 December 2009 (hereinafter referred to as “O’Brien interview”), with Nicola Morris, Jesuit Refugee Service Ireland on 2 December 2009 (hereinafter referred to as “Morris interview”), and Brennan/Flaherty interview.

¹⁴¹ Some centres are reported to be especially designed for accommodation of “trouble makers” (Brennan/Flaherty interview).

¹⁴² Mutwarasibo interview.

¹⁴³ Brennan/Flaherty interview.

developmental and educational needs of children. In addition, the level of poverty experienced by most families living in this system (many who often cannot afford basic items such as supplementary foodstuffs, supplies for schools, class trips, birthday parties etc.) along with the long-term consequences for families and parenting where parents are unable to engage in study and work is worrying.”¹⁴⁷

Also, service providers working with asylum seekers say that direct provision is unsuited for lone female parents and single females who are vulnerable and at risk of sexual exploitation.¹⁴⁸

A longer stay in a Direct Provision Centre has in some cases resulted in “institutionalisation” of the persons concerned, i.e. they become unable to live on their own and to organise their lives by themselves.¹⁴⁹

3.3 The Habitual Residence Condition (HRC)

If an asylum seeker, like Abdul in the case study described above, either leaves a Direct Provision Centre on his own during the determination procedure or is, as a “trouble maker” forced to leave, s/he is perceived of as being “voluntarily homeless”. As a result, s/he is usually denied any welfare assistance including housing. This is based either on a failure to meet the HRC criteria as described above or rather, since Parliament passed the amendments to the Social Welfare Act in December 2009, on the perception that they are no longer “habitually resident”. It is worth noting that these amendments were introduced just after a series of decisions by the Chief Social Welfare Appeals Officer in cases taken by FLAC where it was held that there could be no blanket exclusion of asylum-seekers from social welfare benefits and that each case had to be determined on its own merits.¹⁵⁰

It is not clear which authorities are responsible for dealing with those cases, hence it may happen that persons are sent from the Community Welfare Officer to RIA and back (adding to the problem of Community Welfare Officers not always being informed about recent changes in law or guidelines).¹⁵¹ Judicial review of decisions is very difficult to apply

¹⁴⁷ Children’s Rights Alliance and Integrating Ireland, Round Table Information Sheet: Children and Families living in Direct Provision. 29 January 2009. Accessible at www.integratingireland.ie/userfiles/File/Database/Children%20and%20Families%20Living%20in%20Direct%20Provision.doc.

¹⁴⁸ See Immigrant Council of Ireland: “Globalisation, Sex Trafficking and Prostitution. The Experiences of Migrant Women in Ireland.” Dublin, February 2009, p. 74.

¹⁴⁹ Morris interview.

¹⁵⁰ For more details see FLAC’s Public Interest Law Alliance (PILA) Bulletin of 17 December 2009 (item 1) at www.flac.ie/download/pdf/171209_pila_bulletin.pdf

¹⁵¹ McGinley/O’Broin interview

for. It is also not clear whether these persons are entitled to emergency services. This may result in situations where persons are basically left to live on the street.

3.4 Work, health care and education

Asylum seekers are not allowed to seek or enter paid employment, run an own business or trade during the entire recognition procedure.¹⁵²

Asylum seekers have the same access to health services as the mainstream population (barriers such as language, cultural issues, etc. notwithstanding). At some centres GP services are also provided on site, facilitating the referral onward of persons who may require specialist services. Certain specialised mental health services also exist.¹⁵³

All children under the age of 18 have the right to primary and secondary education. Asylum seekers are not entitled to participate in State funded third level education, post Leaving Certificate courses, Vocational Training Opportunities Scheme and courses organised by FÁS or FETAC.¹⁵⁴

4. Dimensions of destitution – Irregular migrants

4.1 Ways into “irregularity”

There are no statistics on irregular migrants in Ireland. One interviewee estimated their number to be about 30,000.¹⁵⁵ In addition to those who have come to Ireland irregularly or whose asylum applications have been rejected, the majority have come as regular migrants and remained in Ireland after their visa expired (“overstayers”).

An interesting case example in this context are Brazilian migrants. At present, Brazil is a non-visa requirement country in relation to Ireland; citizens of this country can enter Ireland for a

¹⁵² It is worth mentioning that in 1999 a special scheme was introduced to allow asylum seekers awaiting a decision for over one year to access employment. Calls to introduce a similar scheme have been dismissed by the Government so far (information from Mr Mutwarasibo in an email message to the author, dated 6 January 2010).

¹⁵³ For details see Amnesty International Irish Section, Mental Health Lobbying Network: Background Note on Mental health and Asylum Seekers/Refugees. June 2008 (on www.amnesty.ie).

¹⁵⁴ FÁS is the National Training and Employment Authority (Foras Áiseanna Saothair); FETAC is the Further Education and Training Awards Council.

¹⁵⁵ Raluca Anucuta, Migrants Rights Centre Ireland, Dublin, in interview on 1 December 2009 (hereinafter referred to as “Anucuta interview”). The same number is given in Migration News Sheet, December 2009, p. 7: Ireland/Erratum concerning amnesty. See also the data analysis in Migrants Rights Centre Ireland, Life in the Shadows. An Exploration of Irregular Migration in Ireland. Dublin 2007 (hereinafter referred to as “Life in the Shadows”), at pp. 21-22.

three month stay as tourists without a visa. They become “irregular” by overstaying this period of time. Before May 2005 and the accession of the ten new Member States to the European Union, this was rather tolerated by the Irish authorities, as Ireland had a huge deficit in terms of labour. A political “blind eye” was used to ensure that the economic boom of the “Celtic tiger” Brazilians were encouraged to bring their families as they were seen as ‘well-behaved’ and hard-working. By 2005 they were well integrated, having started to arrive at the beginning of the boom in 1999. Helping integration was the 50/50 gender balance among them and an average 40% representation at the primary schools and 10% at the secondary school. With the beginning of the economic crisis and the harsher migration regime however, their situation has considerably worsened.¹⁵⁶

Some (Chinese) migrants are known to have come as students but were no longer able to afford the University fees. Subsequently they started to work which, under the “Immigration stamp” system, they are not allowed, and so they became “irregular.”¹⁵⁷

Others have come as migrant workers and attained a visa for a fixed job in a certain enterprise but have later encountered problems with their employer. For various reasons, including workplace exploitation, their employment has been terminated.¹⁵⁸ Work permits, issued by the Department of Enterprises, Trade and Employment are bound to a certain workplace, and so a change of the workplace requires a new work permit. As the residence permit (“Stamp 1”), issued by the Department of Justice is closely linked to the work permit, it automatically expires if the work permit is no longer valid. A three months extension of Stamp 1, in order to seek new employment, lies within the immigration officer’s discretion. Review on the merits of the case against a negative decision of the immigration officer can only be sought within the authority. Leaving the workplace, for whatever reason, can therefore result in becoming “irregular”.

If a migrant who has become irregular has received a deportation order from the Department of Justice, s/he must report regularly to the responsible immigration officer until the deportation can be enforced.

4.2 Social welfare and the “Habitual Residence Condition” (HRC)

¹⁵⁶ Information from Mr Frank Murray in an email-message to the author, dated 8 January 2010.

¹⁵⁷ Interview with Sr. Eleanor O’Brien RLR of JRS Ireland, Dublin, on 3 December 2009. See “Life in the Shadows”, p. 30.

¹⁵⁸ The following information relies on Anucuta and O’Brien interviews.

Irregular migrants are especially affected by the HRC.¹⁵⁹ Nowadays, the rule is interpreted even more strictly because of the economic crisis and its impacts on public funds. Irregular migrants are not entitled to social welfare if they do not meet the HRC criteria.¹⁶⁰ In some cases they might receive Supplementary Welfare Assistance, but for no more than six months.

It should be noted that many ‘irregular’ migrants have contributed to the National Pension Fund and paid their taxes but may have no right to refunds.

4.3 Housing and the “Habitual Residence Condition” (HRC)

For homeless associations, the HRC is not mandatory. Nevertheless, since they are to a large extent funded by the State, these agencies find themselves under heavy pressure to act along the State’s policies or risk their funding. Hence, it is difficult for an irregular migrant even to get shelter.

As the economic situation worsens, migrants must turn to living in overcrowded conditions. A couple with a 12 year old quadriplegic son and two infant children, for instance, were sleeping in one bedroom and sharing a four bedroom house with five other men to keep costs down as they had no recourse to social benefits when unemployed.¹⁶¹

4.4 Work

Irregular migrants are not allowed to work. The current economic recession hits migrant and especially undocumented workers very hard.¹⁶²

Complaints against employers for workplace rights violations, including unpaid salaries, can be lodged with the Labour Courts, but during the long procedure the worker is not entitled to any social welfare payments if s/he does not

¹⁵⁹ The following information relies on Mutwarasibo and O’Brien interviews.

¹⁶⁰ Or, as Joe O’Brien of Crosscare states, “in our experience the HRC criteria are not even considered or applied if someone presents to an officer without in-date immigration status. Their claim is simply not considered.” (Email message to the author, dated 5 January 2010.) This practice got some legal grounding after the December 2009 changes in law.

¹⁶¹ Information from Mr Frank Murray in an email-message to the author, dated 8 January 2010.

¹⁶² The case of the Brazilian community in Gort where many people have decided to go back to Brazil even if they have lived for years in Ireland shows the impact the economic recession can have especially on migrant workers. See BBC News, 5 Oct. 2009: Ireland’s Brazilians pack their bag. The case of these Brazilian, however, opposes a global trend of immigrants choosing to stay put in their adopted countries rather than return home despite very high unemployment and lack of jobs. For a discussion of this trend see Migration Policy Institute: Migration and the Global Recession. A Report Commissioned by the BBC World Service. September 2009.

meet the HRC.¹⁶³ In a growing number of cases employers have sought to rely on the defence of illegality of contract. This stems from the traditional position that where the employee is not legally entitled to work, their contract of work is illegal and therefore unenforceable. This is one major barrier to legal redress for undocumented migrant workers.¹⁶⁴

4.5 Health care

Irregular migrants are not banned from health care but often they do not go to the doctor or the hospital because of misinformation, fear, or lack of sufficient financial means. Additionally, there is a lack of professionally trained interpreters.

At the same time, doctors and hospital staff are not obliged to report irregular migrants to the police as the law does not say anything about this issue.¹⁶⁵

5. Conclusions and recommendations

5.1 Consequences of the State's laws and policies resulting in destitution

Social assistance

1. For asylum seekers during the recognition procedure, the amount of social assistance is very low and does not cover all needs of daily life.
2. The Direct Provision system results in dependency and, at least in some cases, in "institutionalization" of the persons concerned.
3. Migrants who, in the view of the responsible officers, do not meet the Habitually Residence Condition (HRC), do not receive any social assistance at all.

Housing / shelter

4. The implementation of the HRC can block access to shelters even for asylum seekers who are forced to leave the Direct Provision System, as well as undocumented migrants.

Work

5. Because of the restrictive legal provisions, asylum seekers and undocumented migrants often cannot obtain work permits and therefore rely on irregular jobs that in the majority are underpaid and unstable.

Education

6. There are no possibilities for asylum seekers to obtain higher education, vocational training, etc.

No ways out of destitution

7. Even if the law provides for some ways of regularization, it does not offer entitlements but rather a wide area of discretion for the Minister of Justice.

For the Irish society

8. The complete exclusion of some migrant groups from enjoying basic human rights shows the negative side of a welfare state. It creates new invisible borders within the Irish society. The welfare system is in danger of being eroded from the bottom.
9. Ireland does not fulfil completely its international obligations to respect human rights of all persons being subjected to their jurisdiction.

5.2 Recommendations

1. Ireland should adopt and implement the relevant European law, including the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.
2. All procedures and decision-making processes should be transparent, based on a clear set of criteria, and fair.
3. The wide range of discretion given to the Minister of Justice in migration matters should be reduced to a clearer set of rights and entitlements. This includes granting citizenship or long-term residence status.
4. Decisions should be subjected to review on demand, as well as on a case's merits, by an independent, judicial body.
5. Access to basic social assistance including housing should be provided for everybody who cannot afford the costs of living on his or her own. Insofar, the HRC should not apply.
6. Access to all necessary (social) assistance should also be possible while a complaint against an employer is pending at the Labour courts.
7. Law should provide for possibilities to change jobs while staying in Ireland, including the issue of (temporary) residence permits for a reasonable period of time used for job-searching.

¹⁶³ Information from Anucuta interview.

¹⁶⁴ Information from Ms Anucuta in an email message to the author, dated 5 January 2010.

¹⁶⁵ Anucuta interview.

8. The Direct Provision System should be replaced by a scheme offering more autonomy to asylum seekers, e.g. self-catering.
9. After at least a six months stay in Ireland, asylum seekers should be given the right to work.
10. Asylum seekers should be enabled to access language, vocational and FAS training as well as FETAC courses. NGOs providing education to asylum seekers should be eligible to receive adequate State funding.
11. Capacities and training of staff dealing with migrant cases should be improved.
12. Legal representatives, social workers, and interpreters need to be available, especially to all persons seeking protection.

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Case Studies in Italy

1. Case Study

1.1. A Typical Case

Waris¹⁶⁶ is a 39 years old female asylum seeker from Ethiopia, awaiting the outcome of appeal, with an 'illegal stay' on the territory. She arrived in Italy in February 2000 and has been living here since. Waris had to leave her husband and two of her children behind in Ethiopia. Just before she left Ethiopia she witnessed her father's death in an accident. Waris used to work in her parents' shop, of which nothing is left any more.

Waris did not choose to come to Italy; she wanted to come to Europe, regardless of which country. Waris was pregnant when she arrived in Italy, and, for this reason, she was granted a temporary residence permit. During her pregnancy, she applied for asylum. Her asylum claim was rejected twice in the administrative phase of the asylum procedure, in 2001 and in 2002 respectively. Waris explained that the Italian authorities doubted her Ethiopian nationality, since she spoke a language they did not recognise. Waris could not believe this response, because in Ethiopia more than 40 languages are spoken and the Italian authorities cannot expect to know all of them.

Waris appealed against this decision to the Court in 2002. She has been waiting for a decision on her asylum request in appeal for more than 4 years, and has no idea when she can expect a decision to be taken. She appeared very desperate after such a long period of insecurity and living in such dreadful conditions.

During her first weeks in Italy, Waris was able stay at a religious institute after she gave birth to her baby in hospital. A woman that she met in hospital arranged this accommodation for her. After six months staying in this centre she could move to a reception centre because she filed an asylum claim. At the reception centre Waris received food and a bed. She did not receive any cash support. After her asylum claim was rejected in the administrative phase, her living situation became worse and worse.

Waris explained: "Without a legal status (as an asylum seeker awaiting the outcome of appeal) I lost the right to stay in a reception centre. After I was told to leave, I went to the accommodation centre of an NGO, where only families are housed." At the centre of the NGO Waris could stay for nine months. She received food from NGOs. After this period, Waris again stayed for nine months at a reception

centre. "Moving is like marrying a new man," says Waris, "you always have to adapt to the new situation." At the time of the interview, Waris managed to rent an apartment together with others. "I hope I will be able to stay at that place: for a child, stability is better than moving from one place to another."

Waris does not receive any kind of social support, such as housing or accommodation. Waris also does not have the right to access the formal labour market. Being left without any income, Waris decided to take up a job as a cleaning lady in the informal market. She describes that it was very difficult for her to find work as she had no one who could look after her baby while she was at work. At the time of the interview, Waris worked three times a week while her son was at school. Waris is happy with the little money she receives for cleaning. She expressed feeling upset about the fact that if she cannot work for one day, for example because she is ill, she is not paid.

Apart from working, Waris spends time with her son or doing the housework. Waris has no friends. She explains: "I am very poor. I cannot do anything, because I do not have a good job. Only people who have a good job can have friends." Nonetheless, Waris has some limited social contacts through her work and school activities.

During her stay in Italy, Waris sometimes attended language courses. However, she started to have mental health problems because of the situation she found herself in. She had to stop following these courses because she could not concentrate anymore. As she expresses herself: "My head is not right and I cannot study anymore. All my thoughts are always going to my children in Ethiopia. At night I cannot sleep."

Waris is very upset about her situation. She misses her family and finds it difficult to be separated from them. Waris expressed: "My life is always there and here. Now I am here. Life is never perfect. Maybe my son will have a better life. I am not happy but I have no other place to go to". Waris cannot have a normal life in Italy, because this is not possible without any papers. Waris has lost all hope for herself; she carries on through the hope that her son will have a better life someday. Being left without any legal status, Waris is in despair: "How can you live without documents? There is no real job possible without documents. I cannot apply for family reunification without documents. Sometimes I cry because I don't know what will happen." If Waris could return to Ethiopia, she would do that, "a life without both parents,

¹⁶⁶ Name changed for confidentiality purposes.

what kind of life is that for her children?" she asks.

1.2. Context of the Case

The story told by Waris is illustrative of asylum seekers who appeal against their negative decision at the court and who are illegally staying on the territory.¹⁶⁷ Furthermore, her case is also typical of illegally staying third-country nationals with young children. With the use of Waris's case as an example, the specific destitute situation of asylum seekers awaiting the outcome of appeal and whose stay on the territory is not authorised will be examined in more detail below.¹⁶⁸

The factors which connect Waris' case with those of other third-country nationals interviewed are: having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival,

being socially excluded, the State's awareness of their presence on the territory, and having no way out of destitution. The stories told by the interviewees provide an insight to the lives of third-country nationals living in absolute poverty and left without any form of social support. Supplementary and background information was provided by various NGOs working directly with these destitute groups. On this basis, several common elements can be discerned which are typical for third-country nationals in a similar position.

The following general elements can be distilled from Waris's case that create, shape and sustain destitution:

No or limited legal entitlements leading to the inability to meet basic needs

Although Waris is still within the asylum procedure – as she has appealed against the negative decision reached by the administrative authorities – she is illegally residing on Italian territory while awaiting the outcome of her appeal. Waris had to leave the reception centre after the administrative authorities rejected her asylum claim. Only as an exceptional measure was she allowed to stay for a short period in a reception centre again. Waris has no right to any form of financial support and is prohibited from taking up paid employment in the formal labour market. She did receive health treatment in the hospital during her pregnancy.

Generally, asylum seekers who have appealed in court against their negative asylum decision have no right to remain on Italian territory. The Italian authorities treat them in a similar fashion as illegally staying third-country nationals. In other words, the appeal in court against the negative decision reached in the administrative phase of the asylum procedure does not have suspensive effect. This implies that asylum seekers who have appealed in court can be legally removed from the territory during the appeals phase. However, asylum seekers who have appealed against a negative decision regarding their refugee status can file a request to remain in Italy during the appeals phase of their case.¹⁶⁹ Nevertheless, according to JRS Italy, an authorisation to stay is only granted in cases where it is foreseen that a decision upon appeal can be reached in a very short time. Such an authorisation to stay is issued by the Prefect for a period of two months, which can be renewed.¹⁷⁰ In practice, it is the competent Local Police Headquarters who issue such an authorisation to stay. JRS Italy expressed that the Police in Rome never issue

¹⁶⁷ It needs to be stressed, however, that according to the consolidated Law no. 189/2002 (Bossi-Fini Law) there are currently two different asylum procedures: (1) the old procedure for asylum seekers who lodged an asylum claim before 25 April 2005 and (2) the new procedure for asylum seekers who lodged an asylum claim after 25 April 2005. According to JRS Italy, the administrative phase of the old procedure is a very long: it takes around 3 years, and the appeals phase can last 4 years. The new asylum procedure is faster: the first decision on asylum should be reached after 3 to 4 months. The new law, however, does not shorten the appeals phase at court. JRS Italy foresees that the same period (i.e. 4 years) in which applicants have to await the outcome of appeal will apply to new asylum cases. However, JRS Italy has not yet received feedback from asylum seekers in appeal in this respect. The overall majority of the asylum seekers in appeal that have been interviewed are within the old asylum procedure.

¹⁶⁸ In Italy an interview was also conducted with an illegally staying third-country national who is prevented by law from applying for asylum because of his criminal record, but cannot be returned to his country of origin for human rights considerations. It concerns a third-country national who has been in Italy since 1999. Being a Kurd, his life was not safe in Iraq and he had to flee. He applied for asylum in Italy upon arrival. During his stay in Italy he was arrested and condemned for 5 years imprisonment for participation in a robbery. He always claimed to be innocent. After his release in 2003, he tried again to apply for asylum but his claim was not accepted because of his criminal past. He is not able to return to Iraq, nor is he allowed to request asylum even though in need of protection.

The case of the interviewee illustrates that there are cases of illegally staying third-country nationals who are not allowed to file an asylum claim due to their criminal past, but, on the other hand, are in need of some form of international protection. These illegally staying third-country nationals are not removed because of human rights violations. However, no legal solution is offered within Italy for their situation.

Illegally staying third-country nationals who are prevented from applying for asylum end up in a destitute situation and their case is comparable to that of destitute asylum seekers in appeal without residence rights, being bound by the same common five elements: having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival, being socially excluded, the State's awareness of their presence on the territory, and having no way out of destitution.

¹⁶⁹ Asylum seekers who have filed an asylum claim before 25 April 2005 (i.e. the "old cases") are legally excluded from the possibility of requesting a permission to remain.

¹⁷⁰ Article 17 of Presidential Decree no. 303/2004.

such an authorisation to stay. Another possibility of legalising the stay on the territory during the appeals phase of the asylum procedure is to oppose removal from the territory at the competent court. The court can sojourn or impede the actual removal of the asylum seeker from the territory by granting an authorisation to stay (or remain) on the Italian territory.¹⁷¹ The renewal of such an authorisation to stay is issued by the court is at the discretion of the Local Police Headquarters.

What characterises asylum procedures in Italy is the fragmentation of asylum matters in different laws and the fact that decision-making is carried out at the regional or local level. According to Caritas, Local Police Authorities are not well-informed about the applicable legislation regarding asylum seekers in appeal. As a result, major regional differences exist regarding the issuance of such an authorisation to stay, and the situation gives rise to legal uncertainty. Furthermore, most asylum seekers in the appeals phase are not aware of the possibility of requesting an authorisation to stay, and therefore remain illegally in Italy during the appeals phase.

Asylum seekers in the appeals phase who are staying illegally on the Italian territory have a rather generous access to the public health system in Italy. Apart from this, rights to services under Italian law are lacking. This legal category of asylum seekers has no right to access the formal labour market, financial support or housing. Housing is only provided by the state in exceptional circumstances and is a discretionary power.

Reliance on charity for survival

During her stay in Italy, Waris and her child relied on NGOs, other civil society actors and friends to meet their basic needs necessary for subsistence. For periods of time she stayed in public housing, but this housing could not be secured after her claim was rejected in the administrative phase of the asylum process. In between, she stayed in housing facilities offered by NGOs and religious institutes. Currently, she is able to share private accommodation due to her work in the informal market. Additionally, several NGOs have given her and her baby food.

The story told by Waris is typical of asylum seekers who have appealed at court against the negative decision of their asylum claim. From first being able to stay at a reception centre, or, alternatively receive financial support, all entitlements are lost after a negative administrative decision.

As a consequence, a great number of asylum seekers in appeal turn to NGOs and other civil society actors for their survival. They visit food kitchens and make use of the housing facilities offered by NGOs. In very exceptional situations, some NGOs on a case-by-case basis provide limited financial support to asylum seekers in appeal. Some also receive support, for example the offer of a place to stay, from their friends who are in a better financial position than themselves. Others manage to find work in the informal market which allows them to share private accommodation. The wages earned as a result of irregular employment are far from sufficient. They cannot meet all their basic needs and many still rely on NGOs for food.

Social exclusion

Although Waris has already been in Italy for 7 years, she does not feel part of society. Her lack of papers and access to the formal job market, as well as her poverty, all leave her isolated. Waris expressed that because she is so poor and has no papers she cannot find friends or engage in social activities.

Feelings of loneliness and isolation are typical for asylum seekers in the appeals phase who are illegally staying on the Italian territory. Many feel that they have to hide and stay out of the public eye as much as possible so as not to draw the attention of the State authorities. This is a clear barrier to participating in society. Further, the prohibition to work is also a barrier. Homeless asylum seekers in the appeals phase experience the most extreme cases of isolation.

The State's awareness of their presence on the territory

By lodging an asylum claim and appealing to the court, Waris's presence on the territory is known to the Italian authorities, and they therefore know her identity. Yet, her appeal to the court has no suspensive effect, meaning that her stay on Italian territory is considered illegal. Furthermore, although Waris is still within the asylum procedure no state support is provided to her. Asylum seekers in this situation are still subject to removal. Authorisation to remain on Italian territory may be requested, but only limited use is made of this possibility and no clear rights are attached to such an authorisation.

No way out of destitution

Waris is very desperate about her destitute situation and sees no way out of it. She is waiting for the court to reach a decision regarding her asylum claim. For herself she has no hope of a better life; all hopes for a better future are vested in her son.

¹⁷¹ Article 700 of the Italian Civil Code.

A significant number of asylum seekers in appeal feel forced to continue to live in awful conditions in Italy. Returning to their countries of origin is no option for them. This could either be for practical reasons, such as the lack of identity papers, but also because of a fear of persecution upon return. First and foremost, it should not be forgotten that this group of asylum seekers are still within the asylum procedure and that no final decision has been reached by a court upon their asylum claim as yet. The Italian State has not decided finally whether or not they are in need of international protection. Asylum seekers in appeal have legitimate expectations that they will be granted refugee status on appeal and are awaiting this decision in Italy. Return in such a situation is not a viable option for them. According to JRS Italy, asylum seekers in appeal have to wait 4 years on average for a court decision to be reached.

2. Relevant Status under Asylum and Foreigners law

2.1. Relevant Asylum Laws

In Italy there is no comprehensive law on asylum, but the following laws can be considered relevant to this study and partly regulate the asylum policy in Italy:

- Article 10 of the Italian Constitution¹⁷² - Constitutional Refugee Status
- Law no. 416/1989 converted into Law no. 39/1990 (Martelli Law)¹⁷³ - Urgent regulations on the subject of refugee status, entry, residence and regularisation of non-EU citizens
- Law no. 253/1992 - Implementation of Dublin Convention¹⁷⁴
- Legislative Decree no. 286/1998 - Consolidated Act of the provisions regulating immigration and the norms on the status of foreigners¹⁷⁵ and its implementation rules¹⁷⁶

¹⁷² Original language: La Costituzione della Repubblica Italiana.

¹⁷³ Martelli Law: Decree Law 30 December 1989 n.416 converted in Law 28th February 1990 no. 39 (Original language: Decreto Legge 30 dicembre 1989 n. 416 convertito in Legge 28 febbraio n. 39 cd. Legge Martelli Art. 1).

¹⁷⁴ Original language: L. 253/1992 Ratifica Convenzione di Dublino.

¹⁷⁵ Original language: Decreto Legislativo 25 luglio 1998 n. 286 testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero.

¹⁷⁶ The most relevant implementation rules are:

- Presidential Decree no.394/1999 - Regulation on application of the consolidated act regarding immigration and norms on the condition of foreign

- Law no. 189/2002 (Bossi-Fini Law) – Changes in regulations on the matter of immigration and asylum¹⁷⁷ - and its implementation rules¹⁷⁸
- Legislative Decree no. 85/2003 - Implementing EU Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof¹⁷⁹
- Presidential Decree no. 303/2004 - Regulation on procedures granting or withdrawing refugee status¹⁸⁰
- Legislative Decree no. 140/2005 - Implementing EU Directive 2003/9/EC of January 2003 laying down minimum standards for the reception of asylum seekers¹⁸¹

citizens in line with para. 1, comma 6 of the Legislative Decree no. 286 of 25 July 1998 (Original language: Decreto del Presidente della Repubblica 31 Agosto 1999, n. 394 Regolamento recante norme di attuazione del testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, a norma dell'articolo 1, comma 6, del decreto legislativo 25 luglio 1998, n. 286).

- Presidential Decree no. 334/04 - Amendments to Presidential Decree n.394/1999 (Original language: Decreto del Presidente della Repubblica 18 Ottobre 2004, n. 334, Regolamento recante modifiche ed integrazioni al D.P.R. 31 agosto 1999, n. 394, in materia di immigrazione).

¹⁷⁷ Original Language: Legge 30 luglio 2002, n. 189, Modifica alla normativa in materia di immigrazione e di asilo cd. Legge Bossi – Fini

¹⁷⁸ The most relevant implementation rules are:

- Presidential Decree no. 136/1990 - Regulation for the implementation of Section 1 Decree Law no. 416/1989, regarding recognition of refugee status (Original language: DPR 136/1990 regolamento per l'applicazione dell'art. 1 D.L. 416/1989 sul riconoscimento dello status di rifugiato),
- Decree no. 237/1990 - Initial assistance to asylum seekers and refugees implementing Section 1 Decree Law no. 416/1989, regarding recognition of refugee status (Original language: DM 237/1990 regolamento per l'applicazione dell'art. 1 D.L. 416 in materia di prima assistenza a richiedenti asilo e rifugiati).

¹⁷⁹ Original language: Decreto legislativo 85/2003 Attuazione della direttiva 2001/55/CE relativa alla concessione della protezione temporanea in caso di afflusso massiccio di sfollati ed alla cooperazione in ambito comunitario

¹⁸⁰ Original language: Decreto del Presidente della Repubblica 16 settembre 2004 n. 303 – regolamento relativo alle procedure per il riconoscimento dello status di rifugiato

¹⁸¹ Original language: Decreto Legislativo 140/2005 Attuazione della direttiva 2003/9/CE che stabilisce norme minime relative all'accoglienza dei richiedenti asilo

2.2. Asylum Status

Under its asylum laws, Italy offers protection in the following three situations:

*Convention Refugee*¹⁸²

Asylum seekers can apply for asylum within Italy by submitting an application for the recognition of convention refugee status. Italy has ratified the 1951 Refugee Convention by Law no. 722/54. Pursuant to Law no. 39/1990 and Presidential Decree no. 303/2004, refugee status is granted if the asylum seeker is considered to be a refugee according to the Geneva Convention. Article 1 of the 1951 Geneva Convention provides that the term "refugee" shall apply to any person who, as the result of a well founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership to a particular social group, is outside of the country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, as well as the stateless person who, being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. With the adoption of Law Decree no. 416/1989 (Martelli Law) the Italian government abolished its "declaration on geographical limitation" of the Geneva Convention, which restricted the application of refugee status to citizens from Eastern European countries. At present, convention refugee status can also be granted in Italy to non-Europeans falling within the scope of the 1951 Refugee Convention.

*Refugee status under the Constitution: Political Asylum*¹⁸³

Refugee status other than convention refugee status can be issued pursuant to Article 10 of the Italian Constitution, which is referred to as "Political Asylum."¹⁸⁴ Third-country nationals who are not granted the basic freedoms of the Italian Constitution in their countries of origin have the subjective right to ask for asylum in Italy. Pursuant to Article 10(3) of the Italian Constitution a third-country national "who is denied the effective exercise of the democratic liberties guaranteed by the Italian Constitution in his or her country, has the right of asylum in the territory of the Italian Republic, in accordance with the conditions established by law."¹⁸⁵ The status is different to the Convention refugee's status as it does not require the proof

of individual persecution. No implementing law on constitutional asylum has yet been adopted. Nevertheless, the Supreme Court of Appeal¹⁸⁶, the highest court in civil matters, has declared Article 10 of the Italian Constitution to be directly applicable, and as a result, constitutional asylum can be claimed before a civil court. Recently, the Supreme Court of Appeal ruled that on the basis of Article 10 a third-country national has the right to enter Italy, but s/he must first follow the administrative procedure in order to be recognised as a convention refugee before being able to apply for constitutional asylum before a civil court.¹⁸⁷

*Temporary Protection*¹⁸⁸

Temporary protection may be granted for the purpose of meeting "important humanitarian needs on the occasion of conflicts, natural disasters or other events of particular seriousness in countries not belonging to the European Union."¹⁸⁹

*Humanitarian Protection*¹⁹⁰

Pursuant to Article 5(6) of Legislative Decree no. 286/1998 Humanitarian Protection may be offered on the grounds that return of a third-country national to his country of origin is not possible because of the principle of non-refoulement.¹⁹¹ A residence permit on humanitarian grounds can be issued in cases where a third-country national cannot be qualified as a refugee, but at the same is not able to return to his country of origin for safety reasons. The Local Police Headquarters¹⁹² are granted with the competence to issue such residence permits on humanitarian grounds. The implementation of humanitarian protection varies between the different Local Police Headquarters within the territory.

¹⁸⁶ Original Language: Corte di Cassazione.

¹⁸⁷ Sentence no. 25028/2005 adopted by the Supreme Court of Appeal on 25 November 2005.

¹⁸⁸ Original language: Protezione temporanea.

¹⁸⁹ Article 20 of Legislative Decree 286/1998, as amended by Law no. 189/2002. Original language of quoted text: "le misure di protezione temporanea da adottarsi (...) per rilevanti esigenze umanitarie, in occasione di conflitti, disastri naturali o altri eventi di particolare gravità in Paesi non appartenenti all'Unione Europea."

¹⁹⁰ Original Language: Permesso di soggiorno per motivi umanitari

¹⁹¹ The prohibition of non-refoulement is laid down in Article 19(1) of Legislative Decree no. 286/1998; it prohibits removal to countries in which the third-country national may be subject to persecution on the grounds of his race, sex, language, citizenship religion or political opinion.

¹⁹² Original language: Questura

¹⁸² Original language: Status di rifugiato

¹⁸³ Original language: Asilo Politico.

¹⁸⁴ Original language: Asilo Politico.

¹⁸⁵ Original language: "Lo straniero, al quale sia impedito nel suo paese l'effettivo esercizio delle libertà democratiche garantite dalla Costituzione italiana, ha diritto di asilo nel territorio della Repubblica, secondo le condizioni stabilite dalla legge".

3. Removal of Illegally Staying Third-Country Nationals: Obstacles, Practice and Solutions

This section briefly discusses the recognised obstacles to removal in Italian law, the possible legal solutions in such cases and the implementation of the laws on return in practice.

3.1. Grounds for Non-Removal

In light of this report, the most relevant laws which regulate the return of third-country nationals in Italy are:

- Legislative Decree no. 286/1998 - Consolidated Act of the provisions regulating immigration and the norms on the status of foreigners¹⁹³ and its implementation rules
- Law no. 189/2002 (Bossi-Fini Law) – Changes in regulations on the matter of immigration and asylum¹⁹⁴
- Legislative Decree no. 140/2005 - Implementing EU Directive 2003/9/EC of January 2003 laying down minimum standards for the reception of asylum seekers¹⁹⁵
- Law of 2 July 2009 (Security law).

Pursuant to Article 19(1) of Legislative Decree no. 286/1998, the removal of third-country nationals is prohibited to countries in which the third-country national may be subject to persecution on the grounds of his race, sex, language, citizenship religion or political opinion.¹⁹⁶ Paragraph 2 of the same Article lists several other situations that provide obstacles to the removal of third-country nationals, of which the most important are:

- Minors below the age of 18¹⁹⁷ and
- Pregnancy; pregnant women in their last stage of pregnancy and 6 months after delivery.

Medical needs can form another reason why third-country nationals are not removed to their

¹⁹³ Original language: Decreto Legislativo 25 luglio 1998 n. 286 testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero

¹⁹⁴ Original Language: Legge 30 luglio 2002, n. 189, Modifica alla normativa in materia di immigrazione e di asilo cd. Legge Bossi – Fini

¹⁹⁵ Original language: Decreto Legislativo 140/2005 Attuazione della direttiva 2003/9/CE che stabilisce norme minime relative all'accoglienza dei richiedenti asilo

¹⁹⁶ In such a situation, a third-country national may start a procedure for recognition of refugee status or the procedure for humanitarian protection.

¹⁹⁷ Minors still maintain the right, however, to follow a parent or guardian who is being removed from Italian territory.

countries of origin. This follows from the fact that a third-country national who is illegally residing on Italian territory can, exceptionally, request a special stay permit for health reasons if their medical condition does not allow removal or if no adequate medical care can be provided upon return.¹⁹⁸ Further practical reasons, such as the lack of the necessary travel documents, can also be obstacles to return. These reasons are considered to be of a temporary nature and consequently only temporarily justify an abstention from removal. There is no clear regulation implementing a legal solution for these cases.

The Security law of 2 July 2009 makes entry and stay in the Italian Republic without the necessary permission a criminal offence punishable by a fine of 5,000 to 10,000 Euros and immediate expulsion. In order to execute the expulsion, the migrant can be held in a detention centre (CIE) for a maximum period of 6 months. If the expulsion is not executed in this period of time the migrant is released with the order to leave Italy within 5 days. If later he is caught again he can be imprisoned for 1-5 years.

3.2. Legal Solutions in case of Obstacles to Removal

Short and medium term legal solutions

The Italian asylum and foreigners law offers some possibilities for illegally staying third-country nationals who cannot be removed and want to regularise their stay. Generally, (temporary) residence permits can be issued for the reasons of minor age, family ties, pregnancy and health.

Long-term legal solutions

No long term legal solutions are provided by law for third-country nationals who cannot be removed, such as the instrument of regularisation after a prolonged stay on Italian territory. However, arbitrary regularisations of certain groups of illegally staying third-country nationals have taken place in the past (the most recent in September 2009) that were ordered by the Italian government. Also a “hidden regularisation” can take place in individual cases through the implementation of annual quotas for legal admission.

4. Dimensions of destitution

This part will give a detailed overview of what it means to be destitute for asylum seekers awaiting the outcome of their appeal and illegally staying third-country nationals prevented from applying for asylum. This is based upon information provided by the

¹⁹⁸ See in this respect Circular 5/2000, issued by the Ministry of Health.

interviewed persons from the focus group, as well as additional information provided by JRS Italy and other NGOs.

4.1 Health

“If I have health problems I go to the local hospital. Until now I have received the treatment I needed.”

– Male asylum seeker awaiting the outcome of his appeal from Nigeria, 31 years old –

Access to Health Care

Italy follows an inclusive health policy for third-country nationals. The right to health care for third-country nationals is regulated in Legislative Decree no. 286/1998. Third-country nationals who are legally residing in the country have the same rights to access health care as Italian citizens. This equality of treatment is recognised in Articles 34 and 35 of Legislative Decree no. 286/1998. Article 34 stipulates that lawfully residing third-country nationals “are entitled to equal treatment and full equality of rights and duties” as Italian citizens. Asylum seekers with a permit of stay also fall within this category. The law on access to health care for asylum seekers in appeal is very unclear. According to JRS Italy, however, in practice they are treated as illegally staying third-country nationals and receive no special entitlement to health because they are still within the asylum procedure.

Illegally staying third-country nationals have a more limited right to access health care. Pursuant to Article 35(4) of Legislative Decree no. 286/1998 health care is guaranteed for illegally staying third-country nationals if they require urgent or in any case essential, even if continuous, out-patient or hospital treatment in the case of sickness or accident. Further, they are entitled to follow preventive medicine programmes and receive medical care for the protection of individual and collective health. In particular, Article 35(4) mentions explicitly that health care is guaranteed, regardless of legal status, for pregnant women on an equal basis with Italian citizens, for minors, for vaccinations and the prevention, diagnosis and treatment of infectious diseases. Generally, the fact that an illegally staying-third-country national can access health facilities does not give rise to any form of reporting by the medical staff to the relevant authorities.¹⁹⁹

The actual access to health care is organised differently for third-country nationals depending on their residence status. Third-country nationals who are in the possession of a residence permit, including asylum seekers,

¹⁹⁹ Article 35(5) of Legislative Decree no. 286/1998. Reporting only takes place when it is compulsory (i.e. for public security reasons) on an equal footing with Italian citizens.

have to enrol at the National Health Service²⁰⁰ and receive a Medical Card as evidence of enrolment. This Medical Card should be shown in order to have access to the public health care system under the same conditions as Italian citizens.

Illegally staying third-country nationals can seek medical assistance in public and accredited health facilities. In order to receive medical treatment to which they are entitled under Italian law, they first have to obtain a “STP”-code²⁰¹ (Temporarily Present Foreigners), which can be obtained at the Local Health Service.²⁰² Where access to health care is guaranteed, the costs for the medical treatment are not charged in cases of a lack of financial resources. However, a financial contribution to the costs of the medical treatment may be requested on an equal footing with Italian citizens. According to Medici Senza Frontiere (hereinafter referred to as “MSF”),²⁰³ the legal provisions for health care in Legislative Decree no. 286/1998 are poorly implemented, with a result that asylum seekers in the appeals phase and illegally staying third-country nationals face some practical barriers. In view of MSF, some Local Health Services do not issue STP-codes with the consequence that illegally staying third-country nationals are unable to receive medical treatment, even if they are entitled to do so under Italian law. MSF explained that withholding a STP can be attributed to a lack of knowledge among administrative officers at the Local Health Services in respect to the existing laws and implementation rules. In addition, MSF mentioned that many asylum seekers in the appeals phase and irregular migrants do not know about their rights regarding access to health care, which might be a reason why they do not visit a hospital when in medical need. Because of the generous health care laws in Italy with respect to third-country nationals, MSF explained that they concentrate on providing information to different social actors and to third-country nationals on their rights to access health care instead of providing medical care themselves.

Those interviewees with medical needs all reported making use of the health care system in cases of accident, emergency or pregnancy.

²⁰⁰ Original language: Servizio Sanitario Nazionale

²⁰¹ Original language: Stranieri Temporaneamente Presenti

²⁰² Original language: Azienda Sanitaria Locale

²⁰³ Medici Senza Frontiere (Doctors Without Borders) is an independent international medical humanitarian organisation that delivers emergency aid to people affected by armed conflict, epidemics, natural or man-made disasters, or exclusion from health care in more than 70 countries. MSF started its activities in Italy in 1999 and has as its focus point the provision of information on the right of access to health care to different social actors and to asylum seekers, refugees and illegally staying third-country nationals.

The interviewees were generally satisfied with the medical treatment they received, except with respect to dental care. One interviewee, who had lost all his front teeth after an accident, said he did not receive the necessary dental care because he was unable to pay. His story has to be valued against the general dental care system in Italy, as the cost of dental care in Italy is also not refunded by the Italian state.

It should be noted, however, that on 2 July 2009, the Italian Senate passed into law a Security Bill making entry and stay in Italy without the necessary permission a criminal offence (and no longer a misdemeanour) punishable by a fine of 5,000 to 10,000 Euros.²⁰⁴ Public officials must report the stay of irregular migrants. Even if the duty to denounce is not directly imposed upon medical doctors, some voices interpret the new law as saying that everybody has to denounce a criminal offence and therefore medical doctors and health service officials do have the duty to report irregular migrants as criminal offenders to the responsible authorities. Hence irregularly staying third-country nationals who go to the doctor must fear being reported to the immigration authorities and removed from the Italian territory.

Health Condition

Asylum seekers awaiting the outcome of their appeal and irregular migrants generally have access to health care in cases of medical need. The result of this public health system is that treatment is received and illnesses are, in most cases, halted at the first stage. Furthermore, due to a general inclusive prevention strategy, there is less danger to the general public health. Notwithstanding this, special attention should be given to the health condition of asylum seekers awaiting the outcome of their appeal and irregular migrants for three reasons. Firstly, the insecurity of their stay and the fact that they have difficulties meeting their basic needs negatively affects their mental health. Some of the interviewees reported suffering from problems such as insomnia, stress and lack of concentration as a result of their insecure and destitute situation. They started to have these problems during their stay in Italy. Secondly, the fact that generally these groups find themselves in a destitute situation implies among other things poor housing conditions and insufficient food. Their poor living conditions weaken their general health condition. Some of the interviewees expressed feeling generally weak; for example, they had to cough a lot or suffered from malnutrition. Thirdly, many asylum seekers in appeal and irregular

migrants work in the informal market, and are most likely to work in unsafe and unhealthy working conditions. They run a high risk of becoming involved in accidents or experience long-term consequences of unhealthy working conditions. One interviewee showed his hands during the interview that were full of spots created by the toxic fluids with which he is working. Also several other interviewees reported having medical problems related to accidents at work.

4.2 Housing/Shelter

"I am living together with other people of whom one is the official tenant and is in the possession of a legal status. I am sleeping with 3-4 people in one room. We do not use heating. This would be too expensive. We keep ourselves warm with thick blankets. The shower only works with cold water and we have to warm up the water first in the kitchen".

– Male asylum seeker awaiting the outcome of appeal from Guinea, 32 years old –

Right to Housing

Illegally staying third-country nationals do not have a general right to public housing. This applies to asylum seekers in the appeals phase who have not been granted an authorisation to stay. Nevertheless, Article 40(1) of Legislative Decree no. 286/1998 stipulates that the mayor, when emergency situations are found to exist, may arrange for accommodation to be provided in the reception centres for third-country nationals not in compliance with the regulations on entry and residence in Italy. This does not prejudice the provisions regarding the removal of third-country nationals in such situations. General provision in Legislative Decree no. 286/1998 is made regarding housing for legally residing third-country nationals, without specific reference to asylum seekers. Pursuant to Article 40(1) of Legislative Decree no. 286/1998, reception centres are set up to provide accommodation for third-country nationals legally residing for reasons other than tourism, who are unable to provide for their own accommodation and subsistence needs.²⁰⁵ Legislative Decree no. 140/2005 has been introduced which provides that the right to housing (or alternative economic support) is granted to each asylum seeker during the administrative process of the asylum claim. Asylum seekers, who are not detained when applying for asylum, can be housed in different locations dependent on availability: first at the Accommodation Centres of the "Protection System for Asylum Seekers and Refugees", or else in First Accommodation Centres. When a

²⁰⁴ In original language: legge n. 94 del 15 luglio 2009; Gazzetta Ufficiale n. 170, 24-7-2009. The law came into effect as of 8 August 2009.

²⁰⁵ The reception centres are set up by the Prefectures, in collaboration with the Provinces, Municipalities and volunteer associations and organisations. See Article 40(1) of Legislative Decree 286/1998.

decision upon asylum status has been reached by the administrative authorities, the right to housing ceases to exist. No further support in terms of housing is provided by the municipality. In exceptional cases, asylum seekers in appeal are allowed to reside in public housing on humanitarian grounds.

Again, the Security Law of 2 July 2009 should be taken into consideration because if strictly applied it makes renting a house or rooms impossible for irregular staying migrants: those who rent a house or rooms to foreigners who, at the date of conclusion or renewal of the contract, do not regularly stay in the Italian Republic risk 6 months to 3 years imprisonment.

Sleeping arrangements

Housing is one of the most pressing needs of asylum seekers in appeal with no authorisation to stay and irregular migrants. Many live on the streets of Rome. Others manage to stay at a friend's house, rent private accommodation with others or are able temporarily to stay at housing facilities offered by NGOs or other civil society actors.

Among the beneficiaries of the Help Desk run by Federazione delle Chiese Evangeliche In Italia (hereinafter referred to as "FCEI")²⁰⁶, two thirds are irregular migrants, including asylum seekers awaiting the outcome of their appeal. This number shows that even asylum seekers in the asylum procedure (in appeal) are vulnerable to becoming destitute and homeless. Many find it hard to cope in a different cultural environment and some are faced with language barriers, which increase the risk of ending up on the streets. No public housing is provided for those asylum seekers in appeal not authorised to stay and, further, no financial support is provided to enable them to arrange their own accommodation.

One interviewee describes his homeless situation as follows: "After 11 days I had to leave the reception centre, where they placed me after I lodged my asylum claim. I slept for two weeks on the street and in the train station. I had huge problems at that time: I was attacked and people tried to steal my remaining money. My family sent me more money to survive. I did not know anything about the Italian procedures. I did not expect this situation. I didn't know where to ask for help." Asylum seekers in appeal and others with an irregular stay run a high risk of ending up on the streets, given the lack of a right to housing. Being homeless in Rome exposes them

to violence, weakens their health and lowers their chances of finding work in the informal market. When living on the streets, it is even more difficult to leave the destitute situation behind since more and more choices and chances are taken away.

In general, as the FCEI states: "The most pressing need of our clients is shelter, especially when it becomes winter and sleeping in the streets is a problem for the overall health condition. Two third of our clients are homeless. Persons who sleep in temporary and precarious accommodation, such as at a friend's house, have to be considered as particularly vulnerable. We experience an increase of 10% of the clients in November, who indicate that they are normally sleeping at friend's places. Their accommodation conditions are characterised by overcrowding". One interviewee who stays at a friend's house says: "After my rejection of my asylum application, I managed to sleep at the place of friends who have a humanitarian status or a work permit. But it is problematic to do that as they are married and have children. I don't want to disturb them all the time". Another interviewee says: "I am normally sleeping at friends' places and pay them whenever I have money. It is all very uncertain for me as the friend at which I am staying now also doesn't have a fixed job and therefore the payment of the rent is a day to day struggle." Some asylum seekers in appeal or irregular migrants manage to sleep in abandoned residences. Different ethnic communities occupy these abandoned places, in particular from Somalia, Ethiopia, Eritrea or Romania. These abandoned places are far below the minimum standards of housing; for example, there are broken windows, overcrowded rooms and no warm water.

Only a limited number of asylum seekers in appeal and irregular migrants are in a position to rent private accommodation. FCEI describes the private housing market in Rome as the following: "The rent in Rome is too high. Fewer and fewer people are able to rent a house. For third-country nationals who are not eligible for housing programmes provided by the state, the only solution is to take up employment in the informal labour market to finance their housing privately."

Lastly, asylum seekers awaiting the outcome of appeal and irregular migrants who do not find private accommodation try to find a place in a shelter managed by a NGO or a charity organisation. However, according to FCEI, resources and places at NGOs are limited. As a general rule, accommodation offered by NGOs is only temporary with a maximum one-year period of stay. Due to the limited resources of the NGOs, the housing facilities can neither take cultural differences into

²⁰⁶ Federazione delle Chiese Evangeliche In Italia (FCEI) has been running a Refugee/Migrant Service for 20 years. Their work is divided into three areas: providing information, running a helpdesk and political work. Among these services they have a helpdesk for housing, work and language issues.

account, nor can they respond to the specific needs of their clients. The most vulnerable groups are the elderly and those with medical problems. One former resident of a housing facility described the situation as follows: "I am living in the streets. I left the shelter I was staying at because I didn't think it appropriate for me. The presence of all the younger people with no discipline is nothing for me. They have stolen my clothes and bag, hoping to find money."

The fact that many asylum seekers in appeal and irregular migrants leave the housing facilities of NGOs after the maximum period has been reached makes it difficult for them to maintain their contact with the relevant State authorities. In this respect, JRS Italy conveyed: "Like this the state is losing control over the actual residence of asylum seekers in appeal and irregular migrants, and the communication between State and them becomes more and more difficult." For the purposes of maintaining state contacts, JRS Italy established a mail service that allows their beneficiaries to use the address as their official address.

4.3 Food/Clothing

"I do not have my own food. I managed to get a meal from JRS through a coupon."

– Male rejected asylum seeker in appeal from Sierra Leone, 33 years old –

Third-country nationals staying in reception centres set up by the Prefecture also receive food at these centres.²⁰⁷ As an alternative to housing, they can receive economic support, which is supposed to cover the costs of food and other essentials.²⁰⁸ However, many asylum seekers in appeal and irregular migrants are not placed in reception centres. It is apparent that a significant number of asylum seekers awaiting the outcome of their appeal and irregular migrants do not have control over their own supply of food. A lot of them rely on the food provided by NGOs and other civil society actors. For those who benefit from the housing facilities provided by NGOs and other civil society actors, most have easy access to soup kitchens or second hand clothes, as the housing facilities give information regarding the organisations and locations where these types of services can be found. Some of these soup kitchens receive funding from the municipality: the funding is part of the Municipality's general programme for homeless people. One interviewee stated: "Well, mostly I got food in a shelter where I was staying. When I stayed at friends places I went to the soup kitchen. My clothes I financed from the wages of my irregular jobs."

²⁰⁷ See Article 40(3) of Legislative Decree no. 286/1998.

²⁰⁸ See Legislative Decree no. 140/2005.

If asylum seekers awaiting the outcome of their appeal and irregular migrants do manage to find work in the informal market, their income is used to meet their basic needs. However, their wages for the main part are spent on monthly rent and little is left to buy food. The result is that many of them, as a supplementary means, visit NGOs or other civil society actors to arrange their food and clothing.

4.4 Statutory Support

"I was released from the detention centre Crotone and I received nothing more than money for my train ticket to Rome."

– rejected asylum seeker awaiting the outcome of appeal from Liberia, 29 years old –

Right to statutory support

Pursuant to Decree no. 237/1990, asylum seekers who are in possession of a residence permit²⁰⁹ may apply for financial support to the Local Police Headquarters if they do not benefit from accommodation at the reception centres and are unable to meet their basic needs themselves. However, the daily amount granted is only paid for 45 days. With respect to this financial support, MSF remarks: "Only in the case there is no accommodation available in a reception centre, the asylum seeker can receive monetary assistance of in total 790 Euro, which means 17,50 Euro per day for only 45 days".

Illegally staying third-country nationals are not entitled to receive statutory support. Asylum seekers in the appeals phase who have not received an authorisation to remain on the Italian territory are treated like any other illegally staying third-country national and are not entitled to receive statutory support. Due to an incoherent practice, it is not clear whether asylum seekers in the appeals phase who did obtain an authorisation to remain on the Italian territory are excluded from applying for financial support at the Local Police Headquarters.

Receiving statutory support

Not only is the amount of financial support received by asylum seekers with a residence permit very low, the financial support is also only provided for a limited period of time. Furthermore, much confusion existed among the interviewees as to whether they were entitled to receive financial support or to stay in a reception centre.

In particular, asylum seekers whose appeal against a negative decision is still pending find themselves in an unclear legal situation. The

²⁰⁹ Temporary residence permit in accordance with the Dublin II Regulation or a provisional residence permit for the asylum request.

decision to grant an authorisation to stay is in most cases left to the Local Police Headquarters, leading to legal uncertainty. Furthermore, it remains unclear whether they are entitled to be placed in a reception centre or are eligible to receive financial support if they do not remain at a reception centre. In this respect, Caritas Roma²¹⁰ (hereinafter referred to as Caritas) notes: "The state acts like asylum seekers in the appeals phase don't or shouldn't exist on the national territory." Due to this unclear situation in law and practice, several NGOs provide, in exceptional cases, financial assistance to asylum seekers in their appeals phase.

4.5 Work

"I work three times a week as a cleaning lady. It was hard for me to find this job, but it is very uncertain if I can keep working there."

– Female asylum seeker awaiting the outcome of appeal, with illegal stay on the territory, from Ethiopia, 39 years old –

Right to access the formal labour market

Illegally staying third-country nationals are prevented from gaining legal access to the labour market. Asylum seekers have the right to access the formal labour market 6 months after they filed an asylum claim. In such a situation, a work permit is issued at the discretion of the Local Police Headquarters.²¹¹ Given the fact that asylum seekers in appeal have an illegal stay on the territory, they do not have access to the formal labour market. Among several of the interviewees confusion existed as to whether they were allowed legally to engage in working activities. One interviewee said: "The police issued me a work permit, but this was withdrawn again. I don't know whether I have the right to work or not."

Motives to find work

The chief motive of the interviewees to take up (irregular) employment is to generate income to be able to meet basic needs such as housing, food and clothing. Many interviewees reported finding it extremely difficult to accept having to rely on others for everything, and for this reason hope to achieve a level of independency by finding work. Furthermore, the interviewees also described an emotional need for an activity that structures their daily life and brings them into contact with other people. Having work means being able to be an active participant in society. As one

interviewee puts it: "If I have money, I have friends. If not, then I have nobody." In order to create structure during the day and create a sense of self-worth, some asylum seekers in the appeals phase or irregular migrants take up voluntary work with NGOs. FCEI points out that 3% of their clients actually have a work permit, while 93% express the willingness and motivation to work. JRS Italy reported that third-country nationals without residence rights, including asylum seekers in appeal, run a serious risk of being arrested while working irregularly and being removed.

Success in finding work

The Italian economy is partly based on an informal labour market. Although the extent can only be estimated, the informal labour market is part of the Italian society. Most of the interviewees, who were prevented from accessing the formal labour market, did have success in finding employment in the informal labour market. However, some were not able to work because they suffered from too many mental health problems, were physically incapable or had a child to take care of. Particularly vulnerable individuals are asylum seekers in appeal and irregular migrants with serious psychological problems due to the traumatic experiences in their countries of origin. They have difficulties looking after themselves and are not in a position to work.

Type of work and salary

Most of the male interviewees try to survive with short-term jobs or by selling small products on the streets. In fact, they are looking every day for a new job opportunity. One interviewee explained that selling on the street is rather organised and a "boss" runs each sector of products. Female asylum seekers in appeal and irregular migrants are mostly engaged in caring, cleaning and catering activities, which more likely involves long-term employment. In general, asylum seekers in the appeals phase and irregular migrants who are highly skilled have more chance of finding a long-term job with the same employer. One interviewee stated: "I have a small technician job. I am very keen to learn something from the job I am doing, something I could use later. In my home country I studied communications at university. Now, I am maintaining coffee machines."

Exploitation

Third-country nationals engaged in the informal labour market face the serious risks of poor working conditions, being greatly underpaid, and are vulnerable in cases of accidents and periods of unemployment. The interviewees are well aware that they have no income security. "I have many friends and money through my

²¹⁰ Caritas Rome was the first office in Rome working with immigrants. Caritas Rome provides social assistance, and its services include: an accommodation service, child care, social assistance centre, a help centre to assist immigrants with starting their own business, a soup kitchen and assistance with referrals to medical services.

²¹¹ In accordance with Legislative Decree 140/2005.

irregular work. But I will never have security.” One of the interviewees mentioned receiving 400 Euro per month as wages as a technician, which is half the minimum wage in Italy at around 800 Euro. The interviewees believe they do not have any other choice than to accept the poor working conditions.

4.6 Life Planning

“I feel tied up. I normally live in an area about 500 or 600m around my house. I am afraid to be interrogated by the police. I feel insecure without papers. In the beginning that was even worse, I did not know anyone and I had no friends. Now I am struggling for my life. My situation is getting worse. I am so frustrated. I have no possibility to better myself. I wish I had the opportunity to learn something.”

– rejected asylum seeker in appeal from Sierra Leone, 33 years old –

Prisoners of destitution

The lack of an organic law on return and the fact that most decisions on return are taken by the Local Police Headquarters results in legal uncertainty for third-country nationals and also major regional differences regarding the application of the relevant laws. According to Caritas, local authorities are not always well informed about the applicable legislation. Based on the stories of the interviewees as well as the information provided by the NGOs, cases exist of illegally staying third-country nationals who have been released from detention because the Italian authorities were unable to remove them, who did not receive a (temporary) residence permit in such a situation and were thus left without any rights, such as the right to social support or the right to access the formal labour market.

Asylum seekers in appeal are left in a limbo situation for long periods of time. According to JRS Italy, asylum seekers in appeal can be left in uncertainty for several years: 7 years of uncertainty for “old” asylum cases is not uncommon. Most of the interviewees do not see an alternative to remaining in their destitute situation. One of the interviewees explained: “I have no possibility to leave Italy and apply for asylum elsewhere because I am registered, you know. Because of Dublin II. But I cannot return to Iraq either. In fact, I feel like a fish in a bowl: I feel I cannot leave the situation and as if there is no country for me. Getting papers would be for me like winning the lottery.” Practical reasons do provide an obstacle to removal, such as missing travel documents or the lack of a safe travel route. However, these circumstances do not lead to the issuance of any form of residence permit. Therefore, asylum seekers without any further perspective of regularisation or other legal remedies have

to live in limbo, not being able to leave the country but also not being recognised in Italy. Besides practical reasons, several interviewees expressed fear of persecution upon return to their countries of origin, based on the traumatic experiences that made them flee in the first place. It should be again noted that asylum seekers in the appeals phase are still within the asylum procedure. The Italian State has not yet reached a final decision as to whether they are in need of international protection and have the duty to care for them. Asylum seekers in appeal have legitimate expectations that their claims of asylum will be accepted. For them, returning to their countries of origin in such a phase of the asylum process is not a viable option and they are waiting until the Italian authorities reach a decision.

Another factor of influence upon return, mentioned by JRS Italy, is the special situation of parents. They tend to project their own expectations concerning the migration journey onto their children and hope they will encounter what they themselves were looking for. One of the interviewees expressed that she hoped her son would have a better life in Italy than she had.

Living a life in destitution

Being destitute means, for most of the interviewees, being isolated from normal society. The NGOs confirmed that asylum seekers in the appeals phase and irregular migrants live on the margins of society. The most extreme cases of isolation concern homeless persons: being on the streets every day, in a poor condition and tired, neglected and unemployed. The interviewees were not entitled to access the formal labour market and are prevented from participating and contributing to society by taking up paid formal employment.

Another element of being destitute with a lack of a clear residence status is the fact that the interviewees feel they constantly have to hide. For asylum seekers in the appeals phase without an authorisation to stay and irregular migrants, simply walking along the street can be seen as a serious risk. They are exposing themselves to the authorities and could get checked by the police. Many live in constant fear of detention. One interviewee reported: “I don’t know what I am actually doing. I am afraid of being too visible: I was caught once and I got one day in detention.” Another interviewee explained that as he is always dressed elegantly and properly, he never gets stopped by the police.

The main daily activities are focused on meeting the most pressing needs: finding a way of earning money, including begging and work in the informal market. If these strategies are

not successful, days are filled with finding a way of accessing services provided by NGOs or other civil society actors (soup kitchen, shower and accommodation facilities). Some asylum seekers awaiting the outcome of appeal or irregular migrants do take up some social activities, if they find themselves in a more stable living situation. However, a significant number of the interviewees reported feeling lonely from time to time.

The inability to take part in the most normal social activities influences the whole emotional well-being of the person. One migrant interviewee expressed his feelings: "Time is passing by and people can only live once. I feel like I am wasting my time and time is passing by faster and faster. Four years of life without any future or perspective. I am not afraid of hell anymore; I am already in it."

When asked about their future, many interviewees reported having lost their purpose in life during their stay in Italy and are unable to develop any future goals. These feelings can be attributed to their destitute situation and their insecurity of stay, without any prospect of a change for the better. In general, the interviewees refer to their past to explain their views on the future: "I feel trapped in this situation. I am staying in this irregular situation for three years. I feel well but I don't see any future. I feel strange not having identification papers. I don't see a way for the future: I am getting older, without paper and perspective. I feel like being in the mist. No matter in which direction I look I don't see the way". The main focus for the future is receiving a residence status. Particularly for asylum seekers in the appeals phase, all hopes for the future are attached to the decision on their asylum claim. Future plans are rarely made and if so they are very vague and abstract. The only solution to find a way out of the precarious situation seems to be to obtain a legal status and, if possible, a work permit. These two conditions are crucial for people to build a normal life.

One interviewee said: "You know, I want to stay here. I left a part of myself here. It is important to know where you can stay to build up something."

5 Conclusions and recommendations

5.1 Inconsistencies and flaws in the State's law, policies and practice resulting in destitution

Access to health care

1. The legislation of health care for third-country nationals is poorly implemented: several local authorities do not issue the documents to illegally staying third-country nationals necessary to access health care.

Asylum and social support

2. The lack of an organic law in Italy on asylum creates legal uncertainty and an incoherent practice.
3. Many decisions relating to asylum are left to the discretion of Local Police Headquarters, leading to an unclear practice and major regional differences in the application of the law. Furthermore, many Local Police Headquarters are not well informed about the laws.
4. Asylum seekers in appeal without residence rights do not have the right to housing or financial support.
5. Regardless of the need for protection, third-country nationals are prevented from applying for asylum if they have a criminal record in Italy.

Return

6. Appeal to a court against a negative decision in the administrative phase does not have suspensive effect, with the result that asylum seekers in appeal are subject to removal. No legal solution is offered when an illegally staying third-country national is prevented from applying for asylum because of his criminal record, while at the same time he is not removed for human rights considerations.

5.2 Consequences of the State's laws, policies and practice

For asylum seekers in appeal without residence rights and illegally staying third-country nationals prevented from applying for asylum:

1. Isolation from society, especially regarding homeless third-country nationals. They do not participate in society, and, because of their illegal stay, feel the need to hide and avoid social contacts.
2. They have legitimate expectations that the court will decide positively upon their asylum claim. Furthermore, some asylum seekers in the appeals phase are not removed for practical reasons or they do not want to return for fear of persecution.
3. The housing situation of asylum seekers in appeal and illegally staying third-country nationals is alarming: there are many cases of homelessness; many stay in housing facilities of NGOs and insecure and substandard housing.
4. They are almost entirely dependent on NGOs and other civil society actors for food and clothing.
5. Living in poor housing and the lack of sufficient food weakens their general

health condition. Health is also negatively affected by unsafe and unhealthy working situations.

6. Being destitute and having an insecure right to stay badly affects their emotional well-being and leads in some cases to a loss of purpose in life.

For society:

7. NGOs fulfil typical State tasks such as the provision of housing and food in order to combat destitution as much as possible. In many cases, the services of the NGOs and other civil society actors are essential for the survival of destitute third-country nationals.
8. The creation of a growing number of "third-class citizens" who are staying in Italy for long periods without being removed.

Return

9. Asylum seekers in the appeals phase have legitimate reasons to believe that the court will decide positively on their asylum claim, and for this reason they do not want to return. Further, practical reasons may be a barrier to return as well as the fear of persecution upon return.
10. The existence of irresolvable cases of third-country nationals residing on Italian territory in need of international protection without having their cases considered and without being removed.

5.3 Recommendations

Asylum

1. Appeals lodged at a court of justice against a negative asylum decision should have a suspensive effect, with the consequence that the stay of the asylum seeker in the appeals

phase is treated as legal and the person continues to receive social assistance.

2. Introduction of one single, coherent asylum law.
3. Legal training of officers who are responsible for making decisions regarding asylum.
4. If a third-country national has a criminal record they should be excluded from refugee protection only in cases enumerated in Article 1 F of the 1951 Refugee Convention.

Residence rights

5. For those third-country nationals who are unable to be removed, a legal solution in terms of residence rights should be sought.

Medical care

6. Better implementation of the laws on health care concerning third-country nationals. In particular, medical staff should receive training.

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Case Studies in Malta

1. Case Studies

1.1 Jean

– Jean, rejected asylum seeker with an irregular stay from the Democratic Republic of Congo, 37 years old –

Jean²¹² left Kinshasa in 2002, leaving his wife and two children of 10 and 12 years old behind. Jean has a degree in Communications and he worked as a journalist in the Democratic Republic of Congo (hereinafter referred to as “DRC”). His reporting activities about the events in the DRC resulted in his life being threatened and eventually he was forced to flee the country. He first stayed in Libya for a period of time, but, as a black Christian, he encountered major difficulties; he was detained and treated with brutality. After his release from detention, he had no other choice than to flee again to another country. Jean described: “I travelled for three days by boat on the Mediterranean Sea to get to Europe, which was one of my worst experiences ever.”

Upon his arrival in Malta in 2004, Jean was served with a removal order and immediately detained. He applied for asylum shortly after arrival and the effects of his removal order were consequently suspended. The authorities twice rejected his asylum claim and he therefore spent a total of 18 months in detention. Jean describes his stay in the closed detention centre as one of the most awful experiences of his life. He did not understand the necessity of him being put in detention. After his release from detention, Jean received a document acknowledging his presence on the Maltese territory for a maximum of three months. He is legally bound to present himself to the authorities at the end of the three months.

Jean first lived for a period of time in an open centre, known as Tent Village, in Hal Far, a remote area in the south of Malta. Jean describes his days living at the Open Centre as very demoralising and distressing. Furthermore, he also complained about the living conditions: he lived in a military tent with 30 other people in a remote area of Malta, an hour away from the centre. According to Jean, the centre where he stayed was overcrowded and his tent was occupied with many people, leaving him no personal space or privacy. Eating and sleeping: everything happens in this single tent. The tent is filled with rows of bunk beds in between which people are cooking their meals. Jean feels that by staying in this centre he is

not seen as a human being. According to Jean: “Being placed in open centres means that other people think that this is good enough for you. That lowers your self-esteem. They are reducing dignity, humanity and your personality. There would not be a place like that in Malta for Maltese people. In fact, the open centre is the last place you want to live in.”

Jean looked for employment in the informal labour market in order to have sufficient wages to live a life outside the open centre. At the time of the interview, Jean was renting a flat on his own. He thinks that the Maltese people are going to respect him more if he is not living in the open centre and is taking care of himself. Jean occasionally works for building contractors carrying stones, and is forced to work under rough conditions while being paid low wages. He is not able to find a fixed term job, which results in an insecure income: his jobs do not normally last more than one week. Jean says: “I cannot stand up for my rights. So I accept any money they gave to me without complaining.” Because he never knows when he will have another job, he tries to spend as little money as possible.

Jean is thinking a lot about the things he could do if he could obtain a legal status. He could try to work in a position relevant to his studies in Communications. He feels isolated from the Maltese society and has no real social contacts. Sadly, Jean feels that he has no future prospects. As he says, “I have no future. I try to live in peace, try to forget that I don’t have papers. I try to be happy. My biggest problem is that I am not any more what I have been. I cannot do what I planned to do. It is not easy to find your way when all the options are closed.” Jean is unable to return to the DRC as he is still afraid of what he may face if he returns, yet he is not offered the possibility of starting a new life in Malta. Furthermore, his immigration certificate has always been renewed and the Maltese government has never started procedures for his repatriation.

1.2 Ahmed

– Ahmed²¹³, a beneficiary of subsidiary protection from Somalia, 28 years old –

Ahmed left Mogadishu in June 2006. He left his four children and wife behind in order to find peace and protection, in the hope that his family might be able to join him wherever he was. He did not feel that his life and that of his family were safe in Somalia due to all the civil conflict there. He travelled for a month until he

²¹² Name changed for confidentiality purposes.

²¹³ Name changed for confidentiality purposes.

arrived in Libya, where he spent 2 months waiting for the opportunity to leave. In September 2006, he caught a boat, together with another 28 persons, that would take him to Europe where he would find peace and human rights.

The Maltese Maritime Squadron of the Armed Forces of Malta rescued Ahmed and the other 28 persons. They were brought ashore and taken to the Police Headquarters. There they were interviewed and fingerprinted. Ahmed was presented with a removal order and taken to a detention centre in Lyster Barracks. He was given a form to fill in, in order to apply for refugee status. After 3 months in detention, Ahmed was called for an interview with the Office of the Refugee Commissioner. He received a decision about his case after a month, in January 2007. He was granted subsidiary protection and released from detention, where he was placed at the Hal Far Tent Village, an open centre just across the road from Lyster Barracks, where people are housed in military tents. In order to be able to reside in the open centre, he was asked to sign a contract whereby he undertook to obey the rules of the centre and to look for employment within a specified period of time. He was required to register at the centre three times a week in order to be entitled to an allowance, which would provide some support during the period he was unemployed. In February 2007, Ahmed found a job in a hotel working as a dishwasher. He was employed on a full time basis and the salary seemed good enough for him to be able to live in independent accommodation. He found a small apartment not far from the open centre. He paid his rent regularly until March 2008, when he was made redundant because the hotel could no longer afford to employ him. When Ahmed returned to the open centre where he was previously living, he was told that he had lost his bed and there was no place for him. He went to the OIWAS²¹⁴ offices in order to enquire about his situation, since he was a beneficiary of subsidiary protection and therefore entitled to core welfare benefits. The Customer Case department at OIWAS informed him that he did not register at the open centre for over a year and he was struck off the system.

The fact that Ahmed was no longer in the system meant that he could no longer register at the open centre, and consequently he is no longer able to receive his allowance. Since Ahmed has no place to live in he cannot concentrate on finding another job. He is constantly moving from one place to another,

relying on the charity of other Somalis or the goodwill of some organisations that often provide temporary accommodation for a few nights. Ahmed has not yet managed to be reintegrated into the welfare system, even after several months, and he is consequently unable to receive the benefits he is entitled to by law.

2. Legal Background

2.1 Irregular entry

According to the Immigration Act (1970),²¹⁵ any person who is refused entry into Maltese territory or who lands / is in Malta without leave from the Principal Immigration Officer (PIO) is deemed to be a prohibited migrant. The law provides for mandatory temporary detention where a person enters Malta without leave from the PIO, and persons refused admission or issued with a removal order are thus detained. A removal order is issued by the PIO to a person who is refused admission and he or she is detained in custody until he is removed from Malta.

When a prohibited migrant registers his desire to apply for refugee status, the effects of the removal order are suspended and the asylum seeker may not be removed from Malta before the competent authorities have assessed his or her claim. However, if an asylum seeker applies after apprehension he or she remains in custody until his or her application is determined.

The largest number of irregular migrants in Malta are boat arrivals. However, there are also cases where persons enter Malta with a valid visa and overstay their visa, or who enter irregularly by other means and are not apprehended on arrival.

2.2 Detention Policy

National law does not set a time limit on detention. According to government policy "although by landing in Malta without the necessary documentation and authorisation irregular immigrants are not considered to have committed a criminal offence, in the interests of national security and public order they are still kept in detention until their claim to their country of origin and their submissions are examined and verified."²¹⁶

Government policy sets a time limit of 18 months on the detention period. This time limit is reduced to a year in the case of asylum seekers. Therefore, if after one year from arrival in Malta, the asylum seeker's case for asylum is still pending before the authorities, he

²¹⁴ Organization for the Integration and Welfare of Asylum Seekers (OIWAS), a government agency set up to assist vulnerable persons in detention and those living in the community to integrate.

²¹⁵ Chapter 217 of the Laws of Malta.

²¹⁶ *Irregular Immigrants, Refugees and Integration Policy Document*, Ministry of Justice and Home Affairs and Ministry for the Family and Social Solidarity, p. 11.

or she is released from detention. However, if the asylum case were to be closed before the lapse of one year from arrival, then the person would have to remain in detention for 18 months. A prohibited migrant who does not apply for asylum in Malta is released from detention after 18 months if he or she is not returned to their country of origin.

Once a rejected asylum seeker is released from detention, he or she is issued with a document acknowledging his or her presence on Maltese territory. The visa extension is usually valid for 3 months and must be renewed every time.

In the case of persons with international protection, a residence permit is issued which is also renewable after a specific period of time, depending on the kind of protection one has obtained.

2.3 Asylum

Asylum in Malta is mainly regulated by the Refugees Act (2001)²¹⁷ and the Procedural Standards in Examining Applications for Refugee Status Regulations (2008).²¹⁸ The competent authorities dealing with asylum are the Office of the Refugee Commissioner, which examines claims at first instance, and the Refugee Appeals Board, which is empowered to hear appeals from the recommendations of the Office of the Refugee Commissioner.

If a person wishes to apply for asylum in Malta, he or she has to register his or her desire to apply for refugee status by filling in a Preliminary Questionnaire (PQ). Once the PQ reaches the authorities, the applicant's legal status changes from that of a prohibited migrant to an asylum seeker, and consequently the rule of *non-refoulement* (non-return) is applicable. According to law, asylum seekers have a right to access state education and training and to receive medical care and services.²¹⁹ Asylum seekers also have a right to access the labour market after one year.

Asylum seekers who arrive in Malta legally are entitled to the same rights as those who arrive in an irregular manner. However, there is a difference in practice. While they do effectively have access to education and medical assistance, they do not have access to a working permit (since it is very difficult to prove that the services they offer cannot be provided by Maltese citizens), social accommodation and social assistance.²²⁰

The law does not set a time limit within which asylum procedures must be initiated with the competent authorities. The law merely states that the Refugee Commissioner shall interview an applicant for asylum as soon as possible.²²¹ The Office of the Refugee Commissioner has complete discretion on when to initiate the relevant procedures. When the asylum seeker or applicant is eventually called for an interview, an Application Form is first filled in with the assistance of a representative of the Refugee Commissioner. This is usually followed by the interview proper wherein the applicant has to explain his or her reasons for leaving the country of origin and why he or she cannot return. In some cases, the asylum seeker may be called for further questioning and a second interview is held.

After the interview, the Office of the Refugee Commissioner will proceed to assess the claim. The law sets no time limit within which the Refugee Commissioner must reach a decision regarding the case. There is an obligation however to inform the applicant of a delay after six months and to provide information (upon request) on a possible time frame within which a decision may be expected.

The law grants a right of appeal from the recommendations of the Office of the Refugee Commissioner.

2.4 Outcome of Asylum Claim

The Office of the Refugee Commissioner makes recommendations to the Minister for Justice and Home Affairs regarding the acceptance or rejection of the asylum claim.

Refugee status is granted to persons where it is established that he faces a well-founded fear of persecution in his country of origin or habitual residence in terms of the 1951 Convention Relating to the Status of Refugees.²²²

Subsidiary protection status is granted to those persons whose application has been dismissed but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his country or origin, or in the case of a stateless person, to his country of former habitual residence, would face a real risk of suffering serious harm.²²³

When a claim for refugee status is accepted, the asylum seeker is granted refugee status on the basis of Council Directive 2004/83/EC of

²¹⁷ Chapter 420 of the Laws of Malta.

²¹⁸ Legal Notice 243 of 2008.

²¹⁹ Article 13(2) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²²⁰ The Organization for the Integration and Welfare of Asylum Seekers (OIWAS) has stated that it offers its

services only to "boat people", thus excluding from its remit asylum seekers who arrive in Malta legally.

²²¹ Article 13(1) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²²² Article 8(1) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²²³ Article 17(1) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the EU Qualification Directive), which incorporates the refugee definition found in the 1951 Convention Relating to the Status of Refugees, and also provides for subsidiary protection. If an asylum seeker is granted refugee status or subsidiary protection, he or she is granted international protection and is therefore protected from being returned to his or her country of origin. In both cases the beneficiaries of protection acquire a set of rights.

The Minister for Justice and Home Affairs may appeal against the recommendation of the Office of the Refugee Commissioner granting an applicant refugee status or subsidiary protection. A person who is granted subsidiary protection may also appeal against the recommendation of the Office of the Refugee Commissioner, if he or she believes that he or she should have obtained refugee status instead.

If a person is rejected, and therefore not granted refugee status or subsidiary protection, he or she has a right to appeal against the recommendation. If the Refugee Appeals Board rejects the appeal, the asylum seeker obtains no international protection and his or her legal status as an asylum seeker ceases. Once a person is no longer an asylum seeker, the immigration authorities may initiate proceedings for removal at any time. In practice, removal has proved very difficult to effect.

Rights of beneficiaries of international protection

A person declared to be a refugee is entitled to freedom of movement and a residence permit for a period of three years, a Convention Travel Document, access to employment, social welfare, appropriate accommodation, integration programmes, State education and training, and to receive State medical care especially in the case of vulnerable groups of persons.²²⁴ Dependent family members of a refugee enjoy the same rights and benefits as the refugee.²²⁵

A person enjoying subsidiary protection is entitled to freedom of movement and a residence permit for a period of one year, travel documents enabling him or her to travel, especially when serious humanitarian reasons arise that require his or her presence in another state, access to employment, subject to labour

²²⁴ Article 14(1) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²²⁵ Article 14(2)(a) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

market considerations, core social welfare benefits,²²⁶ appropriate accommodation, integration programmes, State education and training, and to receive core State medical care, especially in the case of vulnerable groups of persons.²²⁷ Dependent family members of a person granted subsidiary protection, if they are in Malta at the time of the decision, enjoy the same rights and benefits as the person enjoying subsidiary protection.²²⁸

Vulnerable refugees and persons granted subsidiary protection shall, as far as possible, be provided with adequate health care.²²⁹

2.5 Vulnerable Persons and Asylum Seekers

As a matter of policy, vulnerable cases are exempt from detention. Government policy describes vulnerable persons as unaccompanied minors, persons with a disability, elderly persons, families and pregnant women. Article 14(1) of the Reception of Asylum Seekers (Minimum Standards) Regulations, 2005,²³⁰ states that “account shall be taken of the specific situation of vulnerable persons which shall include minors, unaccompanied minors and pregnant women, found to have special needs after an individual evaluation of their situation.”

Vulnerable cases in detention are assessed by the Organization for Integration and Welfare of Asylum Seekers (OIWAS – see note 221).. This organization operates under the auspices of the Ministry of Justice and Home Affairs (MJHA), and is responsible for making recommendations to the PIO on whether the persons it assesses should be released from detention. OIWAS was not set up by law and is not guided by any laws or regulations, apart from Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (the EU Reception Directive) and the Reception of Asylum Seekers (Minimum Standards) Regulations, 2005.²³¹

Unaccompanied minors

The Refugees Act provides that any child or young person below the age of 18 years shall be allowed to apply for asylum and assisted in terms of the Children and Young Persons (Care

²²⁶ There is currently no law which specifies what the “core social welfare benefits” are.

²²⁷ Article 14(1) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²²⁸ Article 14(2)(b) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²²⁹ Article 14(3) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²³⁰ Legal Notice 320 of 2005. The purpose of these regulations is to implement the provisions of the European Union Directive 2003/9/EC which establishes minimum standards for the reception of asylum seekers in Member States.

²³¹ Legal Notice 320 of 2005.

Orders) Act.²³² According to government policy “unaccompanied children and minors will be placed under state custody in terms of the Children and Young Persons (Care Order) Act... [in order to ensure] that an unaccompanied minor is given the same treatment as a Maltese minor... The detention of minors should be no longer than what is absolutely necessary to determine their identification and health status. Interviews are to be carried in a ‘child friendly’ manner. Unfortunately there will be cases where individuals make false claims about their age in order to benefit from the terms and conditions of a Care Order.”²³³ In practice, unaccompanied minors are automatically detained on the same grounds outlined above in 2.1.

Individuals claiming to be minors who are not accompanied by an adult responsible for them, whether by law or by custom, are referred to OIWAS for age assessment. Referrals are usually made by the immigration police, whether the person concerned declares that he is a minor upon arrival, or by the Refugee Commissioner, where an applicant for asylum declares minor age on his PQ form.

In cases where the individual concerned makes conflicting statements regarding his/her date of birth, one member of OIWAS staff conducts a preliminary interview. Some claims to minority age could be rejected solely on the basis of this interview.

Those who pass this preliminary stage, as well as those who did not need to go through it, are interviewed by a panel of three members of OIWAS staff known as the Age Assessment Team (AAT), who may take a decision on the individual’s claim or, in case of doubt refer the individual for Further Age Verification (FAV), consisting of an X-ray of the bones in the wrist. Before an FAV is carried out, an interim care order is issued and the Minister for Social Policy becomes formally responsible for the individual concerned.

Where a person is found to be a minor, an application is made by the Minister for Social Policy for the issue of a care order. Once the said order is issued, the person concerned is released from detention.

Where a person is deemed to be an adult, s/he is given a letter communicating the decision.

Other vulnerable persons

²³² Article 13(3) of the Refugees Act, 2001, Chapter 420 of the Laws of Malta.

²³³ *Irregular Immigrants, Refugees and Integration Policy Document*, Ministry of Justice and Home Affairs and Ministry for the Family and Social Solidarity, p. 13.

Government policy also lays down that persons with a disability, elderly persons, lactating mothers and pregnant women shall not be detained but be provided with alternative accommodation.²³⁴ Such vulnerable adults are referred to OIWAS for assessment; referrals are made by the police on arrival. In cases where the individual concerned is clearly vulnerable, this is done by the Detention Service, medical staff and by NGOs working in detention.

Individuals referred are first assessed by a social worker who conducts an interview and writes a report recommending release or otherwise. The said report is passed to the Vulnerable Adults Assessment Team (VAAT), a panel made up of 3 members of OIWAS staff, which takes a final decision regarding whether or not the individual concerned should be recommended for release or whether some other action, for example follow-up in detention, is more appropriate. In case of a positive recommendation the case is referred to the Principal Immigration Officer (PIO) who takes a final decision regarding the case.

When vulnerable persons are released early from detention they are placed in specific homes catering for their special needs. A detailed description of these homes will be given further on.

3. Dimensions of destitution

3.1 Health

From the law it is not clear which health benefits migrants in Malta are entitled to. The situation can differ according to their status. Asylum seekers have access to state medical care.²³⁵ The law mentions that the provision of health care for asylum seekers shall be subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health, and where asylum seekers have sufficient resources, or if they have been working for a reasonable period of time, they may be required to cover or to contribute to the cost of the health care or may be asked for a refund²³⁶.

Individuals granted refugee status have access to social security and therefore access state medical care in the same way as Maltese citizens. Although the law states that Convention Refugees are entitled to social security

²³⁴ *Irregular Immigrants, Refugees and Integration Policy Document*, Ministry of Justice and Home Affairs and Ministry for the Family and Social Solidarity, p. 13.

²³⁵ Article 13(2) of the Refugees Acts, 2001, Chapter 420 of the Laws of Malta.

²³⁶ Subsidiary Legislation 420.06 Reception of asylum Seekers (Minimum Standards) – Art. 11.

benefits²³⁷, it is not the case with regards to persons who have been granted subsidiary protection or rejected asylum seekers. Persons granted subsidiary protection are only entitled to core state medical care and core welfare benefits. These entitlements are different from those granted to Convention refugees.

However, there are no clear provisions regarding irregular immigrants' or rejected asylum seekers' entitlements to health care. Although health-related issues for persons who were rejected by the asylum authorities are mentioned under the policy document,²³⁸ there is nothing in the provisions of the law that defines their entitlements in terms of access to health care. The policy document states that "the Ministry for the Family and Social Solidarity shall liaise with other Ministries and as much as possible: a) ensure that all irregular immigrants, without discrimination on any ground, shall have access to food (as provided by MJHA), shelter and other welfare services including health (as provided by the Ministry of Health)(...), b) to provide shelter and welfare support services to irregular immigrants released from closed centres".

Basic health services and emergency care are generally provided in health centres to all persons. However, communication issues and the lack of interpretation services often hinder the provision of medical care. Doctors may write free medicine prescriptions to persons granted subsidiary protection, and in certain cases to rejected asylum seekers,²³⁹ but this is not automatic. Even if they have a free medical prescription, pharmacists may refuse to give them free medicines on the grounds that they are not entitled to such medical services. Another obstacle to accessing health care is that rejected asylum seekers, staying illegally on the territory, fear that the doctor will report them to the relevant authorities. Although no duty to report exists under law, some doctors do report illegally staying third-country nationals to the relevant authorities because they believe it is their duty to do so. Technically, irregular immigrants and rejected asylum seekers should be returned to their country of origin. However, repatriation procedures are complex and it is very often not possible for the Maltese authorities to repatriate persons before the end of the maximum length of time in detention. Thus, a large number of persons would, in fact, remain on the territory with a renewable immigration

certificate valid up to three months: such persons are therefore granted leave to remain on the territory but still bear an "irregular status" regarding their other entitlements.

Another issue of concern which has been observed through practice, is that medical personnel are not trained about what kind of medical benefits migrants are entitled to. Therefore, the provision of health care can range from total care to a complete lack, depending on the medical staff receiving the patient in any of the health centres.

Finally, the medical condition of immigrants in Malta can sometimes be related to their stay in detention for a period of time. Some of the interviewees reported physical problems: diabetes, eye and dental problems. One interviewee complained that he did not receive a medically adapted diet necessary for his diabetic condition during his stay in detention. Several other interviewees confided that they experienced mental health problems, such as depression and sleeping difficulties. Many immigrants suffer from mental health problems because they come from a country at war and have experienced traumatic events. Victims of trauma can see their conditions deteriorating in detention. In addition, the insecurity of their future is certainly detrimental to their psychological health. The Emigrants' Commission, an ecclesiastical organisation working with migrants, notes that common mental health problems among their clients are: depression, post-traumatic stress disorder, and stress-related physical symptoms such as heart problems and high blood pressure. Medical treatment for those with mental health problems is often not given. No counselling is provided in the open centres.

The health condition of a person is a crucial factor in the extent of destitution they face. With a poor health condition it is difficult to find work, and hence to guarantee income necessary to meet basic needs.

3.2 Social welfare: allowances and accommodation

The social welfare of asylum seekers, refugees and irregular immigrants falls under the auspices of OIWAS, which was created in 2007. OIWAS now operates under the Ministry for Justice and Home Affairs. Initially, it operated under the Ministry for the Family and Social Solidarity, but this changed in 2008. This organisation is in charge of the evaluation and assessment of vulnerable persons in detention with the responsibility of referring them to the PIO for release. It is also responsible for the accommodation of the immigrant population, as well as the allowances granted to asylum seekers, persons with protection, rejected asylum seekers, and irregular migrants.

²³⁷ Subsidiary Legislation 318.16 Laws of Malta, Social Security (U.N. Convention Relating to the Status of Refugees) Order – 2001.

²³⁸ "Irregular immigrants, Refugee and Integration" Policy document, Ministry for Justice and Home Affairs – Ministry for the Family and Social Solidarity – 2005.

²³⁹ Rejected asylum seekers who are found to have HIV are given free medicine prescriptions.

When an individual is released from detention he or she is accommodated in an open centre. The State provides shelter in open centres to all immigrants, once released, irrespective of their status. The administration of the open centre organizes the allowance system through a registration procedure. The individual must register at the office of the open centre three times a week. Registration is communicated to the central office of OIWAS which then distributes the allowance. Refugees may be granted an allowance from the moment after their release from detention until they actually start receiving social security benefits. Asylum seekers and persons who have been granted subsidiary protection are given approximately 130 Euros per month, rejected asylum seekers 95 Euros and returnees under the Dublin II Regulation²⁴⁰ are granted 80 Euros per month even if they are beneficiaries of international protection.

If an individual fails to sign even once in the week, he or she will not be paid for the whole week. If a person fails to sign for 3 months his or her entitlement to shelter and allowance will be cancelled. Therefore, if a person finds employment, he or she will not be able to sign the register on a regular basis. It is presumed that if a person fails to sign the register, then he or she is working and can afford to live in independent accommodation. However, this system poses a problem with short-term employment, which is very common among migrants. The job market in Malta is such that it rarely results in job security. Most migrants are employed in the construction industry, the hotel industry or garbage collection. For migrants who work in the construction industry it is very difficult to obtain job security, since they are often recruited for a brief period of time, usually only a few days. If a person fails to sign the register and then loses his or her job, it is very difficult for them to get back into the open centre system. For persons who were employed and are now redundant, no structure exists to rely upon until they find another job.

State-run or NGO-run open centres have been created during the last decade with a capacity of 3500 persons. Hal Far is by far the most populated gathering of open centres and includes a centre for families, a centre for single women, and two huge centres for single men, the Hal Far Tent Village, and the Hangar.

Designation differs according to conditions and legal status. The first differentiation is drawn between vulnerable persons (families with children, unaccompanied minors and pregnant

women) and others. Specific accommodation and social care is offered to some who present a particular need for care. Thus families and unaccompanied minors are accommodated in state-run residential homes with full-time carers and social workers. Three houses of this kind exist with a total capacity of around 40 persons and 12 families. Unaccompanied minors are accommodated until they are 18 years old, after which point they will be able to take a place in an open centre or to find independent accommodation themselves if it is possible to do so. The open centres housing families impose a contract with their residents specifying that their accommodation in the house is available for a year. After a year, the family is expected to settle and afford their own accommodation. Practice in the field has shown that settlement and integration might be harder for families. Families still find it very difficult to afford independent accommodation even after a year and some could no longer afford to pay the rent and other charges. Yet these families are not able to be reintegrated into the open centre system.

For persons who are not considered vulnerable, the open centres offer less support. Basic accommodation in very large open centres can be literally described as the mere provision of a bed and a roof, the roof being of any nature; thus we find the Tent Village and the Hangar.

A new policy will soon be implemented whereby persons living in open centres will be separated according to their legal status. Persons who are beneficiaries of international protection will be accommodated at the Marsa Open Centre, an old trade school which is currently managed by the NGO *Suret il-Bniedem Foundation*. Rejected asylum seekers and irregular immigrants will be accommodated in the Hal Far Tent Village. The change in policy is justified by the reasoning that persons benefitting from international protection should be accommodated together and separately from persons with no protection. The Marsa Open Centre is located close to Valletta, the capital, in a central part of the island where it is relatively easier to find work. The Marsa Open Centre houses persons inside a solid building and has many more facilities as opposed to the Hal Far Tent Village. The latter is located in a rather remote part of the island and houses persons in military tents. The conditions in the Hal Far Tent Village, coupled with the fact that it will house rejected asylum seekers and irregular migrants - persons who have an illegal status - raise various ethical and humanitarian considerations.

Generally, a large number of immigrants who have a stable job do eventually move to independent accommodation. By doing so, they

²⁴⁰ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

choose to abandon their right to free housing from the authorities. If after moving out they become unemployed, or their working time is reduced because of redundancy or any other reason, they cannot be reintegrated into the post-detention welfare system. Some migrants have challenged this state of fact with the help of some NGOs, and practice has shown that this situation can be reversed on a case by case basis when a formal request is addressed to OIWAS.

3.3 Work

The Maltese Reception Regulations state that “in accordance with labour market conditions prevailing at the time, the Ministry responsible for issuing employment licences shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.”²⁴¹ The EU Reception Directive²⁴² states that “if a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.” This has been interpreted to mean that asylum seekers should have access to the labour market after a year. According to government policy,²⁴³ asylum seekers shall have access to the labour market one year after their arrival in Malta. As a consequence, persons who are still awaiting the outcome of their asylum application after one year shall be released from detention after medical clearance and have access to the labour market. Asylum seekers can apply for a work permit. They are granted a three-month renewable work permit.²⁴⁴

Persons who have been granted any kind of protection, whether refugee status or subsidiary protection, also have the right to apply for a work permit with the authorisation of the Minister.²⁴⁵

The system is different for rejected asylum seekers. It is their prospective employer who must apply for a working permit on their behalf, justifying the need to employ that particular person in question.

However, in practice it is very difficult to obtain a work permit. A permit is usually issued after a long period of time and a fee has to be paid for each renewal (either by the employer or the asylum seeker in question). Prior to these 12 months, asylum seekers do not have the right to take up employment in the formal labour market and, in cases where they are released from detention before the lapse of 12 months face a survival problem. This leads to them undertaking jobs in the informal labour market, usually in the construction industry and with cleaning companies, very often by the day or by the week. Each morning outside the open centres, immigrants wait for the construction trucks to pass by and pick up some of them. The others will wait for the next day to try their luck.

Another issue on the labour market concerns single parents who have limited access to childcare. Similarly, elderly or disabled persons face disproportionate difficulties in finding a job that does not require particular physical fitness.

4. Conclusions

4.1 Asylum seekers

While asylum seekers have several rights guaranteed by law, they still face difficulties and are prone to destitution in certain cases. Vulnerable asylum seekers who are released from detention before the lapse of one year do not have the right to access the labour market, and are thus dependent on the welfare system. Those who arrive in Malta legally have difficulty in obtaining accommodation, access to social assistance and even a working permit. Asylum seekers who are released from detention are accommodated in substandard housing consisting of tents, prefabricated containers, hangars and dilapidated buildings.

4.2 Beneficiaries of subsidiary protection

The main problem afflicting the situation of persons who are beneficiaries of subsidiary protection is that the law states that they are entitled to “core welfare benefits”. However, the law fails to specify what constitutes these core welfare benefits. There is no uniform practice or interpretation, and different government authorities do not approach the issue in the same way. Practice has shown that persons benefitting from subsidiary protection are not entitled to, or do not have access to all kinds medical treatment. There have been cases where particular medical treatment has been refused.

²⁴¹ Article 10(1) of the Reception of Asylum Seekers (Minimum Standards) Regulations, 2005, Legal Notice 320 of 2005. The text quoted above is almost identical to that found in the EU Reception Directive.

²⁴² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

²⁴³ “Irregular immigrants, Refugee and Integration” Policy document, Ministry for Justice and Home Affairs – Ministry for Family and Social Solidarity – 2005.

²⁴⁴ See Reception of Asylum Seekers (Minimum Standards) Regulations, 2005 (L.N. 320 of 2005) enacted in terms of the Refugees Act, 2000 (Act XX of 2000, Chapter 420 of the Laws of Malta); according to L.N. 383 of 2005 these regulations came into force on 22 November 2005).

²⁴⁵ Regulation 12(1)(2)(a) of the Procedural Standards in Examining Applications for Refugee Status Regulations, 2008, L.N. 243 of 2008.

Persons who are beneficiaries of subsidiary protection often fall out of the welfare system after they move into independent accommodation, with the consequence that they become destitute once they lose their job and can no longer pay for their accommodation. Practice in the field has shown that there is a growing number of persons in this situation and the Maltese government has not yet recognised this as a cause for concern, nor has it developed a policy to address the situation. OIWAS is currently dealing with the situation by assessing cases on an individual basis, and at the time of writing of this report, only vulnerable persons have managed to be reintegrated into the welfare system.

4.3 Rejected asylum seekers and irregular immigrants

The situation for rejected asylum seekers and irregular immigrants is much more bleak. While rejected asylum seekers and irregular immigrants are recognised as being present on Maltese territory through the issuance of a police immigration card and a short-term visa, they have no rights in law whatsoever and are very much left to fend for themselves. They can only obtain a working permit if their employer applies for it on their behalf justifying why he or she needs their services. They receive a minimal sum of social assistance while they are living in the open centres, but this is granted only as a matter of policy. They have no legal guarantees that provide certainty or security if they end up destitute. Similarly to the beneficiaries of subsidiary protection, if they lose their place in the open centre because they manage to find independent accommodation, they have virtually no chance of being reintegrated into the welfare system, and are thus completely self-reliant.

5. Recommendations

Asylum and return:

1. All entitlements enjoyed by asylum seekers in appeal and rejected asylum seekers on the basis of practice should be incorporated into Maltese law: clear legal rights should be established.
2. Access to health care, housing and social support and the right to access the formal labour market should be provided, based upon the law, to rejected asylum seekers up until the moment of return.

3. A shortening of the period after which an asylum seeker is entitled to access the formal labour market, and work permits should be issued free of charge and for longer periods of time.
4. A shortening of the period in which a decision in appeal is reached.
5. If return cannot be enforced within a reasonable period of time, a third-country national should be given a residence permit with a full set of social rights.

Medical care

6. Improvement of the health facilities at the Closed Detention Centres and enhancement of the referrals to the regular health system by staff working at the Closed Detention Centres and Open Centres.
7. Medicine should be free of charge for all third-country nationals, regardless of status.

Detention:

8. Detention should in all cases only be used in exceptional circumstances.

6. References

Irregular Immigrants, Refugees and Integration Policy Document, Ministry of Justice and Home Affairs and Ministry for the Family and Social Solidarity, 2005.

Refugees Act, 2001, Chapter 420 of the Laws of Malta.

Subsidiary Legislation 420.06 Reception of asylum Seekers (Minimum Standards).

Subsidiary Legislation 318.16 Laws of Malta, Social Security (U.N. Convention Relating to the Status of Refugees) Order – 2001.

Social Security Act, Chap. 318 of the Laws of Malta.

Reception of Asylum Seekers (Minimum Standards) Regulations, 2005 (L.N. 320 of 2005) enacted in terms of the Refugees Act, 2000.

Procedural Standards in Examining Applications for Refugee Status Regulations, 2008, L.N. 243 of 2008.

Case Studies in Portugal

1. Case Study

1.1 A typical case

– Daniel, asylum seeker awaiting the outcome of appeal, Armenian background, 31 years old –

Daniel was forced to leave Russia in the autumn of 2005. He left his wife and daughter behind. He was leading a good life back home as a mechanical engineer with his wife a doctor. They were doing well financially. This good life ended when Daniel was attacked in his hometown because of his Armenian background, stabbed in his lung several times. Daniel explained that ethnic tensions existed towards persons originating from Armenia. With his life at risk, Daniel decided to come to Portugal and ask for asylum.

Upon arrival in Portugal, an NGO brought him into contact with an Armenian family. They assisted him with filing an asylum claim. Daniel handed over to the Portuguese immigration authorities a medical report showing the damage done to his lung as a result of the attack. The immigration officer concerned, however, did not make the effort to translate the medical report or to verify its authenticity. Daniel told us that the Portuguese authorities did not believe that he had an Armenian background; he was extremely upset about this. Daniel's claim for asylum was rejected in the two administrative instances. Daniel has now appealed against his negative decision at court. Daniel is very worried and under stress regarding the outcome of his appeal; he has no idea when the court will reach a decision.²⁴⁶

Daniel felt very lost at the reception centre where he was staying during the period when the immigration authorities examined his asylum claim. His stay was difficult since the other asylum seekers came from other regions and the staff paid no specific attention to his case. Daniel had to leave the reception centre after he was informed his second asylum claim was rejected. With no roof over his head he moved from one place to another in Lisbon. He stayed from time to time in a public shelter in the city centre, and visited food kitchens. "In the shelter I always felt in danger, there were fights all the time and I did not understand the language," says Daniel.

Since the end of summer 2006 he has been staying at JRS Portugal's accommodation centre. In the accommodation centre he receives breakfast in the morning and for the other meals of the day he visits a canteen in the city centre. Daniel worries a lot about his housing situation because the accommodation centre in principle only offers temporary accommodation. He does not see how he will be able to arrange for his own housing after his stay in the centre. Daniel has no right to access the formal labour market, a fact that highly frustrates him and lowers his self esteem. "If I had the right to work I would not need help from anyone. I had a good life back home, I could take care of my family, but now I cannot even take care of myself," Daniel says in desperation. Before his asylum request was refused, Daniel had started a vocational training as part of a project for asylum seekers. It is uncertain whether he can continue this vocational training, given his legal situation. He is following this course every day, which provides him some form of a daily structure. In the future, his wish is to set up his own business, although he does not know what will happen to him and whether he can stay in Portugal. Apart from his courses he does not do much during the day. Daniel thinks a lot about all his problems and is very depressed. He says he does not have any real friends in Portugal who he can talk to.

Daniel's health condition is of great concern. As a torture victim, he suffers from Post-Traumatic Stress Disorder. He receives psychological assistance from a NGO specialised in assisting torture victims. His physical condition is also weak. As a result of his attack, Daniel has reduced lung capacity, causing breathing problems. He received treatment in hospital for his problems when he was staying in the reception centre, but is not currently receiving medical treatment.

Regarding his stay in Portugal: "nothing good has happened to me so far in Portugal. I have twice as many problems here than back home". He wishes that he could go back, but he cannot return for safety reasons. Daniel is very concerned about the safety of his wife and daughter. His wife is Russian, but his daughter looks Armenian, with dark hair, just like him. He proudly showed a picture of both of them. Daniel feels that he has lost the control over his own life: "I am not in the position to make any choices regarding my life." Daniel thinks that when he gets a residence status things will change. Daniel has no future prospects. "The only thing I want is to be reunited with my family again." He explains that he cannot go

²⁴⁶ Nowadays, the Refugee and Asylum Law, Law 27/2008, 30th June foresees that the court decision must be reached in a maximum period of 15 days (article 30, paragraph 2). In practice, however, this period is not respected, since the court decision takes much longer, usually between 6 and 12 months.

back to Russia, because his life would be at risk. Going to Armenia is also not an option, since his wife is Russian and would not be safe there. Daniel is desperate about his situation and does not know what to do except hope that his life will start again someday.

1.2 Context of the case

The story told by Daniel is illustrative of asylum seekers who appealed against their negative decision at the court and whose state support has ceased due to the rejection of their claim. Further, his case is also typical of third-country nationals in a destitute situation who are sick and have problems accessing the Portuguese health system. With the use of Daniel's case as an example, the specific destitute situation of asylum seekers awaiting appeal will be examined in more detail below.

In Portugal, interviews were also conducted with third-country nationals with different legal backgrounds; rejected asylum seekers, holders and "overstayers" of a temporary stay visa related to medical care (hereinafter referred to as "health visa") and illegally staying third-country nationals.

The factors which connect Daniel's case with the cases of other third-country nationals interviewed are: having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival, being socially excluded, the State's awareness of their presence on the territory and having no way out of destitution. The stories told by the interviewees provide insight into the lives of third-country nationals living in absolute poverty, left without any form of social support. Supplementary and background information was provided by various NGOs working directly with these destitute groups. On this basis, several common elements can be discerned which are typical for third-country nationals in a similar position.

The following general elements can be distilled from Daniel's case which create, shape and sustain destitution:

No or limited legal entitlements leading to the inability to meet basic needs

After the immigration authorities rejected his asylum claim, Daniel was sent onto the streets with no social support. After initially being looked after by the State, he lost all forms of support and found himself in destitution. Further, he is prohibited from working and has difficulties in receiving much needed medical treatment.

The case of Daniel illustrates that social support is not guaranteed after an asylum seeker receives a negative decision in the administrative phase of the asylum procedure.

Portuguese asylum law prescribes that social support shall be terminated for asylum applicants whose claim was refused by the immigration authorities and who appeal against this decision at court.²⁴⁷ Asylum seekers who find themselves in such a position have no right to accommodation, food or any type of financial support. Although no social support is provided, asylum seekers in the appeals phase are nevertheless allowed to remain on the Portuguese territory.²⁴⁸

Whether an asylum seeker awaiting the outcome of appeal has the right to work depends on whether he is in the possession of a provisional residence permit. Generally, asylum seekers whose applications have been admitted are issued with a provisional residence permit that allows them to access the formal labour market. Such provisional residence permit is valid for four (4) months counting from the date of the decision of the application admission and is renewable for equal periods of time until a final decision or until the timeframe (30 days) expires²⁴⁹.

Asylum seekers awaiting the outcome of their appeal have in principle access to health care. Yet, the Portuguese health system has complex administrative procedures, which in several cases results in a denial of medical treatment in practice. Asylum seekers, including those in the appeals phase of their asylum, have to obtain a health card first before they can receive medical treatment.

Reliance on charity for survival

The story of Daniel illustrates that NGOs and other civil society actors are essential for the survival of asylum seekers who are left without any form of social support from the State. The only way for Daniel to survive was to knock on the doors of charity organisations. Daniel relied on public shelters, soup kitchens and NGOs for the provision of housing and food. Further, he continues to visit a NGO to receive psychological counselling for the treatment of his Post-Traumatic Stress Disorder.

Reliance on the goodwill of others to meet basic needs is typical for asylum seekers who have to leave the reception centre and have lost all form of social support. NGOs are taking over typical state functions such as the provision of housing, medical care and food

²⁴⁷ Article 60 paragraph 1 of the Refugees and Asylum Law (Law no. 27/2008, 30th June). Pursuant to Article 60 paragraph 2 of the Refugees and Asylum Law continued support can be given only if the economic and social situation of the asylum applicant is appraised and it proves to be necessary to maintain it. In practice, however, this Article is not correctly applied.

²⁴⁸ Article 31 of the Refugees and Asylum Law.

²⁴⁹ Article 27 paragraph 1 and article 31 paragraph 1 of the Refugees and Asylum Law.

supply. In other words, without the existence of NGOs and other civil society actors, the risk of dying on the streets with no food becomes a reality. NGOs not only provide essential needs, but they are also trying to give some human dignity back to those who are being stripped of all their rights. However, due to financial constraints, the services provided by these NGOs are insufficient or inadequate to cover all the needs of asylum seekers left with no rights. In particular, the medical care provided by NGOs is inadequate; some need to have operations or continued medical care and medicine, which cannot be provided by NGOs. The result of withholding all entitlements and the limited, although essential, services provided by NGOs is that for some no housing is provided, cases of malnutrition exist, and they face a worsening of medical problems over time.

Social exclusion

Daniel sees himself as having lost control over his life. He is not in a position to take important decisions. It is the State not himself that decides his future. Daniel's self-esteem is low; he feels very bad about not being able to take up employment legally and take care of himself and his family. Daniel is not taking part in society. Other than following courses he has nothing to do all day, no real friends and for the largest part of the day he is just killing time.

Daniel's case is typical of asylum seekers who are left without any social support and have no right to access the formal labour market. They live on the margins of society. Most of them do not feel part of society because they are not allowed to work in the formal labour market and have nothing to do all day. Many have few social contacts and express feelings of loneliness. Contact with the State is limited to the obtaining of residence rights or within the framework of return. The result of this policy of exclusion is feelings of depression and low self-esteem. They feel abandoned by the State and that their human dignity has been taken away.

The State's awareness of their presence on territory

By submitting an asylum application and appealing to the court, Daniel's presence on the territory is known to the Portuguese authorities. Not only is Daniel's stay in the country known to the authorities, his presence is also allowed under Portuguese law because he lodged an appeal. Yet, he is left without any form of social support by the State.

The Refugees and Asylum Law prescribes that the appeal against a negative decision on asylum has a suspensive effect, meaning that

the decision is not definitive.²⁵⁰ All asylum seekers in the appeals phase are entitled to remain on the Portuguese territory and are not subject to removal.

No way out of destitution

Daniel feels caught by the situation of destitution and sees no way out of it. He fears he will be persecuted upon return. He sees no other choice than to remain in his destitute situation, even if this means having to struggle on a daily basis for his survival.

The case of Daniel shows that even if a person is stripped of all rights and has to depend on the goodwill of others to meet basic human needs, he will not leave the country if he considers his life to be at risk upon return. Safety reasons of such a serious nature, such as the fear of persecution, take away any element of choice and leave only a forced stay in destitution. Further, obstacles to return to the country of origin can exist, such as the unwillingness of the embassy to cooperate, unsafe country of origin, no safe travel route or medical reasons. Asylum seekers awaiting the outcome of their appeal live in forced destitution, while they have a right to stay on the territory. Yet, no response is given by the Portuguese State to improve their situation.

2. Comparable cases of destitution

2.1 Other cases of destitution

During the field trip to Portugal, interviews were also conducted with third-country nationals with a legal situation other than asylum seekers awaiting the outcome of appeal. The following third-country nationals were interviewed:

- Rejected asylum seekers
- Holders and "overstayers" of a health visa
- Illegally staying third-country nationals unable to be removed by the State

What links these interviewees are the same five elements discussed in the previous section; having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival, being socially excluded, the State's awareness of their presence on the territory and having no way out of destitution. Their situation of destitution is comparable to asylum seekers awaiting the outcome of appeal. However, there are some differences in their social and legal situation that are specific to their group. These particularities will be discussed for each respective category accordingly.

²⁵⁰ Article 30 paragraph 1 of the Refugees and Asylum Law.

2.2 Rejected Asylum Seekers

In this category two men were interviewed originating from Sudan (Darfur) and Sierra Leone. For the Sudanese rejected asylum seeker his family was killed in Sudan. The other interviewed rejected asylum seeker left Sierra Leone because of the civil war. Both consider their lives to be at risk upon return and referred to the unstable situation in their countries. Further, the Sudanese embassy refused to issue the necessary documents for the return of the Sudanese rejected asylum seeker. Their cases are illustrative of the destitution of rejected asylum seekers in Portugal.

The elements creating, shaping and sustaining destitution applied to rejected asylum seekers:

No or limited legal entitlements leading to the inability to meet basic needs

Rejected asylum seekers remain illegally on the territory of Portugal after their claim is rejected in a final decision.²⁵¹ Social support is terminated when the final decision on the asylum application is reached.²⁵² Being considered as an illegally staying third-country national, rejected asylum seekers have no right to any long term form of financial support, housing, or food supply. They are also prohibited from working. Apart from emergency situations, rejected asylum seekers only have access to health care if they pay. This lack of social support combined with the prohibition to work forces rejected asylum seekers into destitution. They are not in a position to provide for their basic needs by themselves.

Reliance on charity for survival

Similar to asylum seekers awaiting the outcome of their appeal, rejected asylum seekers rely on charity for their survival. NGOs providing essential materials and services have many rejected asylum seekers among their beneficiaries.

Social exclusion

The form of social exclusion is similar to that experienced by asylum seekers awaiting the outcome of appeal.

State's awareness of presence on territory

As a result of their asylum application, rejected asylum seekers have made themselves known to the authorities. Further, within the framework of return, some asylum seekers have been

detained and released if return proved to be unsuccessful or they have been in contact with police authorities. In some cases rejected asylum seekers have filed a second asylum claim. Although these rejected asylum seekers are not (yet) being removed and Portugal knows of their stay on the territory, they do not receive any kind of state support up until the moment of return, nor do they receive any kind of (temporary) residence rights.

No way out of destitution

Many rejected asylum seekers are afraid of returning to their country of origin. Some have a history of persecution or have witnessed acts of violence. Illustrative is the case of one of the interviewed rejected asylum seekers who saw his family member killed. Many rejected asylum seekers do not want to return home for fear of persecution or the unstable situation in their country, such as civil war or the outbreak of hostilities. Apart from the personal fears of the rejected asylum seeker, other obstacles to return can be identified. These are recognised by the State in law or in practice and include lack of identity papers, unsafe travel route, and unstable situation in country of origin or medical reasons. According to the NGOs contacted, Portugal is not pursuing an active return policy. Rather, the country leaves rejected asylum seekers to their own devices; not removing them, yet not responding by giving them residence rights connected with a clear set of social rights.

As the interviews with the rejected asylum seekers and the information provided by NGOs indicate, rejected asylum seekers feel stuck in their situation of destitution; return to their country of origin is no real option and they are forced to remain destitute.

2.3 Holders and "Overstayers" of a Health Visa

In this category a mother from Guinea-Bissau was interviewed who accompanied her two sick children on the basis of a health visa. Their visa expired several years ago, although one of her children is still receiving medical treatment. Another interview was conducted with a young man from Guinea-Bissau whose arm was amputated because of cancer and whose visa was about to expire at the time of the interview. Both were afraid of returning to their home country. The mother did not consider her two children to be cured and she had already lost two of her children in Guinea-Bissau. As a result of his physical condition, no reception facilities are available for the young man and because of his handicap he would face extreme economic hardship in Guinea-Bissau.

²⁵¹ Pursuant to Article 31 paragraph 1 of the Refugees and Asylum Law, in cases where the asylum claim failed the applicant can stay within the national territory for a transitional period which shall not exceed 30 days.

²⁵² Article 60 paragraph 1 of the Refugees and Asylum Law.

The elements creating, shaping and sustaining destitution applied to holders and “overstayers” of a health visa:

No or limited legal entitlements leading to the inability to meet basic needs

A temporary stay visa (health visa) may be granted to third-country nationals abroad in order to receive medical care or to family members accompanying them.²⁵³ Such temporary stay visas can be issued to nationals of former colonies of Portugal. Portuguese law requires that holders of a temporary stay visa have enough means of subsistence. Alternatively, food and accommodation must be guaranteed during the period of stay. This would be provided by the consular services of their country of origin, a Portuguese citizen or a third-country national authorised to reside permanently in Portugal.²⁵⁴ On the basis of information provided by NGOs, the practice is very different. Many holders of a health visa have insufficient resources for their subsistence or they do not receive adequate support from the person who signed up as their caretaker. The Portuguese government turns a blind eye to this reality and does not provide additional support when necessary. Holders of a health visa are entitled to receive medical treatment for the purpose of which they came to Portugal.

Persons who remain once their health visa has expired lose their authorisation to stay on Portuguese territory, resulting in an illegal stay on the territory. With respect to entitlements under law, their rights are similar to illegally staying third-country nationals residing on Portuguese territory such as rejected asylum seekers.

Many holders of health visas and those who “overstayed” their visa find themselves in a destitute situation, having difficulties meeting even basic needs such as food. Third-country nationals who come on the basis of a health visa often have serious medical problems, which make them even more vulnerable in their destitute situation.

Reliance on charity for survival

Similar to asylum seekers awaiting the outcome of their appeal, holders and “overstayers” of a health visa rely on charity to survive. Many NGOs provides services and material essentials to this group of third-country nationals. Given the fact that holders of health visas come from Portugal’s former colonies, some receive support from these communities in Portugal. When compared with other groups of third-country nationals, they are more likely to turn

to NGOs for medicine and recovery care. This is as a result of their medical background.

Social exclusion

This element is comparable with the situation of asylum seekers awaiting the outcome of their appeal, although those who came on the basis of a health visa do sometimes have contacts within their respective community existing in Portugal. Further, the Portuguese language is for a significant number of them their mother tongue, which allows them to communicate with authorities in their own language and access information more easily.²⁵⁵

The State’s awareness of their presence on territory

The identity of holders and “overstayers” of a health visa are known to the Portuguese authorities who issued the health visa. Many of them request from the Portuguese authorities an extension of their health visa or a residence permit under foreigners law. Although “overstayers” of a health visa are not (yet) being removed, they do not receive any kind of state support up until the moment of return, nor do they receive any kind of (temporary) residence rights. Although the State knows of their identity and presence on the territory, they do not actively assist in their return.

No way out of destitution

The reason why holders of a health visa do not return to their home country is obvious: they are undergoing treatment for serious, sometimes life-threatening diseases. Thus even if this means they have to move from one place to another and collect food from NGOs they will not return. The reason why “overstayers” of a health visa do not want to return to their home countries is often due to their health condition since they do not consider themselves cured. Also they consider that there could be a better life available in Europe.

2.4 Illegally staying third-country nationals unable to be removed by the State

In this category four third-country nationals were interviewed: two female and two male. Two interviewees came as minors to Portugal, of which one was the victim of human trafficking.²⁵⁶ Both are in the process of obtaining identity documents. The two other persons both suffer from serious mental disorders and are residing in a hospital in

²⁵³Article 54 paragraph 1 a) and g) of Immigration Law (Law no. 23/2007, 4 July).

²⁵⁴Article 18 Decree no. 84/2007, 5 November.

²⁵⁵A great number of third-country nationals coming from the former Portuguese colonies speak only a native language or dialect that has some similarities with the Portuguese language.

²⁵⁶Nowadays the Portuguese Immigration Law no. 23/2007, 4th July, contemplates the possibility of a victim of human trafficking to get a residence permit - see articles 109 and 122, paragraph 1 o).

Lisbon. The Portuguese State attempted to return them but was unable to do so because the respective families could not be tracked down and the country of origin lacks reception facilities necessary for treatment of the mental disorder.

The elements creating, shaping and sustaining destitution also apply to illegally staying third-country nationals unable to be removed by the State:

No or limited legal entitlements leading to the inability to meet basic needs

Their legal situation is identical to that of rejected asylum seekers. They find themselves in a destitute situation without any form of state support. The specific groups of illegally staying third-country nationals interviewed – those who cannot be removed – are extremely vulnerable since they are very young, victims of human trafficking or mentally ill. Those with serious mental health problems are particularly unable to meet their basic needs themselves.

Reliance on charity for survival

This element is comparable with the situation of destitute asylum seekers awaiting the outcome of their appeal and rejected asylum seekers. Although what is specific is that two of the interviewees are residing in a psychiatric hospital, thanks to the goodwill of the medical staff. Their continued stay in the hospital is uncertain as they are a financial burden on the hospital and no legal obligation to hospitalise them exists. NGOs noted a growing number of illegally staying third-country nationals with serious mental health problems among their beneficiaries.

Social exclusion

The level of social exclusion is similar to asylum seeker awaiting the outcome of appeal.

The State's awareness of their presence on territory

As stated before, what links these groups of illegally staying third-country nationals is the fact that they are unable to be removed by the State. Within the framework of return, there has been some form of contact between the third-country national concerned and the state; attempts have been made to remove the person but these proved to be unsuccessful, as in the case of the interviewees.

No way out of destitution

In the case of the interviewees, the obstacles preventing their removal from the State are: the lack of identity papers and the lack of adequate reception facilities for those with a mental disorder. The State has actively tried to remove them, but ceased their attempts when it became clear that these obstacles exist. Yet, no

solution is offered by the State for these cases. Because of this policy, third-country nationals who cannot be removed are forced to remain in their destitute situation and have no way out. The State does not give them the right to social support or (temporary) residence rights.

3. Relevant Status under Asylum and Foreigners Law

3.1 Asylum Status

The Portuguese Asylum Law is “Law no. 27/2008, 30th June”, that “Establishes the conditions and procedures for granting asylum or subsidiary protection and the status of asylum, refugee and subsidiary protection to applicants, by transposing into the national legal framework Directives numbers 2004/83 EC, of the Council, of 29 April; and 2005/85 EC, of the Council of 1 December.

Under its asylum law, Portugal offers protection in the following three situations:

Asylum

Refugee status is granted in the following two cases:²⁵⁷

- Third-country nationals or stateless people persecuted or seriously threatened with persecution as a result of activity exercised in the State of their nationality or habitual residence, in favour of democracy, social and national liberty, peace among peoples, freedom and the right of the human being.²⁵⁸
- Third-country nationals or stateless people who fulfil the criteria of Article 1 A (2) of the 1951 Refugee Convention.²⁵⁹

Subsidiary Protection

A residence permit on humanitarian reasons is granted to aliens and stateless persons to whom the provisions of article 3 do not apply and who are prevented or cannot return to their home countries or their usual residence, both due to the systematic violation of human rights occurring there or because they are at risk of suffering serious offence²⁶⁰.

Temporary Protection

The Portuguese State may grant temporary protection to persons displaced from their country as a consequence of serious armed conflicts that generate refugee flows on a large scale.

²⁵⁷On the basis of Article 4 of the Refugees and Asylum Law, refugee status may also be granted to certain family members of refugee status holders.

²⁵⁸Article 3 paragraph 1 of Refugees and Asylum Law.

²⁵⁹Article 3 paragraph 2 Refugees and Asylum Law.

²⁶⁰Article 7 paragraph 1 Refugees and Asylum Law.

Until 2001 this protection was conceded by article 9 of previous Portuguese Refugees and Asylum Law (Law no. 15/98, 26th March).

Meanwhile, Directive 2001/55/CE of the Council of 20 July 2001 on minimum standards for giving temporary protection became part of national legislation through Law no. 67/2003, 23rd August.

3.2 Relevant Status under Foreigners Law

Temporary stay visa

For the purposes of this report it is important to mention the possibility of a temporary stay visa for health purposes (the “health visa”). Since 1970s Portugal entered into health agreements with its former colonies (the so-called “PALOPS”; Guinea Bissau, Angola, S. Tome and Principe, Mozambique and Cape Verde), according to which nationals of the former colony can come to Portugal for treatment of their illnesses under certain conditions. The agreements have led to a large influx of nationals from former colonies, and many who have received medical treatment continue to stay in Portugal even though their health visa expired and is not renewed because the Portuguese authorities consider that the medical reasons cease to exist.

The health agreements have been implemented in national law. A temporary stay visa may be granted abroad to third-country nationals for the purpose of receiving medical treatment in official Portuguese health establishments.²⁶¹ A temporary stay visa may also be granted to family members accompanying the third-country national who is receiving treatment.²⁶²

4. Removal of Illegally Staying Third-Country Nationals: Obstacles, Practice and Solutions

4.1 Grounds for Non-Removal

In the Portuguese asylum and foreigners law the grounds for non-removal are the same as the grounds upon which asylum might be granted. Article 47 of the Refugees and Asylum Law follows that removal of a rejected asylum seeker may not result in the return to a country where his or her freedom could be put at risk by causes that might be considered as a ground for the grant of asylum or which in any way violate the prohibition of expelling or repelling (principle of *non-refoulement*) in accordance with the international obligation of the Portuguese State. In addition, no one shall be returned, removed, extradited or expelled to a country where he/she shall be subject to

torture or to cruel and degrading treatment. A similar provision can be found in the Portuguese foreigner’s law; Article 143 of Law no. 23/2007 provides that removal may not take place to any country where the third-country national may be persecuted for the reasons that justify the granting of asylum. The person concerned should, within the removal procedure, invoke this fear of persecution and submit proof for it.

The present Immigration Law (Law no. 23/2007, 4th July) establishes new grounds for non-removal.²⁶³

Foreign citizens cannot be removed from Portugal if they have a strong connection to the country, namely:

- a) Were born in Portuguese territory and reside there;
- b) Have effective custody of minor children of Portuguese nationality who are residing in Portugal;
- c) Have minor children, nationals from a third-country and residents in Portuguese territory, over whom they have effective parenthood and ensure their livelihood and education;
- d) Have lived in Portugal since they were younger than 10 and are still residing in Portugal.

4.2 Lack of Systematic Return Mechanisms

Pursuant to Article 135 of Law no. 23/2007 third-country nationals will be removed from Portuguese territory when they remain illegally in Portugal. According to JRS Portugal and the NGOs interviewed, the Portuguese authorities do not conduct an active return policy with respect to rejected asylum seekers, third-country nationals who “overstayed” their health visa and other illegally staying third-country nationals. No systematic removal of these categories of third-country nationals is taking place. The Portuguese authorities are less tolerant when the third-country national in question poses a threat to public security.

In general, illegally staying third-country nationals may, when they are sentenced for a crime with more than six months prison sentence or an alternative fine, be forcibly removed as part of their sentence.²⁶⁴

4.3 Views Expressed on Return Practice

As mentioned before, the general view among those NGOs interviewed is that Portugal does not pursue an active return policy of third-country nationals who are not legally residing on the territory. According to Santa Casa da

²⁶¹Article 54 paragraph 1 al a), Law no. 23/2007, 4th July.

²⁶²Article 54 paragraph 1 al g), Law no. 23/2007, 4th July.

²⁶³Article 135 Law no. 23/2007 (restrictions to removal).

²⁶⁴Article 151 Law no. 23/2007 (Removal accessory penalty).

Misericórdia²⁶⁵ (hereinafter referred to as “Santa Casa”) although the migration services are aware that some asylum seekers continue to stay in Portugal after their claim had been rejected, no action is taken against them. This view is shared by the former director of Centro de Acolhimento São João de Deus²⁶⁶ (hereinafter referred to as “CATSJD”), who informed us that some of the irregular migrants stayed for over a year in their accommodation centre without being removed. Some of the interviewees have also been residing in Portugal for many years of irregularity without serious attempts to remove them. According to JRS Portugal, irregular migrants and rejected asylum seekers generally do not fear the police, since they do not actively control whether a person has the right to stay in the country. In cases where the police come across a person with an irregular status during their daily activities, only in a limited number of cases do they arrest this person and bring them before a criminal court for a decision upon removal. Normally when it is the first time that the authorities detain the foreign citizen in question, they invite that person to vacate the national territory voluntarily within the agreed period, from 10 to 20 days.²⁶⁷

The present Immigration Law excludes the protective custody from enforcement measures that could be applied during an expulsion procedure.²⁶⁸

PROSAUDESC²⁶⁹ considers that due to the malfunctioning of the processes of return, many rejected asylum seekers and irregular migrants are living for long periods of time in Portugal, socially excluded and in extreme poverty. The government should provide statistics about the number of persons living without residence rights in Portugal and be aware of their living conditions. According to PROSAUDESC, those who have been residing in Portugal for many

years should become legalized and be assisted with integration.

In particular, no structure is in place for the assisted return of third-country nationals to the former colonies that came to Portugal to receive medical treatment. JRS Portugal believes that these health agreements are outdated because they do not provide any instrument to enforce the return of persons whose visa had expired.

4.4 Legal Solutions in case of Obstacles to Removal

Solutions under foreigner’s law for illegally staying third-country nationals

The Portuguese foreigner’s law offers some possibilities for rejected asylum seekers and other illegally staying third-country nationals who want to regularize their stay. This section will mention the most relevant possibilities. Illegally staying third-country nationals can apply for a residence permit without having to obtain a visa first if they find themselves in the following situations:²⁷⁰

- Minors, offspring of foreign citizens holders of a residence permit, born in Portuguese territory;
- Minors born in national territory who have stayed there and are attending preschool education²⁷¹ or primary school, secondary or professional education (and also their parents);
- Offspring of holders of a residence permit who have reached the age of majority and have lived in national territory since they were 10 years old;
- Adults born in national territory who have never left the country or have stayed here since before the age of 10;
- Minors who are obliged to remain under guardianship in accordance with the Civil Code;
- Citizens who no longer have the right to asylum in Portugal because the reasons for which they obtained this protection have ceased²⁷²;
- Those who suffer from a disease that requires prolonged medical assistance preventing him/her from returning to the country in order to avoid a health hazard;
- Having served in the Portuguese Armed Forces;

²⁶⁵Santa Casa da Misericórdia is a humanitarian and social organisation, where asylum seekers can be referred to their Social Service by the Portuguese Refugee Council. Santa Casa’s Social Service provides financial support to asylum seekers for food, housing, transport and other basic needs. Further, Santa Casa assists in the provision of housing and with the integration process. Santa Casa is the facilitator of public food kitchens throughout the city centre of Lisbon.

²⁶⁶CATSJD was an accommodation centre which hosted homeless migrants. The Centre had a capacity of 50 users and it functioned from 2003 to 2005. In addition to shelter, the centre provided food, medication and clothing.

²⁶⁷ Article 138 Law no. 23/2007.

²⁶⁸ Article 142 paragraph 1 Law no. 23/2007.

²⁶⁹PROSAUDESC is an immigrant association that works mainly with irregular migrants, asylum seekers and rejected asylum seekers from former Portuguese colonies. The association provides medical care, including health prevention and medicine, and social support in the form of food, hygiene products, transport tickets and financial support in exceptional cases.

²⁷⁰ Article 122, Law no. 23/2007, 4th July.

²⁷¹ From the age of 3.

²⁷² See also Article 42 paragraph 3, Refugees and Asylum Law.

- Who, albeit have lost Portuguese nationality, stayed in national territory for the last fifteen years;
- Who haven't left national territory and whose residence right hasn't become null and void;
- Having minor children resident in Portugal or with Portuguese nationality over whom he/she exercises effective parenthood power and ensures livelihood and education;
- Diplomatic and consular agents or his/her spouse, ancestors and descendants being in charge of the former accredited in Portugal for a period no less than three years;
- Who are or have been victims of a penal offence or serious or very serious regulatory offence related to work, rendering in lack of social protection conditions, salary and working hours exploitation, for which there is proven evidence from the General Labour Inspection, and as long as he/she has declared the infraction to the authorities and collaborated with them;
- Having been granted residence permit under article 109. (Residence permit issued to victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration);
- Who, having been granted a residence permit for purpose of studies under articles 91 or 92, and having concluded them intend to carry out in national territory a professional activity as employee or self-employed, except for the cases when the permit has been issued within the scope of co-operation agreements and there are no ongoing motives of national interest that justify it;
- Who, having been granted a temporary staying visa for research or highly qualified activity, intend to carry out in national territory a research activity, a teaching activity in a high education establishment or subordinate or independent highly qualified research.

And also

- Those who are married or who live as man and wife with a Portuguese national, with a national of the member states that are party to the Agreement on the European

Economic Area²⁷³ or with a foreigner who is legally resident²⁷⁴;

Furthermore, in extraordinary situations an authorisation for residence may be made by the Director General of SEF or on the initiative of the Ministry of Internal Affairs, in the following cases:

- Foreign citizens who do not fulfil the requirements of the immigration law
 - For reasons of national interest;
 - For humanitarian reasons;
 - For public interest reasons resulting from the exercise of a relevant activity in science, culture, sports, economical or social activities.²⁷⁵ JRS Portugal gave as an example the case of an irregular migrant who is a priest; his activity could be considered a relevant social activity to regularize his stay in the country.
- Foreign citizen who meets the following conditions:²⁷⁶
 - Holds a work contract or has a labour connection confirmed by a workers' union, by an association which is party to the Consulting Councillor, or by the Work General Inspectorate²⁷⁷
 - Has legally entered national territory and here remains legally²⁷⁸
 - Is registered in the Social Security System and has fulfilled all his/her obligations to that department.

Although the solutions offered are wide-ranging, most rejected asylum seekers or other illegally staying third-country nationals like "overstayers" of a health visa do not fulfil the necessary requirements to obtain a residence permit, such as identity papers, strict proof of

²⁷³ Article 1 paragraph 2 and Article 2 e) ii), Law no. 37/2006, 9th August.

²⁷⁴ Article 100, Law no. 23/2007.

²⁷⁵ Article 123, Law no. 23/2007.

²⁷⁶ Article 88 paragraph 2, Law no. 23/2007.

²⁷⁷ Identical regime for carrying out an independent professional activity, for research or highly qualified activity or to high level students (articles 89 paragraph 2, 90 paragraph 2, 91 paragraph 3, Law 23/2007).

²⁷⁸ In practice the illegal permanence could be forgiven by the payment of a fine.

means of subsistence and proof of accommodation.²⁷⁹

The strict proof of means of subsistence²⁸⁰ in this period of economic crisis and unemployment can remove even legal residents from their rights. For the renewal of a Residence Permit the foreign citizen is obliged to prove the means of subsistence (the reference value is the minimum national salary – 450.00 Euros month - that increases in case of a large family (that reference value an additional 50% for spouse and 30% for each child). The family reunion procedure is also affected by identical rules.

Long-term solution

In cases where the third-country national receives a residence permit under foreigner's law this can be considered a long term solution. Furthermore, in Portugal a Nationality Law was introduced at the end of 2006. Pursuant to Article 6 paragraph 5 of this law, Portuguese nationality may be granted to adults who have been born on the national territory and who have remained on there the ten years immediately preceding the date of the application, regardless of the irregularity of their situation.

5 Dimensions of destitution

This section will give a detailed overview of what it means to be destitute for asylum seekers awaiting the outcome of their appeal, rejected asylum seekers, holders and "overstayers" of a health visa, and illegally staying third-country nationals who are unable to be removed by the State.

5.1 Health

"I have problems with falling asleep at night. I think a lot about all my problems. It is hard to forget. Why did this happen to me? I feel depressed."

– Male rejected asylum seeker from Sierra Leone, 37 years old –

Access to health care

As a recent study on maternal health care has shown, in Portugal immigrant families are often of a greater social disadvantage than Portuguese families. Their vulnerability emerges in relation to their poorer health.²⁸¹ A greater access to health care is important for them.

²⁷⁹ Article 77 of Law 23/2007. For a residence permit for exceptional circumstances a special regime is applied, see Article 123 of the same law.

²⁸⁰ Ordinance no. 1586/2007, 11th December (Original language: Portaria n.º 1586/2007, de 11 de Dezembro).

²⁸¹ Maria do Céu Machado et al., "Are they treated differently? Maternal and Childhood Healthcare in an Immigrant Population", Lisbon, 2007.

Asylum seekers awaiting the outcome of their appeal, holders of a health visa, illegally staying third-country nationals and rejected asylum seekers have the right to access primary, secondary and emergency health care. Although a right to health care exists, in most cases the third-country nationals are charged the costs of health treatment. Holders of a health visa can receive the medical treatment for the purpose of which they came to Portugal free of charge.

The right to health care is guaranteed in the Portuguese Constitution, which states, "everyone shall possess the right to health protection."²⁸² Further, the Constitution provides that the State is under a duty to guarantee access by every citizen regardless of his economic situation, to preventive, curative and rehabilitative medical care.²⁸³ According to the information booklet of the High Commissioner for Immigration and Minorities, the provisions in the Constitution on the right to health care also apply to third-country nationals.²⁸⁴ The right to have access to health care has been further regulated in Order no. 25360 of 12 December 2001, issued by the Ministry of Health. Pursuant to this Order, illegally staying third-country nationals have a right to health care.²⁸⁵ Health Centres providing primary care or hospitals may not refuse medical treatment to a person on the basis of any reason connected with nationality, lack of financial means, lack of legal status or any other grounds.

To receive medical treatment, third-country nationals have to show a National Health Service card (Cartão de Utente do SNS). Asylum seekers, including those awaiting the outcome of their appeals, and other third-country nationals legally residing in the Portuguese territory can obtain a National Health Service card from the Health Centre in their area or from a Citizen's Shop. Illegally staying third-country nationals can only make use of the health care services if they can prove they have been living for more than ninety days in Portugal. A document proving residence is issued by the local borough council upon production of two statements by local

²⁸² Article 64 paragraph 1 of the Portuguese Constitution.

²⁸³ Article 64 paragraph 3 a) of the Portuguese Constitution.

²⁸⁴ *Immigration in Portugal – useful information 2008*, ACIDI, p. 74. See also Article 15 of the Portuguese Constitution which provides that foreigners and stateless persons who fund themselves or who reside in Portugal shall enjoy the same rights and be subject to the same duties as Portuguese citizens. No exception is made with respect to health care.

²⁸⁵ Original language: Despacho do Ministério da Saúde n.º 25360/01, de 12 de Dezembro.

residents who declare that the person concerned is living in their neighbourhood.²⁸⁶

Although in theory all third-country nationals have the right to access health care, the exercise of this right is often denied in practice.

The main obstacles to receiving medical treatment identified on the basis of the interviews are:

Administrative barriers

The Portuguese health system is very complex. According to Centro Pe. Alves Correia²⁸⁷ (hereinafter referred to as “CEPAC”) some rejected asylum seekers and illegally staying third-country nationals have difficulties obtaining a national health card since they move from one address to another and therefore cannot prove that they have been residing for more than ninety days in Portugal. It is also complicated for asylum seekers, including those awaiting the outcome of their appeal, to find their way in the health system. Santa Casa provides assistance to asylum seekers to obtain national health cards, because of the complex procedures. No such assistance is provided to rejected asylum seekers because the support of Santa Casa in principle discontinues after an asylum seeker’s claim has been finally rejected.

Non-recognition of medical need

PROSAUDESC noted that the medical care offered to rejected asylum seekers and other illegally staying third-country nationals depends very much on the practice exercised in each health centre and not on the medical situation of the person in question. The Portuguese law on health care is applied in very different ways. There are no clear working procedures regarding medical services offered to illegally staying third-country nationals. As a result, the health care provided differs per health centre and hospital and depends on the good will of the administrative and medical staff. Further, when the medical condition of a rejected asylum seeker or other illegally staying third-country national is not considered to be an emergency, access to medical services is not guaranteed. PROSAUDESC provided an example of an irregular female migrants receiving medical assistance in one health centre, but being systematically refused medical assistance in another health centre. The former director of CATSJD noted that medical specialists often deny that an irregular migrant is seriously ill

and therefore withhold the necessary medical care.

Lack of finances

Rejected asylum seekers and other illegally staying third-country nationals are in principle charged for the costs of health treatment. One of the exceptions to this rule are situations where there is a risk to Public Health and there is a need for medical care; this applies to all infectious diseases (such as Tuberculosis, HIV/AIDS and sexually transmitted diseases), maternal health, infant health and family planning, and vaccination.

PROSAUDESC suggests that another major obstacle to receiving health care is the inability to pay for the costs of the medical treatment. General rules prescribe that those who have low incomes are exempt from paying medical bills. However, although rejected asylum seekers and illegally staying third-country nationals may apply for exemption, they are prevented from doing so by administrative obstacles. Santa Casa/Social Security writes declarations for asylum seekers stating they are not financially capable of paying the bill and therefore should be exempt. In some exceptional cases this procedure is also possible for illegally staying third-country nationals or rejected asylum seekers. No similar possibility is offered to holders of a health visa. In order to guarantee that rejected asylum seekers and other illegally staying third-country nationals receive much needed medical treatment, some NGOs, like CEPAC, pay the medical bill.

Mental health condition

A significant number of the interviewees reported having mental health problems at the time of the interview. Mental health problems mentioned by the interviewees were depression, stress, post-traumatic disorder and schizophrenia. These mental health problems manifest themselves in headaches, flashbacks, not being able to sleep for more than 1 or 2 hours per night, loss of energy, a sense of restlessness and feeling tired all the time. Only some of the interviewees received counselling for their mental health problems. One interviewed rejected asylum seeker is being treated for his post-traumatic disorder at the Centre for Victims of Torture, a private institute. Two interviewed irregular migrants with schizophrenia are staying in a psychiatric hospital in Lisbon, where they receive medication and therapy. Their social worker declared that they were in need of specialised care in a psychiatric institute, but that their irregular status was a barrier to transferring them to that institute.

²⁸⁶Article 34 of Decree-Law No. 135/99, 22rd April.

²⁸⁷CEPAC is a catholic organization that works mostly with immigrants from Africa. The organization has a social service with a street team. CEPAC provides medical and juridical support and distributes food products and clothes.

More and more third-country nationals with mental health problems seek the help of the NGOs interviewed. Many suffer from serious forms of depression and stress. They often complain of insomnia and are unable to cope with their destitute and irregular situation. Some turn to alcohol or drugs to try and forget about their problems. Third-country nationals with mental health problems living on the streets are hardest to reach and do not receive the medical attention that is required. The former Director of CATSJD highlighted the fact that many destitute irregular migrants with a history of living on the streets suffered from mental health problems as a result of this horrific experience.

What is typical for the cases described above is that as a result of their mental health problems, return to their country of origin becomes less and less feasible. The third-country nationals themselves are not in a position to decide or arrange their return, while at the same time the Portuguese State neither tries to remove them - in most cases - or ceases in its attempts to do so if removal turns out not to be realistic. The result is that the NGOs interviewed have to provide services and essential materials to these "remaining cases" for which no solution exists. JRS Portugal in particular is faced with this problem, and has been providing services for many years to the same irregular migrants who are living on the streets for long periods and for whom no way out can be found. Furthermore, the NGOs spoken to have limited financial resources and are not always in the position to respond to these cases in an adequate way.

The stories told by the interviewees also indicate that mental health is a matter of concern for rejected asylum seekers, asylum seekers awaiting the outcome of their appeal, holders and "overstayers" of a health visa and irregular migrants. According to those interviewed, these mental health problems were caused by the insecurity of their stay in Portugal and the inability to meet their basic needs. Lacking a residence status and having an uncertain legal future proved to be major sources of depression and stress. In addition, it is the interviewees' destitute situation itself which has a negative impact on their mental health condition. The insecurity of meeting basic needs and their continued reliance on others leads to high levels of stress and feelings of depression. In particular, the anxiety of one day ending up on the streets affected the well-being of the interviewees. Another cause of their mental health problems relates to traumatic experiences in the country of origin. One of the interviewees witnessed the murder of his relatives and another interviewee was the victim of torture.

Poor mental health has a negative impact on other aspects of the lives of rejected asylum seekers and others with an illegal stay on the territory. Many see that their general living situation worsens. For example, some of the interviewees reported having lost their jobs and houses after their mental health problems started.

Physical condition

Not only do a large number of destitute third-country nationals have mental health problems, their physical condition is also considered to be generally weak. Based upon information provided by NGOs and the health problems mentioned by the interviewees, common physical health problems among rejected asylum seekers, asylum seekers awaiting the outcome of their appeal, holders and "overstayers" of a health visa and irregular migrants are infectious diseases such as Tuberculosis and HIV/AIDS, Hepatitis, cancer, heart problems and chronic diseases such as diabetes. In their work, NGO also encounter a large number of pregnant migrant women whose condition is of great concern to them. Among the interviewees, physical problems mentioned were cancer, blood disease, toothache and back pain.

These physical problems are often caused by sleeping rough and malnutrition. Some of the focus group has difficulties in following a healthy diet; they only eat dry food products but no fresh food such as dairy products and fruit and vegetables. In cases where a special diet is required for medical reasons, such as diabetes, a lack of financial resources means they are unable to buy specific foods. Their medical situation therefore deteriorates.

Generally, those with chronic diseases are extremely vulnerable since they need to have ongoing medical support and medicine, which is often lacking. Further, health problems are often more serious for those who overstay their health visa, because they already have a history of serious health problems so their general health condition is lower than average. PROSAUDESC explained that in general this group of irregular migrants receive treatment for the symptoms of the disease only rather than the root cause itself. For this reason many of them are still seriously ill, even though their health visa is not being renewed.

Being ill or disabled lowers the chance, or makes it impossible, to take up (irregular) employment and secure a certain level of income. For one of the interviewees his handicap was an obstacle to finding work in the informal labour market. The informal labour market offers mainly low-skilled physical labour; he is incapable of fulfilling this work because he is missing one arm.

Medical care by NGOs

Several NGOs have decided to provide free medical assistance to rejected asylum seekers, asylum seekers awaiting the outcome of their appeal, holders and “overstayers” of a health visa and irregular migrants for two reasons. Firstly, as a response to the current practice of Portuguese hospitals and health centres that deny third country nationals access to medical services, especially those of a non-emergency nature. Secondly, because no appropriate continuous medical care is given and no adequate follow-up takes place in case of a medical operation.

Due to the gaps in the health care system, CEPAC offers weekly free medical consults and medicine to a large number of beneficiaries. JRS Portugal also provides medical care to third-country nationals; they have weekly consultations and provide medicine. They receive medicine from pharmacists or through private donations. The Portuguese health system also leaves obstacles to the provision of health care by NGOs. A problem encountered by JRS Portugal is the access to the medical files of those who have been treated in hospital. JRS Portugal explained that when a rejected asylum seeker or irregular migrant comes to them for follow-up treatment after treatment in hospital, they need to know the specific medical history of that person. A copy of the medical report can be obtained for free, but in some cases they are difficult to obtain since medical information is confidential and normally can only be shared among doctors. A written request must be presented to the hospital administration, and it often takes a long time before they respond.

5.2 Housing/Shelter

“I have been sleeping in an abandoned car during the night. I was begging on the streets for food. My biggest fear is to end up at the streets again.”

– Male irregular migrant from Morocco, 18 years old –

Right to housing

Rejected asylum seekers, third-country nationals who “overstay” their health visa and irregular migrants have no entitlements to public housing nor receive financial support to rent private accommodation. Asylum seekers, refugees and holders of a humanitarian status have the possibility of staying in a reception centre or are given the financial support to rent private accommodation. Support for housing is terminated if asylum seekers are in the appeals phase of the asylum procedure.²⁸⁸

Holders of a health visa have to provide housing for themselves; the Portuguese State does not take responsibility. In some cases the embassies of the country of origin provide housing. For example, the Cape Verde embassy has arranged that persons from their country receiving medical treatment in Portugal can reside in a hostel on their expenses. They can also be taken in by relatives, friends or members of their national community, usually in a temporary and precarious way.

Change in housing situation due to loss of status

The story was often heard that due to a loss of status provided under asylum law, rejected asylum seekers lose their entitlements to housing and the majority rely on friends and charity for shelter from that moment onwards. Housing is not secure without a residence status. An interviewee whose humanitarian status had been withdrawn had to leave his accommodation. He could not afford the rent, barred from taking up legal employment any more which was a barrier to finding paid employment. He then slept rough for 4 months on the streets, some nights in a shelter. He has been staying at the accommodation centre of JRS Portugal for several months now and fears living on the streets again in future.

Sleeping arrangements

During the field trip to Portugal, the only access to third-country nationals for interview purposes was to those staying at the accommodation centre of JRS Portugal. JRS Portugal only has limited capacity to host third-country nationals who have no other place to stay, and the demand is higher than the places offered. Many rejected asylum seekers and irregular migrants are staying on the streets, because they are not in a position to arrange accommodation themselves and do not have friends or charity to rely on for housing. The interviewees consider themselves to be very fortunate to be able to stay in the JRS Portugal accommodation centre, even though they can only stay temporarily at the centre. As a result, securing housing in the future was of great concern to them and in some cases led to high levels of anxiety, stress and sleepless nights. Many fear ending up in the streets (again). Three of the interviewees had been living on the streets before they were hosted by JRS Portugal. One irregular migrant slept in an abandoned car for several months and begged on the streets during the day. Another irregular migrant moved from one abandoned house to another in a city near Lisbon for a long period of time. Some of the interviewees had been staying for several nights in dormitories offered to homeless people in the city centre of Lisbon. Besides relying on charity and public dormitories for housing, irregular

²⁸⁸ Article 60 paragraph 1 of Refugees and Asylum Law.

migrants also stay with friends. An interviewed irregular female migrant had been staying for several years at the house of a friend of her husband. The husband himself was still residing in their home country. He paid for the rent and bought them food. The moment he returned to his home country, she was forced to leave the house.

Need for temporary housing

Temporary housing was considered to be one of the biggest needs for rejected asylum seekers and other illegally staying third-country nationals by NGOs. Currently, there is a lack of emergency housing for rejected asylum seekers, asylum seekers awaiting the outcome of their appeal, holders and “overstayers” of a health visa and irregular migrants who are unsuccessful at finding accommodation for themselves. From 2003 to 2005 CATSJD functioned as a hostel for irregular migrants and rejected asylum seekers. The Centre closed due to a lack of resources. During its two years of activity the Centre gave shelter to about 300 persons. JRS Portugal’s accommodation centre is the successor to this centre and is intended as a short term solution to housing. The third-country nationals hosted at the centre are expected to move on to other forms of accommodation after 3 or 6 months in the centre. However, JRS Portugal informed us that it is not always easy for the hosted persons to find durable solutions to their housing problems and, as a consequence, many stay in the centre longer than foreseen. Furthermore, JRS Portugal can only offer a limited number of places and the demand for accommodation is higher than their capacity. The former director of CTASJSD told a similar story. In their centre the normal period to offer shelter was one month, which could be extended to three months. In practice, however, the period extended to six months or even a year. The reason for such a long stay was that no alternative could be found for housing; often the person concerned was very sick or had no papers. In exceptional cases Santa Casa staff gives continued support to rejected asylum seekers whose situations are very precarious and who cannot afford housing themselves or do not receive support from friends or their community.

Access to public dormitories

According to CEPAC, many of the rejected asylum seekers or irregular migrants end up sleeping on the streets. Private housing can only be afforded by those who find full-time work in the informal labour market. CEPAC estimated that the rent of a simple bedroom would be on average 150 euro per month, but rents are continuously rising. Irregular migrants have difficulties accessing public dormitories in the

city centre of Lisbon. According to CEPAC, irregular migrants are not allowed to make use of the housing facilities offered by Santa Casa. Only in exceptional cases are irregular migrants or rejected asylum seekers accepted in public dormitories, but only for one or two nights after which time they end up on the streets again. There is one shelter facility that may accept them for a longer period, but only if they speak Portuguese. However, this centre is aimed at homeless people with drug addiction problems, which makes it difficult for irregular migrants and rejected asylum seekers to stay there. CEPAC reported that public dormitories are unsafe places and that most third-country nationals prefer to stay on the streets because they fear being robbed in the dormitories. An interviewed asylum seeker awaiting the outcome of his appeal always felt in danger when staying in a shelter in Lisbon because fights often broke out between the residents. Irregular migrants, asylum seekers awaiting the outcome of their appeal and rejected asylum seekers are particularly vulnerable when staying in shelter facilities for homeless people because they are from a different culture and often do not speak Portuguese.

Effects of insecure sleeping arrangements

The unstable housing situation results in high levels of stress and anxiety. Many of the interviewees were in constant fear of ending up on the streets. Desperation was heard in their voices. Most of them see no way out of their situation and have no prospect of arranging housing for themselves after their stay at JRS Portugal’s accommodation centre comes to an end. Some of the interviewed migrants hope to find irregular work to allow them to rent private housing. However, the chance of finding work in the informal labour market is not very high. Even for those who are successful, the work found is only short-term and the wages are not sufficient to rent accommodation. One of the interviewees is severely disabled, which makes his need to find proper housing even more serious. He also hopes to find work in the informal labour market, which is not very realistic. The fact that the interviewees have to rely on others for housing and are unable to take their own responsibility lowers their self-esteem.

5.3 Food/Clothing

“When I was staying at a friend’s place he bought food for me and my children. I was unable to buy my own food. When he left I had a problem. Sometimes the woman next door gave me some food.”

– Female migrant who “overstayed” her health visa, 39 years old –

The Portuguese State does not provide statutory support for food to rejected asylum seekers, asylum seekers awaiting the outcome of their appeal,²⁸⁹ holders and “overstayers” of a health visa and irregular migrants. As a result, these groups of third-country nationals almost entirely rely on charity organisations, friends or public soup kitchens for their food. The majority have no control over access to food on their own. This general situation is reflected by the stories of the interviewees; all depend on the food provided by NGOs or public soup kitchens. The Banco Alimentar (Food Bank) distributes food products among many organisations with various backgrounds, which then distribute them among their beneficiaries. Each organisation sets its own criteria as to whom food will be supplied to. This may include irregular migrants, rejected asylum seekers and holders of a health visa. In Lisbon, public food kitchens are facilitated by Santa Casa. However, irregular migrants are not easily accepted at their food kitchens. There are a few soup kitchens in Lisbon who accept any person regardless of status. In particular, the Sisters of Saint Vincent of Paul have a soup kitchen for irregular migrants. JRS Portugal sends all their beneficiaries to their refectory for a meal during the day. JRS Portugal, as well as PROSAUDESC and CEPAC, provide food or hygiene products to rejected asylum seekers, asylum seekers awaiting the outcome of their appeal, holders and “overstayers” of a health visa and irregular migrants. Clothing is also given to those in need. JRS Portugal’s Social Aid Office has noted an increase in requests for food and clothing over the past few years. Due to financial restraints, the NGOs cannot sufficiently meet the requirements for food and clothing for the respective third-country nationals. The inability of rejected asylum seekers to meet their nutritional needs has led Santa Casa to provide continued support to rejected asylum seekers. When asked about why they decide to give such continuous support, Santa Casa’s representative answered: “If we don’t support them, nobody will.” Santa Casa only provides continued support in exceptional cases if persons find themselves in extremely vulnerable situations, such as families with minors or persons with serious health problems.

At present access to food is secured for the interviewees through their housing situation, but many had problems receiving sufficient food in the past and expressed worries about this in the future. Before their stay in the centre, many interviewees relied on friends or persons living in the neighbourhood for their food. One of the

²⁸⁹Social support ends with the final decision on the application for asylum or subsidiary protection, independently of the lodging of the judicial remedy. (Article 60 paragraph 1 of Refugees and Asylum Law).

interviewees had been living for several months on the streets and had to beg for money to buy food each day. Another interviewee visited a soup kitchen regularly for a hot meal. Uncertainty about having a meal each day was a great cause of stress for many interviewees. Even though they found themselves in this destitute situation where not even food could be guaranteed, the interviewees did not consider returning to their country of origin because of well-founded fears of persecution or the existence of obstacles taking away the element of choice. They were forced to remain in this situation of destitution.

5.4 Work/Social Welfare

“If I had the right to work I would not need help from anyone, I had a good life back home. I could take care of my family, but now I cannot even take care of myself”

– Asylum seeker awaiting the outcome of appeal, Armenian background, 31 years old –

Right to access the formal labour market – Right to statutory support

Asylum seekers awaiting the outcome of their appeal are only allowed to access the formal labour market if they are in the possession of a provisional residence permit.²⁹⁰ However, such a permit is not issued or renewed in the appeals phase, resulting in the exclusion of asylum seekers who have lodged an appeal from the labour market. This group also has no right to statutory support.²⁹¹ Rejected asylum seekers, holders of a health visa and irregular migrants have no right to take up employment at the formal labour market in Portugal. Furthermore, they too are excluded from any kind of statutory support. Given these facts, these third-country nationals have no other possibility than to work in the informal labour market if they want to support themselves. All of the interviewees are aware of the fact that they are prohibited from working. The majority of the interviewees had been engaged in temporary working activities in Portugal at one time or another or were still currently working in the informal labour market.

Motives to find work

All interviewees expressed a strong wish to be employed, even if this implied that they have to take up irregular employment. The main motive to find work is to be able to support oneself and one’s family. The interviewees see finding a job in the informal labour market as the only solution to leave their destitute and

²⁹⁰The decision of asylum refusal is susceptible of judicial impugnation before administrative courts, within 15 days, with suspended effect (Article 27 of the Refugees and Asylum Law).

²⁹¹Article 31 of the Refugees and Asylum Law.

dependent situation behind. One of the interviewees mentioned that he had a job when in possession of a humanitarian status, but he lost this job immediately after his humanitarian status was withdrawn and was then unsuccessful in finding irregular work. Shortly after, he also had to leave his house, because he could no longer afford the rent. Now, he is destitute, relies on NGOs for shelter and has been unemployed for more than two years. He still has no success in finding work in the informal labour market. Other reasons to find work were the wish to contribute to society, increase self-esteem, become less-dependent, feel useful, be proud of oneself and bring structure to the day. According to CEPAC, some of the migrants had mental health problems and low self-esteem because they were not allowed to work and had nothing to do all day. Similarly, it was noted by JRS Portugal that by prohibiting the right to work irregular migrants and rejected asylum seekers are being excluded from society and withheld the means to be financially independent.

Success in finding work

It is difficult for illegally staying third-country nationals to find work in the informal labour market. One NGO explained that the unemployment rate in Portugal has compounded over time the limited possibilities in the irregular market. Most interviewees are only successful in finding short-term activities once in a while. One interviewee stated that his health condition and physical disability was a barrier to finding work.

Type of work and salary

It is difficult to determine the average wages earned by the interviewees. One interviewee answered that he earned about 10 Euro per day for work at a construction site, while another interviewee estimated that he could earn between 700 and 800 Euro per month without specifying which kind of work he had in mind. A female interviewee expressed that she did not have a clear agreement on payment at her work as a hairdresser; usually it was dependent on what her clients were willing to give her. Work found in the informal labour market is often short-term. According to the NGOs interviewed, work in the informal labour market by illegally staying third-country nationals usually entails construction work (by men) or cleaning (by women). Other examples of work carried out by the interviewees included hair dressing and transportation.

Exploitation

Cases of exploitation are not uncommon for rejected asylum seekers and other illegally staying third-country nationals engaged in irregular working activities. Irregular migrants

and rejected asylum seekers for which return is not an option are extremely vulnerable when compared to the irregular worker who comes for a certain period to Portugal solely to earn money before returning to their home country. Rejected asylum seekers and irregular migrants who are not removed for practical or human rights reasons lack the element of choice to return. As a consequence, they are desperate and willing to take any kind of job even if it is unsafe or very badly paid. Further, many of this group have severe mental health problems as a result of violence experienced in their country of origin or their destitute situation. This can mean they have difficulties standing up for themselves when necessary.

One of the interviewees, a victim of human trafficking, came to Portugal at the age of 14 and was forced to clean and take care of children for almost 5 years in the house of the woman who brought her to Portugal. Fortunately, she managed to escape the house and the woman will be prosecuted for this crime. Most of the NGOs interviewed explain the high number of exploitation cases to be the result of the extreme vulnerable position of these illegally staying third-country nationals. Examples of exploitation were non-payment of wages for work done and accidents due to unsafe working conditions.

5.5 Life Planning

“If just someone would offer me the possibility I will go and start living. I want to live like others. I do not know what will happen next.”

– Male rejected asylum seeker from Sudan (Darfur), 21 years old –

Prisoners of destitution

A sense of powerlessness was felt during the interviews with the migrants. Many expressed having lost control over their own lives since they found themselves in a destitute situation. This sense of powerlessness concerned not only the dependency on others to meet basic needs, but also concerned their illegal stay in the country. Many asked themselves how they ended up in such a situation and felt there was no way out. The only solution in their eyes was the granting of residence rights by the State, since returning to their country of origin was no option for them.

According to NGOs working directly with irregular migrants and rejected asylum seekers, the chief obstacle to removal is the lack of identity papers and the unwillingness of the embassy to provide travel documents. In addition, Santa Casa also heard of cases where the rejected asylum seeker fears persecution or is too sick to be returned. According to JRS Portugal, many rejected asylum seekers and irregular migrants also

have feelings of shame about their rejected migrant project and therefore do not return. With respect to those who “overstayed” their health visa, many believe they have not been adequately treated and feel too sick to be returned, or they fear extreme hardship without any reception facilities able to treat their physical condition.

A third of the interviewees expressed an inability to return as a result of these obstacles. Around another third of the interviewees are unable to return to their country of origin because of humanitarian reasons of a medical character. Other reasons heard were the fear of persecution, giving support to family back home and the lack of ties with the home country. Some have lost family members in their country or origin. One female interviewee was trafficked as a minor, and her passport was taken from her. For a long period of time she has been trying to get identity documents. Another story was told by a male rejected asylum seeker from Sudan, who had been detained but was released because the necessary documents could not be obtained. The Sudanese embassy systematically refuses to issue a *laissez-passer*. Two irregular migrants who are unable to return for humanitarian reasons have severe mental health problems and are staying in a psychiatric hospital. In their countries of origin no specific psychiatric care can be provided and no family members can be found. For these reasons, the Portuguese authorities have suspended the removal process for one of the irregular migrants without offering a solution to the case. These two migrants cannot apply for a residence permit for health reasons, because they do not meet the requirements (proof of own means of subsistence). They are forced to stay in an irregular situation and, because of their irregular stay they cannot be referred to a psychiatric institute which would provide them with the specialised medical care they need. Those whose health visa is about to expire fear going back. One migrant had his arm amputated in Portugal. He expects to face extreme hardship upon return, since he comes from a farmer’s family and they have neither the financial means nor reception facilities to take care for him. Another interviewee accompanied her children who both needed treatment. Their health visa has expired, although one of the children is still undergoing treatment. She fears that her children will die of their disease in their home country; two of her children already died due to a lack of medical treatment.

All of the interviewees felt stuck in their situation and felt no way out of it. They believe they are being forced to remain in destitution. Their cases are illustrative of many who find

themselves in a similar situation. In all cases where obstacles exist for removal, no financial or other support is given by the Portuguese State.

Living a life in destitution

Rejected asylum seekers, asylum seekers awaiting the outcome of their appeal, holders and “overstayers” of a health visa and irregular migrants live a life on the margins of society. As the former director of CATSJD put it, rejected asylum seekers and irregular migrants find themselves in a “situation of exclusion.” They are unable to participate in society fully because they have no right to access the formal labour market. They have little to no social contacts and their days are filled with strategies to survive and, apart from that, they are extremely bored. All of the interviewees felt socially excluded and were very negative about their stay in Portugal. For a number of interviewees, their destitute situation resulted in depression and a loss of purpose in life. They feel frustrated about not being able to live the life they want. Most interviewees found it unbearable that their destitute situation was long-term with little likelihood of improvement. Some have been in their destitute situation for long periods of time with any change in the future unlikely.

One interviewee declared: “I do not want everything for free. I do not want to be a beggar. I make a sign in my heart every time I receive help from someone.” The lack of the right to access the formal labour market, confirmed by JRS Portugal, not only creates dependency, it also results in not being able to participate in society and a lack of structure during the day. . For the young male interviewees this was especially hard to cope with. A male migrant who was economically successful in his country of origin found it very difficult not to be able to take care of his family any more.

Some of the interviewees confided they felt very lonely and had no real friends, although several of the interviewees did have social contacts with persons of the same nationality as them. Some of these persons find themselves in the same situation, while others have been granted refugee status and are doing relatively well. According to CEPAC, several informal migrant networks exist within Portugal. All networks show solidarity, but they cannot provide all the help needed because the majority of those migrants within the network are living in difficult circumstances. In general, the African communities are quite close and provide the most help among each other when compared with other communities.

The days of the interviewed migrants are mainly filled with strategies to survive. Many

are actively looking for a job, and occasionally they have short-term jobs. Nonetheless, some felt extremely bored and dissatisfied as a result of having nothing to do during the day. A positive opportunity for the migrants is that several NGOs in Lisbon are providing language and computer courses. A great number of the interviewed migrants participate in these courses and feel grateful that they are able to learn and improve their skills. For some, the following of a course also provides a structure to their day, while others hope to improve their chances in the job market. Few interviewed migrants noted that they felt too occupied by their problems to be able to follow education.

Many of the interviewees have not developed clear goals about their future. In their view, the question of whether they have a future depends on whether they will receive residence rights in Portugal. As one male rejected asylum seeker from Sierra Leone expressed: "Getting a right to stay is the only thing in my life." For another interviewee, reuniting with his family was the only wish he had for the future. According to CEPAC, few third-country nationals in a destitute situation consider returning to their country of origin as a real option. What is clear to all of the interviewees is that they want to remain in Portugal, even when this means living a life in destitution.

6 Conclusions and recommendations

6.1 Inconsistencies and flaws in the State's law, policies and practice resulting in destitution

Access to health care

1. Although a right to health care exists for the third-country nationals within the focus group, this is often denied in practice due to complex administrative procedures and the charging of the medical care.

Social support

2. Access to emergency social services is systematically denied, independent of the seriousness of the person's situation.
3. The Portuguese State does not, as a general rule, provide continued social support such as housing and food after an asylum claim has been rejected in the administrative phase of the asylum procedure.
4. The Portuguese State does not provide continued social support such as housing and food for rejected asylum seekers up until the moment of return, not even for those where obstacles to return exist.
5. The Portuguese State does not provide social support such as housing and food for

irregular migrants, including "overstayers" of a health visa, who cannot be removed because of the existence of obstacles.

6. The Portuguese State does not provide additional support for holders of a health visa who are unable to meet their basic needs.

Return

7. The return policy and practice of Portugal has its limitations; not all illegally staying third-country nationals can be removed.

6.2 Consequences of the State's laws, policies and practice

For rejected asylum seekers, asylum seekers awaiting the outcome of their appeal, holders and "overstayers" of a health visa and irregular migrants unable to be removed by the State, the consequences are the following:

1. Destitution weakens their mental and physical health condition, which worsens over time.
2. Third-country nationals with serious mental health problems are the hardest to reach and affected most by the destitute situation.
3. Being forced into destitution with no way out leads to depression, loss of a purpose in life and low self-esteem.
4. The prohibition to access the formal labour market results in many third-country nationals seeking irregular work and being subject to exploitation.
5. The increasing number of homeless third-country nationals, often with serious mental health problems.

For society

6. NGOs are fulfilling typical State tasks such as the provision of housing, food supply and medical care in order to combat destitution as much as possible. In many cases, the services of the NGOs are essential for the survival of destitute third-country nationals. However, quite often NGOs that work with this population are overloaded and unable to provide an adequate answer to the needs of their users, since they do not have enough resources (not only are they unable to share the cases with better resourced institutions that simply refuse to assist destitute migrants, but they are also under funded, since their target group is not recognised as a priority or even as a reality by national authorities that usually finance NGOs).

7. Destitute third-country nationals are socially excluded and unable to contribute to society. Society is not benefiting from their skills.
8. Creation of growing number of “third-class citizens” who are staying in Portugal for long periods and are not being removed.

Regarding Return

9. The withholding of all forms of support leading to destitution does not stimulate return. Many rejected asylum seekers, “overstayers” of health visas and irregular migrants would rather remain in their destitute situation than return to their country of origin.

6.3 Recommendations

Medical care

1. Access to health care in its two dimensions (physical and psychological/mental) should be granted in all mentioned cases, as stipulated by the Portuguese Constitution and Legislation, throughout the entire stay of the third-country national in Portugal.

To achieve this:

- Any obstacles, administrative or otherwise, which restrict access to health care, should be removed;
- Clear working instructions and guidance by the Department of Health should be given to medical, administrative and other relevant staff, to guarantee that those third-country nationals in medical need receive medical treatment;
- Education on human rights issues should be promoted for health and social care workers, especially with respect to irregular migrants.

Social support

2. Access to emergency social services should be granted to all individuals, irrespective of their status.
3. Social support such as housing and food should be guaranteed for all asylum seekers awaiting the outcome of their

appeal. In addition, the right to access the formal labour market should be guaranteed in all cases.

4. Continued social support should be given to rejected asylum seekers until the moment that they have left the Portuguese territory, or they should be given the right to work in order to support themselves.
5. Additional social support should be given to holders of a health visa when they are unable to meet their basic needs. The evaluation and decision whether additional assistance is necessary should be laid down in clear procedures.
6. In cases where the Portuguese State recognises obstacles to return, irregular migrants should receive social support until the moment they are removed from the territory.
7. Residence rights
8. The State should grant a (temporary) residence status with the right to social support or the right to work for those illegally staying third-country nationals who are unable to be removed within a certain period of time after which it became clear that a barrier exists to return.

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Case Studies in Romania

1. Case Study

1.1. A Typical Case

– Yusef, a rejected asylum seeker with toleration, from Somalia, 28 years old –

Yusef had to flee Somalia in 1998 because of the outbreak of civil war. He lost all his family during the hostilities. His own life was at risk and he decided to flee before it was too late. Yusef used to be a driver for the Red Cross. He fled to Kenya, where he stayed for some years. However, in Kenya he was also threatened because of his ethnic background and he had to leave the country again. Through Turkey he travelled to Romania, where he arrived in the winter of 2002. He directly applied for asylum, but was refused by the immigration authorities in the administrative procedure. His appeal at court against his negative decision was rejected in 2003. Yusef then applied for a toleration to remain on the territory, which was granted to him in the same year.

Yusef has been living in a tolerated situation on the Romanian territory for more than two and a half years; due to objective reasons the Romanian State is unable to remove him back to his country of origin. He has been reporting regularly to the responsible authorities - currently the Direction of Migration.

During the asylum process, Yusef was accommodated in a reception centre of the Romanian Immigration Office. He had to leave the centre after his claim was finally rejected by the court. After some time on the streets, Yusef was able to stay at the accommodation centre of JRS Romania (“Pedro Arrupe” centre) in the beginning of 2004. Until the end of 2006, Yusef stayed for long periods of time at JRS Romania’s accommodation centre, but also for some periods he was living on the streets. Yusef had to leave the centre one month before the interview took place because of his deteriorating mental health, which had a negative impact on the other residents at the centre.

From the moment at which Yusef became tolerated up to the moment of the interview, Yusef lived in abject poverty and had been struggling every day to get food and other basic needs. He regularly visits a NGO to collect food packages. JRS Romania also provides him with some food. “I do not have money to buy my own food. I eat whatever is given to me”, says Yusef.

Yusef is not allowed to take up employment in the formal labour market and also is not

entitled to social support. He says: “how does the Romanian State expect us to live, if we cannot work? I am looking for an illegal job now at the construction sites. I need money. What do I need to do otherwise?” In the opinion of Yusef, no one wants to give him work, because he has no papers and also because of his poor appearance after periods of living on the streets. At the time of the interview, Yusef had been living on the streets of Bucharest for over one month; he has no friends to support him. According to Yusef, “If I am lucky I do have some money and can go to an internet cafe during the night, if not, I walk around the city centre of Bucharest for hours. The streets of Bucharest are not safe at night, which is why I do not want to rest somewhere in public. I have been threatened sometimes by Romanians, because they see that I am different. When it is daytime again I go to an NGO and sleep in their garden for several hours.” Yusef has nothing to do during the day; he sometimes looks for a job or sits behind a computer using the internet at JRS Romania.

Yusef is physically very weak and also has mental health problems. Living for several years in destitution has had a severe impact on his health. As he lives on the streets and is unable to get proper rest his health condition is deteriorating. He says that he does not visit a doctor, because they will not accept him. Sometimes JRS Romania will give him medicine if he has a viral infection. His mental health situation is worrying. He is not entitled to medical insurance nor does he have money to pay for the medical consultation and the medicine. Yusef has had many bad experiences in his life. He saw his family killed, was forced to leave everything he had behind, and now he has been living in abject poverty for many years in Romania, without any improvement in his situation. Yusef receives no counselling for his mental health problems. “All of my problems I have now are because I have no residence papers.” Yusef was very confused and upset during the interview. He said he feels neglected by society and that he sees no end to his destitute situation. “Sometimes I am crying on the street. Why did I come to Romania?” Yusef cannot go back to Somalia.²⁹² He says that nothing positive has happened to him so far in Romania. Yusef describes his stay in Romania as “another hell after where I fled

²⁹² According to information provided by JRS Romania after the interview, Yusef, in an act of despair, contacted the International Organisation for Migration (IOM) for voluntary return. However, IOM did not want to assist his return to Somalia because of the absence of a safe travel route and the instable and violent situation in Somalia.

from.” He finds it hard to understand why he does not receive residence status. “I think I can make it here. I got used to Romania; I have learned the language. I want to have a chance.” Yusef wants to start living again.

1.2. Context of the Case

The story told by Yusef is illustrative of third-country nationals in the possession of a toleration who are left without any form of state support. His case is also typical of third-country nationals who are living on the streets of Bucharest and are suffering from mental health problems. Among the interviewed persons were rejected asylum seekers and third-country nationals who were staying illegally on Romanian territory before they received a toleration. Several had been detained before they received toleration, when their return proved to be impossible. Rejected asylum seekers and irregular migrants are granted a toleration if the authorities concede that the person cannot be removed from the territory. Toleration means solely the permission to remain on Romanian territory and it is given by the Romanian Immigration Office to third-country nationals who do not have the right to stay and due to objective reasons cannot leave the Romanian territory. Using Yusef’s case as an example, the destitute condition of third-country nationals with a toleration will be explored below.

In Romania, interviews were also conducted with rejected asylum seekers who, although not removed, did not receive toleration from the authorities upon application. The factors which invite comparison between Yusef’s case and the cases of other third-country nationals interviewed are: having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival, being socially excluded, the State’s awareness of their presence on the territory in most of the cases, and having no way out of destitution. Many of them live for many years in this situation without any prospect of integration and a chance to have a normal life. Supplementary and background information to these cases was provided by various NGOs working directly with these destitute groups. On this basis, several common elements can be discerned which are typical for third-country nationals in a similar position.

The following general elements can be distilled from Yusef’s case that create, shape and sustain destitution:

No or limited legal entitlements leading to the inability to meet basic needs

Yusef has been granted a toleration, which means he is allowed to remain on Romanian territory. Even though Yusef’s stay in Romania is

authorised by the relevant authorities, he is prohibited from accessing the formal labour market and has no entitlement to statutory support. Yusef is also in need of medical care, but he does not visit a doctor because he has no residence status.

The granting of toleration only provides the authorisation to stay on Romanian territory; no entitlements such as social support – e.g. financial aid, food housing - or the right to access the formal labour market are attached to it. Holders of toleration are legally treated as if they were illegally staying third-country nationals. Moreover, holders of toleration only have access to treatment in hospital for emergency surgery and for diseases with an endemic/epidemic potential but only until the emergency problem is resolved and usually up to maximum three days; they are barred from all other forms of medical care.

Reliance on charity for survival

Yusef is entirely dependent on charity for his survival; he does not receive any kind of State support. Yusef does not have any friends who can provide support; he turns to NGOs for all his survival needs. He is not able to secure his own food; he eats whatever food NGOs provide. Furthermore, Yusef does not have the financial means to arrange his own housing. He had previously been residing for a long period at JRS Romania’s accommodation centre, but at the time of the interview was living on the streets. From time to time, Yusef receives medicine from JRS; he is prevented from receiving medicine through the public health system.

As a result of this situation, holders of toleration are entirely dependent on the goodwill of others to meet their basic needs. The vast majority of holders of toleration rely on NGOs for their subsistence, although some also receive support from members of their own community who have received asylum status or a form of protection. If NGOs did not provide these essential services, holders of toleration would face extreme difficulties. NGOs active in Bucharest are carrying out typical state-functions such as providing housing, food supplies, medical services and medicine. Holders of toleration are found also in other parts of Romania (especially big cities with communities of refugees) but no NGOs are providing assistance there. The services provided by these NGOs are too restricted by financial constraints to cover all the demands of third-country nationals. This is particularly true with regards to housing; JRS Romania is the only NGO in Bucharest (and from Romania) providing housing specifically to holders of a toleration and rejected asylum seekers. Beneficiaries of JRS Romania also come from

other regions of the country, especially from the five accommodation centres for asylum-seekers and refugees and from the two detention centres for illegal third-country nationals across the country. JRS Romania has limited housing capacity and the housing provided is only short-term, usually for six months. Therefore they often have to turn down a request for housing. Furthermore, the provision of food and medical care is also inadequate when compared with the needs of holders of toleration and rejected asylum seekers. The consequence of limited resources and a continued dependency on NGOs is that holders of toleration insufficiently meet their basic needs. This results in malnutrition, homelessness and a weak physical and mental health condition. In addition, being destitute and having to rely on others has driven many holders of toleration into depression and provokes great despair.

Social exclusion

Yusef feels neglected by society. He is living on the streets, his mental health problems are deteriorating, and the State authorities are not providing any kind of support. His contact with the State is limited to fulfilling his monthly reporting duties. This causes him a great deal of stress as to whether his toleration will be renewed. His only contacts are NGO workers and the beneficiaries of JRS Romania. Yusef is not allowed to work in the formal market according to the law, and would not be able to do so due to a lack of an ID, a fixed address and his mental health problems. Yusef has expressed willingness to integrate into Romanian society; he has already learned the language.

Yusef's case is typical of holders of toleration; they live in awful conditions without any form of social support and have no right to access the formal labour market. The Romanian state has, through its laws, socially excluded them; they are prohibited from taking up employment legally, can only access emergency health care and have no right to housing. As a consequence, holders of toleration are unable to participate in society. They feel excluded in all aspects and have very limited social contacts. The law does not provide them with any entitlements. They are preoccupied with meeting their daily basic needs and that prevents them from establishing social contacts. Holders of toleration feel left out and stripped of their human dignity. Contact with the State is limited to reporting monthly at the Foreigners Authority for the purpose of prolonging the toleration. For many holders of toleration these visits are very stressful since the authorities can make a decision as to whether the grounds upon which the toleration was issued still exist. This can be

on a 6-month basis, or even shorter if deemed necessary. If the grounds have ceased, the holder of toleration shall be immediately removed from the Romanian territory without any prior notice.²⁹³ Romania's policy of exclusion results in depression, low self-esteem, feeling of loneliness and frustration as well as mental health problems.

The State's awareness of their presence on the Territory

Yusef made himself known to the authorities directly upon arrival in Romania when he applied for asylum. After his claim was rejected, Yusef was granted toleration. Yusef has been in possession of toleration for more than two and a half years. During this period Yusef has been reporting to the Foreigners Authority every month. The Romanian authorities thus know of Yusef's presence on the territory and his whereabouts.

Through the issuance of toleration, Romanian authorities recognise the fact that there are third-country nationals present on their territory who cannot be removed. Regular contact for reporting duties means that the Romanian state knows exactly the whereabouts of holders of toleration. The toleration has a limited territorial validity in the range of competence of the immigration office that issued it and any journey outside must be prior approved. In case of non-compliance with this measure, the tolerated person could be taken into detention.

No way out of destitution

Yusef received toleration because he could not be removed from the Romanian territory. For more than two years he has been tolerated, which means living a life in limbo and extreme poverty. The Romanian State did not consider removal possible, but also does not grant a form of protection.

Toleration is issued for those third-country nationals who for objective reasons – independent of their own will – are not removed from the Romanian territory. Hence, the state recognises by the granting of a toleration that certain third-country nationals should not be removed to their respective country of origin. Yet, the Romanian state only allows third-country nationals the right to remain on the territory; no residence status, right to access the formal labour market or basic state support is provided.

Under the old regime, some holders of toleration have been in detention for several years and have received toleration after their release.²⁹⁴ Many holders of a toleration have

²⁹³ Article 104(4) of Emergency Ordinance no. 194/2002 (consolidated text).

²⁹⁴ According to Article 97 (3) and (6) of Emergency Ordinance no. 194/2002 (consolidated text) the

been reporting to the authorities for several years, without any change in their legal situation or improvement to their awful living conditions. They are not granted a (temporary) residence, even though the Romanian state has, by granting a toleration, recognised that objective reasons stand in the way of removal. Among the reasons why holders of a toleration are not removed are: the unwillingness of the national embassies to cooperate, the lack of a safe travel route and the outbreak of violence in the country of origin. Some holders of toleration are too depressed to make any reasoned choice with respect to their return. Many of the rejected asylum seekers who have been issued with toleration fear persecution upon return to their country of origin. Many holders of toleration feel extremely desperate about their situation and see no way out of it. In Romania many have been staying for extremely long periods in a tolerated situation, some for several years. Some of them were saying that this situation is somehow even worse than the one from which they fled in their country of origin.

2. Comparable Cases of Destitution

Rejected asylum seekers illegally staying in the country

In Romania interviews were also conducted with two rejected asylum seekers. They did not receive a form of protection and their request for toleration was refused by the authorities. Both arrived in Romania in 2005. Their cases are illustrative of destitute rejected asylum seekers who are staying illegally on Romanian territory. One of the rejected asylum seekers fled from Nigeria and directly applied for asylum upon arrival. His asylum claim was rejected by an appeal in his absence; his lawyer did not inform him when his case was being dealt with at court and he did not understand Romanian. For this reason, he filed a second asylum claim, but chances are very low that his asylum claim will be accepted. He fears persecution if he returns to Nigeria. His application for a toleration was also rejected. The other rejected asylum seeker left Russia because his life was at risk. Both his asylum claim and application for toleration were rejected. He is afraid of going back to Russia because his life has been threatened before.

The destitute situation of rejected asylum seekers is comparable to that of holders of a toleration and they are also bound by the same common five elements: having no or limited legal entitlements leading to the inability to meet basic needs, reliance on charity for survival, being socially excluded,

the State's awareness of their presence on the territory, and having no way out of destitution. However, there are some differences in their social and legal situation that are specific for this group. These particularities will be discussed below.

No or limited legal entitlements leading to the inability to meet basic needs

The legal situation regarding entitlements under law is almost identical to that of holders of toleration. Rejected asylum seekers do not have the right to access the formal labour market, are not entitled to statutory support or housing, and only have access to emergency health care. What distinguishes this group of rejected asylum seekers from those who received toleration concerns the fact that they are staying illegally on Romanian territory, whereas holders of toleration are permitted to remain. The rejected asylum seekers must leave the Romanian territory voluntarily within 21 days or they will be taken into public custody if the authorities could not return them to their country of origin in 24 hours.

Reliance on charity for survival

Rejected asylum seekers rely entirely on charity for their survival, similar to the conditions of holders of toleration. Rejected asylum seekers run a higher risk, however, of being left on the streets because the state authorities do not, as a general rule, allow illegally staying third-country nationals to be housed in JRS Romania's accommodation centre. JRS has addressed this issue by only allowing illegally staying third-country nationals to stay if they clarify their legal situation of their stay as soon as possible by either applying for voluntary return, requesting a toleration or applying for a (second) asylum claim.

Social exclusion

Rejected asylum seekers are socially excluded by the State's laws, similar to the situation faced by holders of toleration. They shun the state authorities due to their illegal stay on the territory. Furthermore, they are also more likely to become homeless, which makes them even more socially excluded.

The State's awareness of their presence on the territory

Rejected asylum seekers have made themselves known to the State authorities by submitting an asylum claim. Some of these rejected asylum seekers continue to be in the asylum process by submitting a fresh asylum application, while others request toleration or to be voluntarily repatriated. In doing so, the Romanian state is aware of their presence on the territory.

maximum period for the public custody of third-country nationals whom the measure of return has been ordered cannot exceed 6 months and 2 years.

No way out of destitution

Many rejected asylum seekers fear persecution upon their return and prefer living in dreadful conditions in Romania. Some are also too mentally ill to make a reasoned decision regarding their return. Furthermore, even though no toleration has been granted, objective reasons such as the lack of cooperation of the respective embassy may stand in the way of return to the country of origin. Most rejected asylum seekers in Romania feel that they have no alternative other than to remain in their situation of destitution.

3. Relevant status under asylum law

Subsidiary protection

Subsidiary protection can be granted to the alien or stateless person who does not fulfil the conditions to have refugee status recognised and regarding whom there are well founded reasons to believe that, in the case of returning to the country of origin, respectively to the country where s/he has his usual residence, they will be exposed to a serious risk and who cannot or, due to this risk, does not wish the protection of that country.²⁹⁵ A serious risk is defined as:

1. a death sentence conviction or the execution of such a sentence; or
2. torture, inhuman or degrading treatment or punishment; or
3. a serious, individual threat to one's life or integrity, as a result of generalised violence in situations of internal or international armed conflict, if the applicant is part of the civilian population.²⁹⁶

Temporary humanitarian protection

In times of armed conflict in which Romania is not involved, temporary humanitarian protection can be granted to people who come from the areas of conflict.²⁹⁷ A person in need of protection is any person who is part of the civilian population and has left his/her country of origin, as a result of an armed conflict and cannot return in conditions of safety and dignity. There must be a massive and spontaneous influx of people in need of protection. This must exceed the Romanian

Immigration Office's capacity to resolve the individual applications, under the conditions and terms stipulated by the present law.²⁹⁸

4. Removal of Illegally Staying Third-Country Nationals: Obstacles, Practice and Solutions

This section briefly discusses the recognised obstacles to removal in Romanian law, the possible legal solutions in such cases and the implementation of the laws on return in practice.

4.1. Grounds for Non-Removal

The most relevant law in which the return of third-country nationals is regulated in Romania is the Emergency Ordinance no. 194/2002 on the Regime of Foreigners in Romania (hereinafter referred to as "Emergency Ordinance no. 194/2002").²⁹⁹

Article 92(1) of Emergency Ordinance no. 194/2002 lists the grounds of non-removal for illegally staying third-country nationals from Romanian territory:

- a) the third-country national is a minor and the parents have legal residence in Romania;
- b) the third-country national is the parent of a minor who has Romanian citizenship if the minor is under the parental care of the parent or the parent is bound to pay alimony, an obligation which he regularly fulfils;
- c) the third-country national is married to a Romanian citizen and the marriage is not one of convenience.
- d) the third-country national is over 80 years old;
- e) there is justified fear that the life of the third-country national is endangered or that he will be subjected to torture, inhuman or degrading treatment in the state where the third-country national is to be returned;
- f) return is forbidden through international treaties to which Romania is a party.³⁰⁰

²⁹⁸ Article 30 of the Asylum Act.

²⁹⁹ Original language: Ordonanta nr. 194/2002 privind regimul strainilor in Romania. Emergency Ordinance no. 194/2002 has been modified several times; most recently it was re-published in the Official Gazzete no. 421 of 5 June 2008.

³⁰⁰ According to Article 92(1) of the Emergency Ordinance no. 194/2002 exception from the provisions of numbers (1), (2) and (3) are the third-country nationals who represent a threat to public order, national security or suffer from a disease which threatens public health and refuse to comply with the measures set forth by the medical authorities.

²⁹⁵ Article 26(1) of the Asylum Act. On the basis of Article 27 of the Asylum Act, subsidiary protection may also be granted to certain family members of those who are beneficiaries of subsidiary protection.

²⁹⁶ Article 26(2) of the Asylum Act.

²⁹⁷ Article 29 of the Asylum Act. On the basis of Article 32 of the Asylum Act, temporary humanitarian protection may also be granted to certain family members of those who are beneficiaries of temporary humanitarian protection.

4.2. Legal solutions when there are obstacles to removal

Toleration to remain on the territory for non-removable third-country nationals

In some specific and limited cases the Romanian Foreigners Authority may decide that third-country nationals who cannot leave Romanian territory are granted a toleration to remain on the territory.³⁰¹ It should be stressed that this status is not equal to a residence status, but means that a third-country national has simply the right to remain on the territory. In order to qualify for toleration, third-country nationals should have objective reasons why they cannot leave the territory. Objective reasons are defined as “those unpredictable contexts independent of the third-country national’s will, which cannot be avoided and because of them the third-country national cannot leave the Romanian territory.”³⁰²

Pursuant to Article 103 of Emergency Ordinance no. 194/2002, toleration may be granted to the following categories of third-country nationals:³⁰³

- a) those who are in the situations stipulated by art. 15 (1) and are not fulfilling the conditions stipulated by the law in order to obtain a permit to stay;
- b) those against whom the measure of taking them into public custody was ordered and they could not be returned within 6 months;
- c) those who are in detention and against whom the court ordered expulsion but were not expelled in 2 years from the moment of being taken in detention;
- d) those whose temporary presence on Romanian territory is required by important public interests. In this case, toleration shall be granted upon the request of the state competent bodies,
- e) those in relation to whom there are serious reasons to consider that they are victims of human trafficking; in this case, toleration shall be granted upon the request of the Public Attorney or the court.

Toleration is issued for 6 months and may be extended for periods of up to 6 months as long as the objective reasons for remaining on the territory continue to exist.³⁰⁴ When the grounds

³⁰¹ Article 103 Emergency Ordinance no. 194/2002.

³⁰² Article 102 (2) Emergency Ordinance no. 194/2002.

³⁰³ Article 103 Emergency Ordinance no. 194/2002 (consolidated text) stipulates: “The foreigner is not allowed to leave the country in the following situations:

- a) He is accused or defendant in a criminal case and the magistrate orders the interdiction of leaving the settlement or the country;
- b) He was finally convicted by a court order and has to be taken into imprisonment.”

³⁰⁴ Article 104(1) Emergency Ordinance no. 194/2002.

upon which the toleration was granted cease to exist, the third-country national shall immediately be removed from Romanian territory without further notice.³⁰⁵ A holder of a toleration is under the obligation to present himself monthly or whenever he is called to the Foreigners Authority and to notify of any change of address.³⁰⁶ Travel outside the area of competence of the Foreigners Authority group is allowed only with a prior approval.³⁰⁷ In case of non-compliance with these duties, public custody of the third-country national may be ordered.³⁰⁸ A holder of a toleration is only granted the right to stay on the territory; he cannot claim any benefits from the state nor is he granted the right to access the formal labour market.

Legal possibilities for regularisation in case of prolonged stay

The Romanian system does not have regularisation possibilities for third-country nationals who have stayed for a long period illegally or in toleration on the Romanian territory.

5. Dimensions of destitution

This section will give a detailed overview of what it means to be destitute for third-country nationals with toleration and rejected asylum seekers who are illegally staying on the Romanian territory. This is based on information provided by the interviewed persons from the focus group, as well as additional information provided by JRS Romania and other NGOs.

5.1. Health

“Every night I cry about my situation. I am so tired and do not know what to do. I am thinking in circles. I have a headache all the time. I am not really here. I left myself behind. I am like a skeleton.”

– Female holder of toleration from Ethiopia, 24 years, having serious mental health problems –

Access to health care

Access to health care for rejected asylum seekers and holders of toleration is not guaranteed under Romanian law. In principle, rejected asylum seekers and holders of toleration do not have access to primary and secondary health care. Access to health care in Romania depends largely on the possession of health insurance. ARCA³⁰⁹ informed us that

³⁰⁵ Article 104(4) Emergency Ordinance no. 194/2002 (consolidated text).

³⁰⁶ Article 104(6) Emergency Ordinance no. 194/2002.

³⁰⁷ Article 104(7) Emergency Ordinance no. 194/2002.

³⁰⁸ Article 104(8) Emergency Ordinance no. 194/2002.

³⁰⁹ ARCA (Romanian Forum for Refugees and Migrants) is a refugee-assisting organisation, with an ecumenical character, seeking to involve the church and church-related organisations in refugee work. Although most of

referral by a General Practitioner is required for treatment in hospital, except for emergency cases. ARCA continued by stating that often the patients have to prove they have health insurance if they wish to register with a General Practitioner. However, rejected asylum seekers and holders of a toleration are not eligible for public health insurance unlike those with a refugee status or subsidiary protection.³¹⁰ Medical treatment might be received in cases where rejected asylum seekers and holders of a toleration pay for these services. Given the fact that a lack of financial resources is a common problem for these categories of third-country nationals, making use of medical services through payment is not a real option. In other words, rejected asylum seekers and holders of toleration are generally not financially capable of paying medical bills, which leads to a denial of health care in practice. A representative of Organizatia Femeilor Refugiate din Romania (hereinafter referred to as "OFRR")³¹¹ also reported that medicine is not provided free of charge to rejected asylum seekers and holders of a toleration. An interviewee indicated that she always had to pay for the medicine required for her eyes. Notwithstanding the situation described above, it should be noted that Romanian citizens with low incomes can also have problems accessing health care, as noted by OFRR.

The situation for emergency health care is different. In these cases, rejected asylum seekers and holders of a toleration can be

hospitalised free of charge for up to three days. According to OFRR, the medical staff in the hospitals do not apply a strict definition of "emergency cases". One of the interviewees mentioned that some of his friends had been hospitalised without any problem when they were in medical need. In this respect, OFRR added that the medical staff are usually very caring when treating rejected asylum seekers and holders of a toleration. On the other hand, ARCA has also experienced cases where rejected asylum seekers or holders of toleration were denied access to medical care because it was not considered an emergency. Nevertheless, the 'three day-rule' is applied rather strictly and rejected asylum seekers and holders of toleration are discharged from the hospital after three days regardless of their medical needs. The provision of emergency care for only three days is not sufficient in most cases, for example surgery will normally require several days or weeks of recovery and intensive medical care. "Only in case of diseases which pose a threat to public health, such as Tuberculosis, they may overstay this period", according to JRS Romania.

JRS Romania expressed concern for rejected asylum seekers or holders of a toleration with serious mental health problems. In many cases, the psychological problems are not considered an emergency, or, if they are, three days of hospitalisation is not sufficient to provide adequate medical care. According to OFRR, rejected asylum seekers and holders of a toleration suffering chronic diseases can become victims of the Romanian health system. They have problems receiving medical treatment on a continuous basis.

None of the interviewees with medical problems turned to the public health service for treatment, they relied on the limited medical services offered by NGOs. The interviewees were aware that they were excluded from the regular health system, and did not expect to be treated. Only one interviewee visited a hospital when in possession of toleration. However, she had some contacts in the hospital that made it possible for her to receive medical treatment.

Health condition

Generally, holders of toleration and rejected asylum seekers have a weak immune system because they pass long periods in poor living conditions, which makes them susceptible to infectious diseases. Physical health problems mentioned by the interviewees were: eye problems, bad teeth, infection and back pains.

One interviewed rejected asylum seeker reported feeling very embarrassed by the poor condition of his teeth and hopes to visit a dentist one day. JRS Romania explained that

the services are dedicated to the integration of refugees, ARCA has experience in providing services to repatriates, returnees and other migrants. Among its activities are: social counselling, information and guidance for recognised refugees and repatriates, cultural orientation for refugee women, distribution of material assistance: medicines, food items, clothes, school supplies, toys, etc, psychological advice/counselling, vocational training for refugees provided by the decentralised governmental employment services, employment assistance services and monitoring of the integration process.

³¹⁰ Article 20 of the Asylum Act grants refugees and beneficiaries of subsidiary protection the right to benefit from social health insurance. No similar right to social health insurance is given to illegally staying third-country nationals, including rejected asylum seekers, and third-country nationals who have been granted toleration to stay on the territory.

³¹¹ The Organizatia Femeilor Refugiate din Romania (Refugee Women Organisation in Romania) is an organisation founded in 2000 with the support of UNHCR and ARCA in order to support mainly refugee women in the local integration process. The Organisation has a wide range of tasks and is generally concerned with asylum and refugee issues in Romania. Included in its activities are: refugee empowerment, social counselling and self help activities, providing an information centre for refugees and migrants, sewing workshops for skilled and interested refugees, assistance with the integration process, Romanian and English language courses and computer skills and assistance in seeking employment, to attend a vocational course or for scholarships at university level.

as a result of poor diet many rejected asylum seekers and holders of toleration have unhealthy teeth.

Those third-country nationals who live on the streets see their physical condition deteriorating. The two homeless interviewees both expressed feeling generally unwell and lethargic. Their physical state can be described as weak due to constant lack of sleep and hygiene and due to living on the streets. Both ARCA and OFRR expressed concern about the health of rejected asylum seekers and holders of toleration who suffer from chronic diseases. Many of the interviewees showed signs of mental health problems; several appeared very confused, under stress and distracted during the interviews. One female with a toleration cried the whole time while she told her story and expressed desperation regarding her situation.

For many, the stress as to whether their toleration will be renewed and the daily challenge of meeting basic needs was just too much to cope with. Some interviewees were so preoccupied with their problems that they were incapable of relaxing. In particular, the homeless interviewees suffered mental health problems as a result of sleeping on the streets.

The destitute situation was, for most of the interviewees, the cause for their mental health problems. For a number of rejected asylum seekers and holders of toleration, the traumatic experiences in the country of origin were an additional cause of their mental health problems. Only one interviewee had received counselling at a NGO to treat her mental health problems.

ARCA confirmed that the destitute situations of rejected asylum seekers and holders of toleration negatively affect their mental health. According to ARCA, this group is very isolated and it is alarming that no psychological support is given. "Most of them are not able to overcome their mental health problems by themselves". JRS Romania also recognises the existence of mental health problems among rejected asylum seekers and holders of toleration, and noted that the situation of those with a serious mental disorder is a cause for concern. These persons cannot be hosted in the JRS accommodation centre for the safety of other residents. The state does not place them in a psychiatric institute, and they usually end up on the streets. The Romanian State does not provide special care for holders of toleration or rejected asylum seekers with serious mental health problems. NGOs are also incapable of providing the necessary care. This lack of care directly results in homelessness.

Health care provided by NGOs

The limited access to health care for rejected asylum seekers and holders of toleration is recognised by various NGOs. In order to improve health care for these two categories of third-country nationals, some NGOs decided to provide free medical services. ARCA provides medical treatment and counselling to rejected asylum seekers and holders of a toleration and also assists in providing referrals to health services. At JRS Romania a doctor is working on a voluntary basis. Infrequently, he gives medical advice and provides medicine. The medicine is provided by donations, therefore no continuous long-term medicine can be guaranteed and not all medicine can be provided. Since the medical services provided by JRS are irregular and limited, they also refer those in need to other NGOs. OFRR gives information on reproductive health to rejected asylum seekers and holders of toleration. The interviewees with health problems approached the NGOs for treatment.

5.2. Housing/Shelter

"I am very worried about my situation. I am sleeping on the streets and winter is coming. I have nowhere to go. I don't even know where I will be sleeping this evening"

– Male holder of a toleration, from Chechnya, 22 years old –

Right to housing

In Romania rejected asylum seekers and holders of toleration have no entitlements to public housing nor do they receive financial support to rent private accommodation, even though holders of toleration have permission to stay on Romanian territory.

Proof of housing for tolerated stay

The toleration regime, as laid down in Emergency Ordinance no. 194/2002, prescribes that a holder of a toleration is obliged to notify any change of address.³¹² According to JRS Romania, this implies in practice that when a holder of a toleration fulfils his monthly duty to report himself at the Foreigners Authority he also has to provide proof of housing. Thus, the holder of toleration needs to produce evidence of where he is staying. JRS Romania noted that if no proof of housing can be provided the person risks detention. The illustrated practice indicates that when a holder of toleration ends up on the street his toleration might not be renewed as he

³¹² Article 100(6) of Emergency Ordinance 194/2002: "The third-country national shall be bound to present himself monthly whenever he is called to the territorial group of the Authority for Foreigners which granted him toleration and to notify any change of address."

is unable to fulfil the housing requirement. This is a serious consequence of becoming homeless.

Change in housing situation due to loss of status

The majority of the interviewees who claimed asylum stayed in a reception and accommodation centre during the procedures. After their claims were rejected they had to leave the centre within 21 days and had to arrange accommodation themselves. One of the female interviewees stayed at a friend's house during her asylum claim and continued to stay there after her claim was rejected. No continued state support was given to those rejected asylum seekers who could not be removed from the territory. Several have been detained for the sole reason that their stay became illegal after the rejection of their asylum claim.³¹³ In each case they were released from detention, usually after 6 months, on the grounds that they could not be removed and they were granted a toleration to stay on Romanian territory accordingly. The fact that several of the rejected asylum seekers ultimately received toleration did not bring about a change in their housing situation. None of those who had to leave the reception centre were capable of finding housing by themselves. They lacked the financial means, and also did not have friends who could offer them shelter. Since Romania is gradually changing from a transit to a destination country, no organised communities from the countries of origin exist to offer the necessary support. As a result, they had to rely on the shelter facilities of JRS or they ended up on the streets. Their housing situation worsened over time.

Sleeping arrangements

"It is extremely difficult for rejected asylum seekers and holders of toleration to secure proper housing" according to ARCA. Since they have no financial support and no right to access the formal labour market, they entirely rely on the charity of friends for housing. The female interviewees, both with toleration, stayed at a friend's house. In some cases, irregular work could provide the means to afford private housing. One of the interviewees had worked as a money exchanger on the streets for many years and managed to earn sufficient income to rent his own apartment. However, this appears to be the exception rather than the rule. According to the stories of other interviewees, finding work in the informal market is difficult and often too short-term to make renting private accommodation possible. JRS Romania reported that a studio in the city

centre would be around 500 € per month and not affordable for the group concerned. According to JRS, if rejected asylum seekers or holders of a toleration are financially capable of renting a studio it would be in the suburbs of Bucharest and be around 200 €. JRS Romania reported that the living conditions in some of these flats are poor; often the toilets are outside and the houses are not well heated. It is especially harsh to live there in winter. Further, the staff member also noted that even if rejected asylum seekers or holders of toleration have the financial capacity to rent a flat, they would have problems signing a contract with the landlord because they do not have a residence permit. For that reason, many stay at the accommodation of others and contribute to the rent. The majority of the interviewees were staying at JRS Romania's accommodation centre at the time of the interview, or had been staying there for some time. The persons hosted at the centre have to share one large room. Daily meals are not provided. Some of the interviewees had previously slept on the streets. One interviewee with a toleration slept for several weeks on the streets of Bucharest after he was released from detention. He described sleeping rough as the most horrible experience of his life: "Everybody treated me as if I was no one; I received no assistance from anybody and had to look for a different place to stay each night." He was very relieved that he could stay at the JRS accommodation centre again. At the time of the interviews, two interviewees (one rejected asylum seeker and a holder of toleration) were homeless for more than one month. Both considered living on the streets as extremely harsh and were worried about winter. During the night they did not feel safe on the streets. Neither had friends they could stay with. The homeless interviewee with a toleration reported that at night he walked around in the city centre of Bucharest or, when he was lucky and had some money, he stayed at an internet cafe. During the day he slept for three or four hours a day in the garden of one of the NGOs.

Need for temporary housing

JRS Romania is the only NGO in Bucharest that provides housing specifically to rejected asylum seekers, those with toleration and the most vulnerable refugees. On the basis of the information provided by the NGOs, no other – public or private – shelter facilities of this kind are provided in the city centre of Bucharest. One of the interviewees had been in contact with a British NGO that provides shelter to homeless persons. They refused to let him stay, because their facilities are aimed at Romanian homeless citizens. Several of the NGO representatives mentioned the lack of capacity

³¹³ According to Article 97 (6) of Emergency Ordinance no. 194/2002, the maximum period of detention is 6 months for foreigners where the return measure was given and 2 years for foreigners where the expulsion measure was given (art 97 (3)).

of (temporary) housing for rejected asylum seekers and holders of toleration.

Furthermore, the housing of rejected asylum seekers and holders of toleration is a problematic issue for JRS Romania. In 2006 the accommodation centre had two police raids and residents were taken whose stay on the territory was illegal. In order to prevent further incidents, illegally staying third-country nationals residing at JRS Romania's accommodation centre now have to clarify their legal situation by either applying for voluntary return, request toleration or making a (second) asylum claim. If they do not comply with this rule, they have to leave the centre again. Therefore, rejected asylum seekers whose asylum claim and request for toleration has been rejected are often left on the streets. After the two police raids, requests to be housed have decreased. Many illegally staying third-country nationals fear being caught by the police and put in detention or returned.

The accommodation centre of JRS Romania can host up to 16 male residents but usually more than 20 residents are hosted at once. In 2008, 80 vulnerable persons used their facilities. In addition, JRS Romania offers places in social apartments for women and children. The capacity of these social apartments is 16 persons; again however, due to the pressing need for housing, 20 persons are usually hosted. JRS remarked that often they have to refuse rejected asylum seekers or holders of a toleration since all places are occupied. JRS Romania only offers temporary housing; the maximum period of stay is 6 months, but this period can be renewed. In practice, some of the interviewees have stayed for long periods in the accommodation centre because they did not manage to move on and find other means of housing. Many of the beneficiaries of the accommodation centre do not know where they will go after their period of stay there. They run a high risk of ending up on the streets.

5.3. Food/Clothing

"As a matter of principle I want to buy my own food. But I have no money to do so. I always have to rely on others to get something to eat."

– Male rejected asylum seeker from Nigeria, 35 years old –

Holders of toleration have no entitlement to receive food packages or clothing from the State, nor do they receive any type of financial support to satisfy their material needs. Illegally staying third-country nationals, including rejected asylum seekers, are also left without any kind of entitlements regarding food and clothing. According to JRS Romania, there are no public soup kitchens in Bucharest where rejected asylum seekers and holders of

toleration can go. Rejected asylum seekers and holders of toleration almost entirely rely on the goodwill of others for food and clothing. The majority approach NGOs, while others receive material support from friends. A lack of financial resources is the reason for this form of dependency. Some form of control over access to food is only reached when individuals are engaged in working activities. Several interviewees indicated that during the periods when they worked they bought their own food, although in some cases the income was not sufficient to cover all material needs. In January 2006, ARCA initiated a project to provide assistance to tolerated persons. As part of this project, the organisation distributes basic food packages and hygiene products to holders of toleration. In practice, illegally staying third-country nationals including rejected asylum seekers also benefited from these supplies. Material essentials were provided to homeless rejected asylum seekers and holders of toleration, as well as to those who have a fixed address. The majority of the interviewees collect a food package at this organisation. In most cases, this is the only means by which they receive food. JRS Romania's accommodation centre does not provide meals during the day. However, as supplementary to the food provided by ARCA, JRS Romania gives food to their beneficiaries from time to time. The JRS accommodation centre has a kitchen where the beneficiaries can prepare their meals. Sometimes they all bring different foods and cook together. According to ARCA, the amount of food that rejected asylum seekers and holders of toleration have access to is very limited. ARCA stated that their monthly food package is not sufficient to meet their nutritional needs. Furthermore, this group of third-country nationals does not eat a varied diet (mainly dry food) and there are cases of malnutrition. A significant number of rejected asylum seekers or holders of toleration do not eat regular meals each day. ARCA also reported that this group of third-country nationals lack proper clothing. They do not have sufficiently thick clothes to keep them warm, especially in winter. ARCA receives clothing donations and distributes them among those most in need.

5.4. Work/Social Welfare

"I am looking for a job every day. Nobody wants to give me work, because I have no papers. Look at me. I look awful."

– Male holder of toleration from Somalia, 28 years, homeless –

Right to access the formal labour market – Right to financial support

No right to access the formal labour market exists for illegally staying third-country

nationals, including rejected asylum seekers, or holders of a toleration. Thus, even if a third-country national has a tolerated stay on Romanian territory because he is unable to return for objective reasons, he is prohibited from working legally to secure his own income. The interviewees were well informed of this fact. The withholding of the right to access the formal labour market is more worrying given the fact that rejected asylum seekers and holders of toleration are not entitled to claim any type of financial support. In addition, no special regulation of financial benefits exists for rejected asylum seekers.

Motives to find work

A large majority of the interviewed rejected asylum seekers and holders of toleration had been working in the past or were currently involved in short-term work. Several of the interviewees were actively looking for a job every day. They expressed the hope that by finding a job they would improve their living conditions and lower their dependency on others to meet their basic needs. They believed that a job would bring sufficient income to afford housing and to buy food on a regular basis. Those interviewees living on the street were desperate to find work because they thought that this would keep them off the streets. Some interviewees also portrayed feelings of shame and low self-esteem about the fact that they were not working. According to a young male interviewee, "having to rely on others all the time for food and a roof over my head is terrible, I want to work and take care of myself." To make himself feel useful a male holder of a toleration worked for a long period as a volunteer at JRS Romania.

Success in finding work

Finding work in the informal labour market is difficult for rejected asylum seekers as well as for holders of toleration. ARCA mentioned that the labour inspectors check irregular workers in the workplace strictly. An interviewed holder of toleration who occasionally works at a construction site also noted that police are checking more intensively for irregular workers at the workplace. However, he stated that the police sometimes show compassion for his situation by tolerating his presence on the construction site. Although the majority succeeds in finding work occasionally, this usually relates to short-term work of several days. One male interviewee reported feeling very happy when he managed to have a job for 5 days in a row at the construction site, which he considered to be a long time. Other interviewees, however, managed to find work at the construction site for three months in summer time. Only one of the interviewees, a female with toleration, was at the time of the interviews involved in a

"permanent" position. She had been working at a second hand shop for 7 months. Another interviewed holder of toleration had been working during the period when he was illegally staying on the territory as a money exchanger for several years. According to ARCA, many rejected asylum seekers and holders of toleration inform each other of the rare and short-term possibilities to work in the informal labour market. In winter, it is even more difficult to find irregular employment. This is supported by the stories told by the interviewees as well as the information shared by the NGO representatives. Most irregular work for male rejected asylum seekers and holders of toleration is to be found on construction sites, and these working activities cease when the temperature drops below zero. Many interviewees occasionally worked during the summer, but were not successful in finding work at the time of the interviews when winter was approaching. "It is hard finding work in the winter, I worked at the construction site in the summer, I hope I can find some indoors work during winter time", one of the male interviewees wished.

Besides the lack of the right to access the formal labour market, not having a stable address adds an extra difficulty to finding work. Homeless rejected asylum seekers or holders of toleration are often physically unfit. Some of the interviewees also stated that it would be difficult for potential employers to reach them in the rare event when work became available. The male interviewees sleeping rough believed that because they lived on the streets no employer would want to accept them. One of them mentioned that he was tired all the time because of lack of sleep and looked awful and that he could understand why no employer would offer him work.

Type of work and salary

During the interviews, no concrete wages were described for the irregular work done. Only one interviewee informed us that he earned around 10 € for a day or half a day's work at the construction site. Another interviewee, who worked for one month at a furniture factory, considered that if he had been able to continue work at the factory for a longer period it would have been possible for him to rent a private house. The female holder of toleration with a long-term job at a second hand shop stayed at a friend's house and was able to contribute to the rent. However, she reported having financial problems all the time. Generally speaking, on the basis of the interviews it is clear that short-term jobs yield insufficient income to rent private accommodation. With respect to long-term jobs the situation varies; some managed to rent private housing while others did not. Rejected

asylum seekers and holders of toleration are prone to exploitation, in the sense that they are paid very low wages. Rejected asylum seekers and holders of toleration are usually involved in unskilled work. "These persons are often engaged in construction work and cleaning", stated ARCA. Construction work is carried out by male rejected asylum seekers and holders of toleration, while cleaning is mostly done by females. The types of work listed by ACRA are in line with the examples given by the interviewees. Besides construction work, other areas of employment were: shop work, furniture factory work, painting houses and repair work.

5.5. Life Planning

"We are dying silent"

– A male holder of toleration, from Liberia, 31 years –

All interviewees expressed feeling stuck in their situation of destitution. They felt unable to make any important choices regarding their lives. As one male interviewee put it: "I have no control over my own life. I have lost all my freedom." They attribute these feelings to the fact that they are unable to return to their country of origin, but their forced stay on Romanian territory does not come with clear residence rights and some form of state support. They consider the Romanian authorities to be in control over their lives, rather than themselves. The great majority of the interviewees were in the possession of a toleration to stay on Romanian territory. The granting of a toleration status by definition implies that objective reasons, identified by the state, exist for the non-removal of a third-country national without a residence status.³¹⁴ The Foreigners Authority considers objective reasons to be, "those unpredictable contexts independent of the third-country national's will, which cannot be avoided and because of that the foreigner cannot leave Romanian territory."³¹⁵ More than half of the interviewees had been detained and given toleration because the state authorities were unable to remove them. Before the law changed, detention of third-country nationals was not subject to a maximum period of six months.³¹⁶ Two of the interviewees who stayed in detention for two and seven years respectively, and after their release were granted toleration, are victims of this old regime. Some

of the interviewees conveyed a strong wish to return to their country of origin, and they actively tried to arrange their return without success. A male interviewee with toleration from Chechnya visited the Russian embassy many times requesting them to issue him with necessary identity documents. The Russian embassy contacted the police department in his hometown for his files, but they replied that they had lost his files. As a consequence, the Russian embassy refused to recognise him as a Russian citizen and he is forced to stay in Romania without any rights except toleration. Another distressing story concerns a male holder of toleration, from Somalia, who lived in toleration for more than two and a half years. He requested assistance from the IOM to return, but they informed him that no safe travel route exists to Somalia and, secondly, that the situation in Somalia was too violent to warrant return. The situation of feeling stranded in Romania without any rights drove this Somali interviewee to high levels of desperation, and one month before the interview he ended up living on the streets. Besides the unwillingness of the national embassies to cooperate, the lack of a safe travel route and the outbreak of violence in the country of origin, other reasons for non-return were political persecution and, as complementary to other grounds, the loss of ties with the country of origin. Some interviewees stated that their family had been killed, and one female holder of a toleration even reported that she had to leave her newborn baby behind because her life was in immediate danger. She has not heard about the whereabouts of her baby since. Another female holder of toleration from Cameroon mentioned that she and her family had to flee because of persecution; the rest of her family is staying in a refugee camp in a neighbouring country. Her life would be at risk if she were to return to Cameroon. Many interviewees were in despair and did not understand the Romanian asylum and immigration system. Some were in great disbelief as to why their asylum claim was not accepted, and a number of interviewees felt that their case had not been properly looked at in court. One interviewee mentioned that he did not appeal in his asylum case because his lawyer had not informed him of this possibility in time. Those with toleration diligently report themselves to the Foreigners Authority every month, some for several years, without any prospect of receiving a residence status. Most interviewees felt lost in the Romanian system and did not have the money to pay a lawyer to look into their case. Thus a great number of holders of toleration and rejected asylum seekers are left in limbo for long periods of time, without any prospect of a positive change in their social or legal situation.

³¹⁴ In order to be eligible for toleration, third-country nationals should have objective reasons why they cannot leave the territory. See section 5.2 for more detailed legal information.

³¹⁵ Article 102(2) of Emergency Ordinance no. 194/2002.

³¹⁶ Article 104(1) of Emergency Ordinance no. 194/2002 now provides that the maximum period of detention of third-country nationals whom the measure of return has been ordered cannot exceed 6 months.

Living a life in destitution

Feelings of bitterness about their treatment by the Romanian state were clear during the interviews. Most of the interviewees did not report any positive experience during their stay in Romania. Some considered the destitute situation to be just as bad as the situation in their home country that made them flee. A male interviewee with a toleration confided: "Sometimes I am crying on the street. Why did I come to Romania?" Having no rights is hard to understand and many expressed their disbelief about their situation. One interviewee stated in desperation, "What does the Romanian State expect our lives to look like?" According to ARCA, the Romanian State does not seem to care about holders of toleration. OFRR reported that rejected asylum seekers and holders of a toleration feel extremely excluded by the Romanian system. In their view, holders of toleration should be accorded with residence rights and this should form part of the integration policy of Romania. Apart from being excluded by law, the majority of the interviewees also felt socially excluded. Loneliness and isolation seems to accompany destitution. Some mentioned having no friends or only friends in similar situations to themselves. In exceptional circumstances, some receive material support from their friends. According to OFRR, third-country nationals from Arab countries such as Iraq and Afghanistan sometimes receive support from fellow countrymen who have received refugee status. Asylum seekers from the Arab region formed part of the first wave of migration. Some are now settled in the country. They are therefore able to give more support than African migrants to give to members of their community. One interviewee avoided contacts with Romanians because of his insecure and destitute situation. The majority are so consumed by the daily struggle to survive that they have no time and possibility to relax. Many interviewees filled their days with walking the streets and looking for work. They also hang around at the premises of JRS Romania, where they have access to computer facilities. Some follow language or computer courses given by JRS, but several indicated that they were too stressed about their situation to concentrate. The destitute situation prevented the interviewees from having any future perspective. The possession of residence rights is considered to be the key to a change in their situation. They firstly require residence rights before thinking about the future. Yet, the majority expressed a desire to stay in Romania and hoped for a residence status. Those wanting to stay in Romania stated that they have been living there for many years, have learned the language and know the culture and would like to see Romania as their new country.

They would like to educate themselves or find a job. On the other hand, several interviewees reported thinking about their country of origin and revealed hopes of going back one day. All want to live a life in human dignity, to work and to have a home. Holders of toleration and rejected asylum seekers are living in abject poverty without any form of state support for long periods of time. Their health condition is weakening over time; they end up in total despair about their situation and lose all future prospects. Some of them even lose their will to survive.

6. Conclusions and recommendations

6.1 Inconsistencies and flaws in the State's law, policies and practice resulting in destitution

Access to health care

1. Access to health care free of charge is limited to emergency health care; only three day's hospitalisation is allowed. Access to primary and secondary health care is denied in practice because it is chargeable. Payment for medical care in cases of primary or secondary care, or proof of health insurance is required. In practice, rejected asylum seekers and holders of toleration are not able to comply.

Tolerated stay on territory

2. The toleration regime in itself is not consistent; the state acknowledges that a third-country national cannot leave Romania for objective reasons, but it withholds all means for subsistence (i.e. no right to access the formal labour market, housing and financial support).
3. Requirement of proof of housing in order to maintain toleration is not a justifiable requirement if no entitlements to housing or financial support to rent accommodation are given.

6.2 Consequences of the State's laws, policies and practice

For holders of toleration and rejected asylum seekers

1. Rejected asylum seekers and holders of toleration do not receive medical care when in need, resulting in a worsening of their condition. When medical care is received in cases of emergency, three days of hospitalisation is often insufficient. Third-country nationals with mental health problems or chronic diseases are in particular the victims of the Romanian health system; mental health problems are often not considered as an emergency and no continuous medical treatment is given.

2. Being destitute and relying entirely on charity leads to depression, loss of purpose in life, low self-esteem and high levels of desperation.
3. The destitute situation results in a weak mental and physical health condition, worsening over time. Many rejected asylum seekers and holders of a toleration suffer from malnutrition.
4. Due to the limited housing capacity of NGOs, several rejected asylum seekers and holders of toleration end up on the streets. In particular, illegally staying third-country nationals, including rejected asylum seekers, run a high risk of this; they are not allowed to stay in shelter facilities offered by NGOs, nor is public housing provided.
5. Great concern for “mental health cases”: very often they cannot be hosted by NGO shelter facilities due to their mental health condition, while on the other hand the State does not provide the necessary psychological care by placing them in a psychiatric institute. These persons are often left on the streets.
6. The destitute situation of rejected asylum seekers is very hard to bear in winter; they live on the streets in extremely cold weather, they have few opportunities to find work and lack proper winter clothing.
7. Lack of confidence in the Romanian immigration and asylum system. Many rejected asylum seekers feel that their cases have not been adequately represented. There is despair and disbelief about the existence of the toleration among holders of toleration and NGOs active in the field.

For society:

8. NGOs are fulfilling typical State tasks such as the provision of housing, food supply and medical care in order to combat destitution. In many cases, the services of

the NGOs are essential for the survival of destitute third-country nationals.

9. Destitute third-country nationals are socially excluded and unable to contribute to society. Society is not benefiting from their skills.

6.3 Recommendations

Medical care

1. Free and full access to healthcare in all cases throughout the entire stay of the third-country national in Romania. In particular, emergency health care should be provided as long as further medical treatment is required.

Social support

2. Continued social support for rejected asylum seekers until the moment they leave Romanian territory, and they should be given the right to access the formal labour market in order to support themselves.
3. Social support such as housing and food should be provided to illegally staying third-country nationals in the period between the issuance of a removal order and the actual removal.

Residence rights

4. The instrument of toleration to remain on the territory should be abolished. Instead, the Romanian State should grant a (temporary) residence status attached with the right to social support or the right to access the formal labour market for those illegally staying third-country nationals, including rejected asylum seekers, who are unable to be removed to their country of origin within a certain period of time after which it becomes clear that a barrier exists to return.

7. References

European Council on Refugees and Exiles, “ECRE Country Report 2005”.

Case Studies in Spain

1. Case study

1.1 Typical cases

During a research trip to Spain in September 2009, we met a group of irregular migrants in a park in Murcia. They were six young men all from Burkina Faso who had been in Spain for between three months and one year. Some spoke Spanish very fluently. They claimed to have come directly to Murcia. All of them were undocumented. Their aim was to work and earn enough money to support their families and to eventually return. In Burkina Faso they had no perspective but in Murcia they had no stable employment other than odd jobs such as car washing. They lived on the streets, in parks, some in apartments of friends. They did not receive any social assistance. “We are in an impasse”, one of them said, “without perspectives neither in Burkina nor in Spain.” Their only hope was a certain rule in the Spanish law which says that after three years stay in Spain and if they meet several requirements relating to the person’s economic and social situation, a migrant might be able to obtain residence. One migrant later called our office from southern France where he had managed to travel to.

In Madrid we met another group of African migrants. They were six young men (average age: mid-twenties) from Senegal, Guinea-Conakry, and Côte d’Ivoire. They lived in Spain for about three to four and a half years and spoke Spanish fluently. None of them had legal status. Two said they would lodge an application for residence and work permits soon. Three of them had come via another European country to Spain (two via France and one via Portugal), another one had hold an Italian visa. The other two men had been caught at the Canary Islands, held in detention there (for between one week and 33 days) and later brought to Madrid because they could not be returned. In Madrid, they were only treated as irregular migrants and given a “letter of expulsion” from the police. The one who had hold of an Italian visa had planned to lodge an asylum application but was not allowed to do so because under the Dublin II regulation³¹⁷ Italy would have been responsible for dealing with his case.

For all of them, Spain had been the planned destination, either because of having family

members living there or because at the time of arrival – 2006 – there had been a lot of jobs on offer in Spain. One man had easily found a job but later lost it and – because of the economic crisis – could not find a new one. The two men who had come via France said their reason was that it was too difficult to survive in France as a “sans-papier”.

In Madrid, they could only meet their daily needs because they were living in apartments provided for by an NGO who also gave them the necessary things for daily life. Some were selling CDs on the streets,³¹⁸ other work was said to be very difficult to find.

Their vision was to obtain residence status, use their qualifications, find a stable job with a work contract and live as free men.

1.2 The context of the cases

Spain perceives migration only in the context of labour forces and, therefore, in times of rising unemployment rates devotes lots of efforts to restrictions. Consequently, large portions of the population either irregularly migrate to Spain or become “irregular” during their stay in the country after having lost employment. *Cáritas Española* explained that they observed a striking contradiction in the current Spanish debate on migration: on one hand employers and their organisations repeatedly call for more flexibility of the working force, on the other hand Spanish law allows regularisation only with a one year working contract.³¹⁹ Also, there is a contradiction between the rather restrictive *immigration* policies and the rather liberal *integration* policies.³²⁰

Destitute migrants in Spain are mostly migrants who have entered Spain legally but did not

³¹⁸ This can be dangerous as it can constitute a breach of copyrights law and is therefore a crime.

³¹⁹ Interview with Sergio Barciela Fernández and María Segurado Lozano, Migrants & Refugees Team, Central Services, *Cáritas Española*, Madrid, 8 September 2009 (hereinafter referred to as “Barciela/Segurado interview”).

³²⁰ As explained by Fr. Josep Buades Fuster SJ, Departamento Relaciones Externas, Centro de Estudios para la Integración Social y Formación de Inmigrantes (Ceimigra), during an interview in Valencia on 10 September 2009 (hereinafter referred to as “Buades interview”). Ceimigra is an agency of the Society of Jesus with the support of the Generalitat Valenciana that offers migrants a wide range of training and formation services, legal assistance and help in integration affairs. Part of *Fundación Ceimigra* is also the Valencian Observatory of Migration that offers the possibility of conducting studies and training and awareness activities from research and analysis of various areas related to immigration, living conditions of migrants, relations between immigrants and natives or previous migrants, social integration, etc. See www.ceimigra.net.

³¹⁷ Art. 9 para. 2 of the Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

leave the country when their visa expired, and migrants who had irregularly entered Spain. Others are former asylum seekers whose applications have been rejected. Whether they have access to basic social services such as health care or housing depends not only on national law but also very much on the rules and practices applicable in the different regions. Daniel Izuzquiza SJ has suggested the following rough distinction:³²¹

- Immigration and asylum law and policies are developed on national level; within the government, the Ministry for Labour and Social Affairs, through the Secretariat General of State for Immigration and Emigration, has the role of lead-management on this policy field.³²²
- Residence and work permits are issued by the relevant branch office of the Ministry for Labour and Social Affairs;
- Integration policies and social service regulations are competencies of the 17 Autonomous Communities;
- Increasingly, the Autonomous Communities have delegated the provision of social services to local administrations and NGOs while maintaining control over financing and legislation of welfare.³²³

As a result the situation a migrant faces can very much differ across Spain according to the policy in the certain region where s/he is living.³²⁴

During the interviews, the most pressing problems for destitute migrants were identified

as a lack of any possibility to generate income and the general insecurity of their situation.

2 Legal Background

2.1 The Law on Aliens

The legal situation of non-nationals in Spain is mainly governed by the Law on Aliens and its Implementation Regulation.³²⁵ The law has been again amended in December 2009 and a new Implementation Regulation is expected by summer 2010.

In accordance to this legislation, foreigners can be *staying* or *residing* in Spain. *Stay* is the presence on Spanish territory as a *visitor* for a limited period of time, up to 90 days (with the exception of students who can *stay* for the period of their courses) whereas a *resident* is a foreigner living in Spain with a valid authorisation (residence permit), either temporarily (for more than 90 days) or permanently. Additionally, special regimes are set up for (a) students, (b) stateless persons, undocumented migrants and refugees, and (c) minors.

This system of temporary and permanent residence together with the three special regimes also covers entry and stay of family members, workers and self-employed persons.

The framework for legal migration to Spain is very restrictive and mostly linked to residence permits for workers and special visas for students. With respect to working permits, potential migrants must obtain working contracts while they are still abroad. In general, there are only two cases in which they can obtain work and residence permits to come to Spain as employees:

- a) The prospective employer can show that the job offered to the migrant falls within the "hard to fill" category, i.e. that there is

³²¹ Interview with Daniel Izuzquiza SJ, Coordinator, Pueblos Unidos, Madrid, 7 Sept. 2009 (hereinafter referred to as "Izuzquiza interview"). *Pueblos Unidos* is a Catholic agency providing social services, formation courses, job services, legal advice, etc. to migrants as well as to Spaniards living in the neighbourhood. About 9 staff members and 140 volunteers deal with approximately 5,000 cases per year, among them about 2,500 new ones. The majority of their migrant clients come from Latin America, West Africa, and – because the neighbourhood is Moroccan-dominated – from Morocco. They engage also in policy and advocacy activities and work together with other Catholic organisations as well as non-faith based NGOs. See also www.pueblosunidos.org.

³²² See Art. 9 para 2 lit. c) of the Royal Decree (Real Decreto) 553/2004 of 17 April 2004 (BOE No 94 of 18 April 2004, p. 16003).

³²³ See also Olga Jubany-Baucells, *The state of welfare for asylum seekers and refugees in Spain*. *Critical Social Policy* 22 (2002), p. 415-435.

³²⁴ Also, the policy of an Autonomous Community can – for better or worse – differ from those on national level. For instance, in contrast to the national State Plan, Catalonia has labelled migrants as a group requiring specific measures in their Plan for the Right to Housing 2002-2007. See Report of the UN-Special Rapporteur on adequate housing, Miloon Kothari, on his mission to Spain, UN-Doc. A/HRC/7/16/Add.2, 7 February 2008 (hereinafter referred to as "Kothari-Report"), para. 77.

³²⁵ Framework Law 4/2000 on the rights and freedoms of aliens in Spain and their social integration (Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social), of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139), was amended by Framework Law 8/2000 of 22 December 2000 (BOE No 307 of 23 December 2000, p. 45508), and by Framework Law 14/2003 of 20 November 2003 (BOE No 279 of 21 November 2003, p. 41193); Implementation Regulation, Real Decreto 2393/2004 of 30 December 2004 (BOE No 6, 7 January 2005, p. 485), amended by *Real Decreto 1162/2009, de 10 de julio, por el que se modifica el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*, aprobado por el Real Decreto 2393/2004, de 30 de diciembre, 10 July 2009 (BOE No 177, 23 July 2009, p. 62864; also available at: <http://www.unhcr.org/refworld/docid/4aa6088d9.html>). For an overview of the relevant Spanish law see also European Parliament, Civil Liberties, Justice and Home Affairs Committee (ed.), *Comparative study of the laws in the 27 EU Member States for legal immigration*. PE 393.281, February 2008, pp. 429-440.

no Spanish citizen or legally residing migrant available to fill the vacancy;

- b) The migrant is hired in accordance with a quota system in which the Spanish Government approves quota for migrant workers in the light of the national employment situation, and taking into account proposals from the Autonomous Communities and comments from trade unions and employers' associations.

In the current economic crisis, it is difficult to find a job and subsequently obtain the necessary permits within this system.

According to Article 28 para. 3 lit. c) of the Law on Aliens, a migrant is obliged to leave Spanish territory "in the event of administrative refusal of applications to remain on Spanish territory submitted by an alien, or in the absence of authorisation to be in Spain." Being unlawfully present on Spanish territory without a residence permit or permission to stay is perceived by the Law on Aliens as a serious criminal offence if there is no application for a residence permit or permission to stay pending. A penalty of a maximum fine of EUR 6,000 (depending on criteria of proportionality) or of expulsion can be imposed.

2.2 The Aliens Law Reform of 2009

On 26 June 2009, the Government approved a bill aiming at "reform" of the Law on Aliens.³²⁶ Despite heavy criticism from several NGOs, the two houses of the national Parliament (*Congreso de los Diputados* and *Senado*) passed the bill into law in November and December 2009 respectively.³²⁷

The law contains several provisions that considerably worsen the legal situation of destitute migrants. In an interview, Cristina Manzanedo of *Pueblos Unidos* has summed up the most important points:³²⁸

- No family reunification visa for parents who are younger than 65.
- No access to public housing facilities in the first five years of residence.
- No provisions on integration.
- The administrative practice of forbidding a change of place of employment and region of stay in the first year that a work permit becomes law.
- No access to education for migrants over 18 years without a legal status.
- If a migrant has come to Spain on an invitation letter and later "overstays", the author of the invitation shall be prosecuted. The same goes for the owner of a house in which a migrant lives who is "empadronado". "Hospitality is sanctioned", Cristina Manzanedo says.
- The period for detention prior to deportation becomes 60 days instead of current the 40. The period counted is interrupted if an appeal for *habeas corpus* or for asylum is filed.
- Repatriation of minors becomes possible even if family members in the country of origin are not known but the child can be sent to a reception centre.
- Fines for infringement of the Law on Aliens are increased.

2.3 Asylum and Refugee Law

The Spanish Constitution provides in Art. 13 para. 4: "The law shall establish the terms under which citizens of other countries and stateless persons may enjoy the right to asylum in Spain." Recently, Spain transposed several EU directives, most notably the "Qualification directive",³²⁹ into national law³³⁰ and set a new substantive framework for refugee recognition. The asylum procedure is still regulated by a Royal Decree of 1995.³³¹

An asylum seeker may either be granted refugee status as defined in the 1951 Refugee Convention, or subsidiary protection. Every alien can apply for protection in Spain either upon arrival or during his/her presence on Spanish territory. If they have entered the country legally, they must submit their applications within the time of the legal stay. Aliens who have irregularly migrated into

³²⁶ Proyecto de reforma de la Ley Orgánica de Extranjera (LOEX).

³²⁷ For a summary of the debate see Migration News Sheet, December 2009, pp. 3-4: Spain/Final Approval of Aliens Bill.

³²⁸ Interview with Cristina Manzanedo, *Pueblos Unidos/Entreculturas*, Madrid, 8 Sept 2009 (hereinafter referred to as "Manzanedo interview").

³²⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

³³⁰ Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria, 30 October 2009 (BOE No 263, 31 October 2009, p. 90860; also available at: www.unhcr.org/refworld/docid/4b03bd9f2.html). The law entered into force on 20 November 2009 and it repeals the previous Ley 5/1984 reguladora del derecho de asilo y de la condición de refugiado of 26 March 1984 and subsequent amendments contained in the Ley 9/1994 de modificación de la Ley 5/1984, reguladora del derecho de asilo y de la condición de refugiado of 19 May 1994.

³³¹ Real Decreto 203/1995, de 10 de febrero, por el que se aprueba el Reglamento de aplicación de la Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado, modificada por la Ley 9/1994, de 19 de mayo (BOE No 52, 2 March 1995).

Spanish territory must lodge their claims within one month after arrival. As long as no final administrative decision has been taken on the claims, the asylum seekers are safe from expulsion or forced return. If these time limits are not met and no “reasonable” explanation for the delay is given, the application can be turned down as inadmissible.

In general, the administrative asylum procedure consists of two steps:³³²

Admissibility procedure

Either at the border or within the country (depending on where the asylum application has been submitted) the authorities check whether the application is admissible or not. An asylum application is inadmissible, if, inter alia, certain exclusion clauses can be applied in this case, if under the Dublin II regulation Spain is not responsible for dealing with the case or if, in the view of the administration, the reasons invoked do not warrant recognition as a Convention refugee. Negative decisions in this procedure can be contested with an appeal to the Central Administrative Court (“Juzgado Central de lo Contencioso – Administrativo”). If the application is not admitted the asylum seeker has to leave the country within a short period of time.

Ordinary procedure

An application considered admissible will then be checked by an officer of the Asylum and Refugee Office (“Oficina de Asilo y Refugio” – OAR). A personal hearing is not conducted in every case. The OAR will later forward the case to the Inter-Ministerial Commission on Asylum and Refugees (“Comisión Interministerial de Asilo y Refugio” – CIAR) that either returns the case to the OAR for further investigation or drafts the final administrative decision to be taken by the Ministry of Interior. At this stage, the procedure is only done in writing. The proposed decision can be (i) Recognition as refugee; (ii) Grant of subsidiary protection, (iii) Grant of leave to remain in Spain on humanitarian grounds, or (iv) Rejection of the application. The Ministry of Interior will notify their decision to the applicant.

The ordinary procedure, in accordance with law, should take not more than six months. In fact, it is usually completed only after more than one year.

Negative decisions under the ordinary procedure can be contested at the Administrative Chamber of the National High Court (“Audiencia Nacional”). An appeal must

be lodged within two months after the decision has been communicated to the applicant, and it has no automatic suspensive effect unless the Court orders removal to be suspended.

Rulings of the National High Court may be further appealed to the Supreme Court (“Tribunal Supremo”). This appeal can only invoke questions of law but not the facts of the case. Here again the appeal does not automatically have suspensive effect.

After a final negative decision the asylum seeker can apply for a re-examination of the case if s/he can submit new evidence in support of the claim or the factual circumstances of the case (e.g. the situation in the country of origin) has substantially changed.

2.4 Regularisation of stay

A foreigner staying in Spain without the necessary permit must leave the country. If not, her/his presence on the Spanish territory constitutes a breach of the law. Nevertheless, in the past the presence of irregular migrants has become regularised several times.³³³ In Spain, the first regularisation campaign was run in 1991 and benefitted those immigrants who had come to the country before 1985. The next “legalisation” took place in 1996, when an ordinance was issued offering the possibility to return to the country of origin, to gain recruitment and to come back to Spain with residence and work permits. A third regularisation was foreseen by a law issued in January 2000 that was amended at the end of the year when at the general elections of March 2000 the *Partido Popular* had won the absolute majority in the *Congreso*. The amendments included a sharp restriction of the regularisation. Against this, irregular migrants - mostly Latin Americans - organised protests from February to April 2001 and gained some concessions resulting in a greater number of migrants benefiting from the regularisation. The most recent campaign was started in autumn 2004 when the new socialist (PSOE) government of Prime Minister José Luis Rodríguez Zapatero announced what the then Minister of Labour and Social Affairs, Jesús Caldera Sánchez-Capitán, explicitly did not want: the label “regularisation” but instead called for a ‘normalisation’ process: issuance of residence permits to those persons who had

³³² For a detailed description of the Spanish asylum procedure see also the information sheet “National Asylum & Return Policy of Spain” on www.erso-project.eu/partners/national-asylum-return-policy/spain.

³³³ The following information relies on an interview with Ms Josefina Hernández Hidalgo, Coordinadora, Delegación Murcia, ACOGE, Murcia, 9 September 2009 (hereinafter referred to as “Hernández interview”). Murcia Acoge belongs to the Spanish association RED ACOGE that is represented in 27 cities across Spain. In March 2009, the organisation became 20 years old. Among their clients the major groups are Latin Americans and Sub-Saharan Africans. On Murcia Acoge see also www.murcia-acoge.com.

entered Spain before 8 August 2004 and held job contracts for at least one year.

It should be kept in mind that all these regularisations had reference dates before which migrants must have entered Spain in order to benefit from an “amnesty”.

Currently only one provision in the Spanish laws offers a way to regularisation:³³⁴ The “roots” (*arraigo social / laboral*) clause basically stipulates that proof of irregular residence in Spain for three consecutive years and the possession of an offer of employment for at least one year, among other requirements, can lead to work and residence permits.

3 Dimensions of destitution

This section will give a detailed overview of what it means to be destitute in Spain, be it as (rejected) asylum seekers or irregular migrants.

3.1 Asylum seekers

Unfair asylum procedure

The number of asylum applications in Spain is currently in decline. In 2008, authorities reported 4,476 applications; in the first four months of 2009, 1,154 applications were lodged.³³⁵ These are the lowest figures for Spain since 1989 “which attests to the enormous difficulties that potential applicants have when it comes to gaining access to asylum procedures, due mainly to several factors: the fact that it is impossible to reach Spanish territory; the fact that potential applicants are unaware of diplomatic application channels; and the obstacles that exist at border points”.³³⁶ A high percentage of applicants do not pass the admissibility procedure and therefore do not have a chance to stay legally in Spain.³³⁷ Even if the application is admitted, chances are slim to be recognised as a refugee or as being in need of international protection. Only 151 persons obtained refugee status in 2008, while another 126 were granted subsidiary protection.³³⁸ In the second quarter of 2009, only 7.4 percent of the protection applications lodged in Spain were successful (85 out of a total of 1,145 decisions). Within the EU, Spain showed the second-lowest protection rate.³³⁹

It should be noted that the asylum procedure in Spain has been described as being quite

unfair. In 2005, Amnesty International heavily criticised the Spanish authorities as “still not adequately identifying refugees escaping persecution and human rights violations” and also not respecting the rights of the applicants.³⁴⁰ According to the Comisión Española de Ayuda al Refugiado (CEAR) 2009 report, there is still no major improvement.

Even the new Asylum Law has already met with criticism: The UN Committee Against Torture (CAT) has denounced the Spanish practice of using diplomatic guarantees given by countries of origin as reasons for excluding potential torture victims from protection. Also, CAT states that the use of the exclusion clauses in the Asylum Law may lead to the breach of the non-refoulement rule of Art. 33 para. 2 of the 1951 Refugee Convention.³⁴¹

If a rejected asylum seeker can neither return voluntarily to the country of origin nor be forcibly returned s/he often remains without proper documents in Spain and the stay therefore becomes illegal.

Housing

Asylum seekers can only during the ordinary procedure stay in reception centres run by the Red Cross or CEAR and only if they can show that they do not have enough means to pay rent. Usually they can stay for six months in a center; this period can be prolonged for another six months for social reasons. During the admissibility procedure and after the six/twelve months period asylum seekers must organize their accommodation by themselves.

Health

Once a claim is deemed admissible, an asylum seeker receives a medical screening. Later s/he is entitled to receive emergency care and essential treatments. Additionally women receive the necessary assistance during pregnancy and childbirth. The medical treatment of minors is unrestricted. Once an asylum seeker is registered with the local authority (*empadronamiento*) s/he is entitled to the same level of health care as nationals.

In the admissibility stage of the procedure and after a rejection of the claim, an asylum seeker may only receive medical aid in the same way as an irregular migrant.

Education

Children of asylum seeking families whose claims are categorized as admissible have the

³³⁴ Art. 31 of the Law on Aliens.

³³⁵ See Migration News Sheet 2/2009 and 7/2009.

³³⁶ Comisión Española de Ayuda al Refugiado (CEAR): Declining Levels of International Protection. Conclusions of the CEAR Year 2009 Report. n. d. (hereinafter referred to as “CEAR-Report”), p. 2.

³³⁷ For details see CEAR-Report, p. 3.

³³⁸ See CEAR-Report, p. 3.

³³⁹ Only the Greek protection rate (1.0 %) was lower. See Eurostat: Asylum applicants and decisions on asylum applications in Q2 2009. Data in focus No. 39/2009.

³⁴⁰ See Amnesty International: Spain. The Southern Border. The State turns its back on the human rights of refugees and migrants. EUR 41/008/2005, June 2005, quotation from p. 93.

³⁴¹ See Observaciones finales del Comité contra la Tortura – ESPAÑA. UN-Doc. CAT/C/ESP/CO/5, 19 November 2009, paras. 13 and 15.

right to attend schools under the same conditions as Spanish nationals. Adult asylum seekers may benefit from courses for the unemployed, but only if they have received a work permit. Education is not provided during the admissibility procedure nor after the rejection of the asylum application.

Work

Asylum seekers whose applications are checked in the ordinary procedure may receive work permits after a six month waiting period and if they can show a job offer. Work is not allowed in the admissibility stage of the procedure and after the rejection of the asylum application.

3.2 Irregular migrants

Growing numbers

An approximation of the number of irregular migrants in Spain is usually made along the following formula: <Number of non EU migrants *empadronado*> minus <Number of non EU migrants with residence permit>. As of 1st January 2009, the resulting number of Non-EU irregular migrants was approximately 990,831. This number is higher than those for 2007 and 2008. Of course, this method excludes Non-EU migrants who neither have a residence permit nor are *empadronado*.³⁴²

Ways into irregularity

Like in other EU countries, the group of irregular migrants in Spain is rather heterogeneous. Some of them have entered the territory without permission and never applied for residence permits. Others came as asylum seekers and their applications were rejected, but they could not return to their countries of origin. In many cases a migrant with residence status lost the working contract and consequently became irregular. In the context of the economic crisis in Spain, the labour markets for little or non-qualified jobs are closing; these are the jobs migrants have predominantly been taking up.³⁴³

Work

On the premises of *Pueblos Unidos* in Madrid, the author had the chance to meet a group of Latin American migrants, six women and one man.³⁴⁴ They came from the Dominican Republic, Bolivia, Nicaragua, and Peru and were staying in Spain for a time between six months and three years. Three of these persons

held residence permits because of family reunification. Their residence permits did not include work permits but they would be able to obtain them if they could provide a job contract. (This has been improved in the last reform of December 2009: now these migrants are entitled to work from the beginning.) The other four persons did not have any residence status.

None of these seven migrants were currently employed. The man said he had some experience in working in construction so he hoped to get a job in this sector. Most of the women had no formal qualification but hoped to be able to get domestic jobs. From previous experience, some persons reported exploitation in domestic service and construction jobs to be a real problem because they were paid much less than Spaniards or even did not receive any money at all.

One woman had been taking care for an old man in a Spanish family for two years. During this time the family treated her inhumanely and when the old man died she was fired immediately. Currently she is only making her living with the help of friends.

The general picture was that migrants had a good chance to obtain jobs if they held qualifications in the medical professions. However there is still the difficulty of getting certificates validated.

In the economic crisis, the construction sector in particular has collapsed, resulting in more and more Spaniards as well as registered foreigners trying to find jobs in the agricultural sector.³⁴⁵ Only the very hard work in the greenhouses is still the "domain" of irregular migrants. For women it is slightly easier to find a job than for men, especially in household-related services.

Without a work permit it is difficult to obtain a job, because employers do not want to deal with bureaucracy. One woman reported that she had been employed by a Spanish couple who promised to file an application but never did and later simply fired her. *Pueblo Unidos* later commented that this behaviour was typical for middle class private employers. On the other hand, according to Murcia Acoge, it is not difficult for a family to employ a foreigner: they only need a tax return proving an income of at least 18,000 Euros per year for two persons.³⁴⁶

The closing of the labour markets in the current economic crisis has also a very negative impact

³⁴² Information from Manzanedo interview; Luis Díe Olmos (Ceimigra/Observatorio Valenciano de las Migraciones): Normalizados y des-arraigados: personas en situación irregular en el contexto de crisis económica. Unpublished PowerPoint presentation. Valencia, July 2009.

³⁴³ Barciela/Segurado interview.

³⁴⁴ Interview with Latin American migrants in Madrid on 8 September 2009 (hereinafter referred to as "Latin Americans interview").

³⁴⁵ International Herald Tribune, 17 March 2009: "In Spain, a battle for work once abandoned."

³⁴⁶ Hernández interview.

on the chances for regularisation.³⁴⁷ As described above in section 2.4, regularisation under the “roots” (*arraigo social / laboral*) clause requires, *inter alia*, proof of stay in Spain for three consecutive years and the possession of an offer of employment for at least one year. Currently the latter, the one year contract requirement, makes the “roots” clause almost unachievable. The number of applicants has already diminished by about 50 per cent. Some buy a false job contract for 1,500 – 6,000 Euros, but the sub-delegation of the central government already has a “black list” with unreliable employers. They also check with labour inspectors and the police if an employer wants to hire more than one person.

Irregular migrants can become victims of exploitation. Spanish media reported about an irregular Bolivian migrant who had been working in a bakery in Real de Gandia, Valencia, without a contract for 12 hours per day for less than 700 Euros per month. On 28 May 2009, his arm was cut off by a kneading machine while he was working. Instead of rushing him to the hospital, the owners of the bakery allegedly abandoned him bleeding some 200 metres from the local hospital, warning him not to inform the authorities. The arm was dumped in a waste bin. On the reports of this incident in the media, the Government decided to grant, on exceptional grounds, a residence permit to the man.³⁴⁸

In cases of exploitation, any migrant worker could go to court and file a suit. However, most migrants are unaware of this possibility or too much fear of state authorities. Spanish law does not recognise associational claims (judicial actions of associations who do not have their own gravamen but act in the name of third parties), hence only the migrant himself could file the suit.³⁴⁹

Social assistance / housing

Irregular migrants do not receive any social welfare payments nor are they entitled to public housing programmes. The state only subsidises organisations who run soup kitchens, offer shelter or other services.³⁵⁰

The interviewed migrants all reported that they rely on NGO or friends’ assistance. Some of them were either sharing rooms with other

persons who were not family members, while others were living in apartments of friends. One expressed hope to obtain an in-house domestic job.

In Valencia, for instance, the lack of shelter for irregular migrants is a major problem: sometimes 50 persons “live” in one apartment, sleeping in shifts. Others try to find shelter in ruins or unfinished buildings.³⁵¹

In other words, circumstances do not seem to have improved since the 2007 visit of the UN Special Rapporteur for housing to Spain: “In Almería, El Ejido and Roquetas del Mar (Andalucía), the Special Rapporteur received first-hand testimonies of migrant workers who face discrimination in accessing housing, live in informal dwellings, on construction sites, in overcrowded houses, or rent beds by the hour. He visited structures in which workers were living in very inadequate conditions.”³⁵²

Health

In Spain, health care is regulated in terms of general guidelines by national law but managed and regulated in detail by the regions. Hence, across the country there are many differences in the quotidian practices.

The Spanish Constitution holds the general principle on equal treatment of migrants and Spanish nationals with regard to health care. But the requirements of this access are sometimes difficult for undocumented migrants to meet.

In general, right to access the health care system is documented by a health card (*tarjeta sanitaria individual*) issued to every Spaniard and to every migrant who is *empadronado*, i.e. registered with the respective municipality.³⁵³ For such an *empadronamiento*, a precondition is to produce a passport and a proof of residence within the municipality, not a residence permit. The health card offers the same coverage as for Spaniards, i.e. treatment free of charge and 60 percent of the cost for prescribed medication. The system is financed by general taxation.

For pregnant women and children (until the age of 18) the health card is issued without the requirement of *empadronamiento*.

General practitioners cannot be accessed without a health card. Consequently, those who do not carry a health card cannot be

³⁴⁷ The following information from Buades and Hernández interviews.

³⁴⁸ See El País, 22 July 2009: Los homeros de Real de Gandia no tenían contrato; Migration News Sheet, July 2009, p. 5: Spain/Residence permit for an irregular Bolivian migrant who was dumped near a hospital after losing an arm in a work accident.

³⁴⁹ Barciela/Segurado interview.

³⁵⁰ Hernández interview and interview with Ms María Teresa Camacho Mene, Programa de Inmigrantes, Cáritas Diocesana Cartagena-Murcia, on 9 September 2009 (hereinafter referred to as “Camacho interview”).

³⁵¹ Interview with Ms. Amparo Picazo, Head of Immigration Department, Médicos del Mundo Comunidad Valenciana (MdM-CV), Valencia, 11 September 2009 (hereinafter referred to as “Picazo interview”). MdM-CV offers immediate medical assistance and refers to other organisations in other matters.

³⁵² Kothari report at para. 74.

³⁵³ Royal Decree 183/2004 of 30 January, BOE n° 037, 12 February 2004.

transferred to specialists and do not receive prescriptions. Emergency services, on the other hand, can be accessed without a health card.

Some administrations issue additional health documents on the request of the emergency services for follow-up treatment for up to six months.

Perhaps the most interesting case of best practice is Valencia. Under current provincial law³⁵⁴ a *tarjeta solidaria* is issued to, *inter alia*, migrants who are not *empadronados*, and it covers 100 per cent of the costs of medical treatment. The card is initially valid for one year and can be prolonged for another three years. Requirement is only proof of neediness, e. g. low income in terms of the *Indicador Público de Renta de Efectos Múltiples* (IPREM). Such a proof can be given by the report of a social worker; in such a case the card is issued via an NGO.³⁵⁵

Similarly, the regional government of Andalucía allows a (temporary) health card to be issued to migrants even if they are not registered with the local municipalities. NGOs, trade unions and hospitals act as intermediaries to facilitate access to this health card. Murcia and Extremadura have their own, additional systems as well.³⁵⁶

Education

Since a ruling of the Constitutional Court, law has made education compulsory for all children in Spain between 6 and 16 years of age irrespective of residence status. But there is a link with the registration problem: if a family is not *empadronado* in a school district, there is no proof that the respective school is responsible for receiving the child. Also, access to education is not guaranteed for (young) adults.³⁵⁷

4 Recommendations

4.1 To the national Government in general

When interviewed in Madrid, the African and Latin American migrants wanted to give us a “message for [Prime Minister] Zapatero”, consisting of the following major elements:

- “Tell the police to leave us alone and in peace. Currently, without papers we can only stay at home. The police should concentrate their efforts on catching criminals and not migrants who have done nothing wrong except being here without papers.”
- “Let us work so that we can earn our livelihood.”
- “If people are in need, give them access to resources.”
- “To tighten the border controls but not care for those persons who are already in and have lived here for years is a paradox.”
- “Change the prison-like situation in detention centres.”

In addition, the national government should:

- Change the policy towards focus on integration and devote more efforts to it.
- Establish wider channels for legal immigration.

4.2 Asylum procedure

Introduce a fair and protection-oriented asylum procedure including access to it for every claimant, irrespective of the way s/he has entered the Spanish territory.

4.3 Health

On national as well as on provincial level, law should guarantee access to health care for everybody. The policy in Valencia could be used as a best practice example.

4.4 Housing

Access to housing should be possible for everyone irrespective of residence status.

4.5 Work

To avoid exploitation, work should be allowed irrespective of residence status.

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³⁵⁴ Most recently Art. 9 para. 2 of Ley 6/2008, de 2 de junio, de Aseguramiento Sanitario del Sistema Sanitario público de la Comunitat Valenciana reads: “La Conselleria de Sanidad acreditará el derecho a la asistencia sanitaria a los extranjeros que se encuentren en el territorio de la Comunitat Valenciana cuando justifiquen la ausencia de recursos económicos suficientes y no puedan acreditar el requisito de residencia en la misma (tarjeta solidaria)”.

³⁵⁵ Picazo and Collantes interviews.

³⁵⁶ Interview with Ms Sara Collantes, Médicos del Mundo, Madrid, 8 September 2009 (hereinafter referred to as “Collantes interview”).

³⁵⁷ Barciela/Segurado, Hernández, and Manzanedo interviews.

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Case Studies in Sweden

1. Case study

1.1 A typical case

- Miguel, 35 years old, rejected asylum seeker from Bolivia -

Miguel³⁵⁸ is about 35 years old and a Bolivian national. In Bolivia he had studied law and was one year before his final exams when he had to flee the country. Miguel wanted to work for the rights of the “campesinos”.

In June 2005 Miguel came together with his wife and two boys to Sweden. In 2009 the boys turned 19 and 11 years old. The family came with tourist visas but later applied for asylum. Mother and the two boys returned to Bolivia before Christmas 2008 because there is a chance for them to obtain an official job offer in Sweden and to return with a worker's visa.

Miguel himself cannot return to Bolivia because he fears persecution on political grounds. His asylum application was turned down, and five subsequent applications had no success. In 2007 an expulsion order was issued and he went into hiding.

According to Miguel, the lawyer did not really do anything for him in his asylum procedure. He is not even sure whether the lawyer forwarded to the responsible authority, the Swedish Migration Board, all the documents Miguel had presented. Later Miguel, at his own expense, hired another lawyer who was from Colombia but this lawyer, as well as a third one, had no success.

During his asylum procedure and some time afterwards he was legally working in a hotel. As a result he received no social assistance for himself but only for the children. But when his LMA card³⁵⁹ expired in 2006 the hotel dismissed him. Since then he is living on what he gains from illicit work. There are no stable jobs but only employment for short periods. Most of the times he cleans offices and houses. His wife, when she was still in Sweden, also did cleaning. He earns about 50 SEK per hour (approx. 4.60 €) compared with the payment for legal workers of about 100 SEK. He is living in an apartment as a sub lessee (hence another name appears on the bell plate). For three rooms which he keeps for housing his family when they return to Sweden, he pays 5,090 SEK (approx.

466 €) per month but he actually sublets one of the rooms for about 2,000 SEK (approx. 183 €) per month.

When they were still in Sweden both boys went to school. There were no problems.

Miguel praises his luck that no one in his family became seriously ill. When the younger son had some problems with his eyes, the Catholic parish St Eugenia in Stockholm helped to find a doctor (one of the parishioners) who did the testing pro bono. Fortunately it turned out not to be a major problem, since they would not have known how to pay the necessary medical treatment. For all other health problems the family did not go to a doctor but rather medicated themselves with aspirin. Without documents (especially a “personnummer”³⁶⁰) they did not expect to be treated in a hospital. Also they feared that the hospital staff might call the police.

The flight for Miguel's wife and children back to Bolivia was financed with the assistance of the St Eugenia parish and the savings Miguel had left in Bolivia.

In Sweden Miguel did not receive much help from his fellow Bolivian compatriots or other persons from Latin America. He rather sought and received assistance either from the Catholic parish of St Eugenia in Stockholm or from one of the smaller, syndicalist labour unions who also stand up for migrant workers.

Asked about his present situation and his future Miguel says: “I am waiting for my family to return so that we can live together here in Sweden. I am also waiting for my expulsion order to expire in 2010 after four years so that I can file a new asylum application. All the time I am completely dependent on authorities and lawyers. I can't do anything myself. I want to work, to make a living for my family and myself from my own money and not from the state's funds. Or I would like to study law or sociology to do something for society. But they do not let me.”

1.2 Context of the case

The story told by Miguel is illustrative of asylum seekers who are living in Sweden after their applications have been rejected. His case also shows problems of the asylum procedure in Sweden as well as the difficulties which destitute rejected asylum seekers and other undocumented migrants have.

Different sources estimate the number of undocumented migrants in Sweden to be

³⁵⁸ Name changed for confidentiality purposes.

³⁵⁹ The LMA card is issued by the Swedish Migration Board and certifies the holder's right to entitlements granted to asylum seekers. “LMA” stands for “Lagen om Mottagande av Asylsökande”, the Reception of Asylum Seekers and Others Act.

³⁶⁰ The personal identification number.

somewhere between 15,000³⁶¹ and more than 30,000.³⁶² Among these irregular migrants are

- Failed asylum seekers,³⁶³
- Irregular migrants who never applied for asylum and came to Sweden either to look for work or as victims of human trafficking,
- “Overstayers” who came to Sweden with a visa but remained in the country when their visa expired.

It is uncertain what the main regions of origin are. According to some interviewees most undocumented migrants are from Latin America, Eastern Europe, including the Russian Federation and the Caucasus states, the Philippines, and Africa.³⁶⁴ Another source³⁶⁵ names the Middle East as the main region of origin, followed by Russia, the Caucasus, and Latin America.

Difficulties in the asylum procedure

An asylum seeker must file the application with the Swedish Migration Board (*Migrationsverket*). This authority first checks if the application is inadmissible on the grounds that the applicant should be removed under the Dublin II regulation. If this is not the case, the Migration Board decides on the case’s merits. The applicant may be recognised as a refugee in accordance with the 1951 Refugee Convention, as a person in need of protection against other severe human rights violations (e.g., torture or execution) or because of war or environmental catastrophes in the country of origin. If no need of protection is established the Migration Board might determine factual obstacles to forced return or “particularly distressing circumstances” impeding expulsion.

³⁶¹ See Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, on his mission to Sweden, UN Doc. A/HRC/4/288/Add.2, 28 Febr. 2007, para. 70. Also Hans Rosenkvist, head of the Aliens Unit at the National Police Department (Rikspolisstyrelsen) is quoted using this number in 2005 (see *Medecins sans frontieres Sweden, Gömda i Sverige. Utestängda från hälso- och sjukvård*. No date, p 8. www.lakareutangranser.se/Global/documents/Rapport_er/StudieGomdaSverige.pdf).

³⁶² Interview with Mr George Joseph, Caritas Sweden, Stockholm, 30 March 2009 (hereinafter referred to as “Joseph interview”). Mr Joseph claims his estimation to be based on information from different organisations working in the field.

³⁶³ According to Mr Joseph, about 8,000 cases have been transferred from the Migration Board to the police in 2008 after issuance of expulsion orders that could not be immediately executed, but this number is not very reliable as not all of them can be expected to be still in Sweden but could have moved elsewhere.

³⁶⁴ Information comes from interviews with Fr Christoph Hermann SJ, director of JRS Sweden, on 25 and 29 March 2009 (hereinafter referred to as “Hermann interviews”), and Joseph interview.

³⁶⁵ Ms Sanna Vestin in an email communication of 21 April 2009.

According to the Migration Board’s statistics,³⁶⁶ in 2008 a total of 33,845 decisions were made. In 8,276 cases (24 percent) a residence permit was granted for any of the grounds listed above.³⁶⁷ In 21,742 cases (64 percent) the application was rejected. From them 3,398 were removed in accordance with the Dublin II regulation, another 839 were expelled immediately to their countries of origin. 17,505 remained within Sweden.

A negative decision can be contested at the Migration Court. If the application is not deemed “manifestly unfounded” (for example, if the country of origin or a transit country is considered to be “safe”), the appeal has suspensive effect. After a negative decision of the Migration Court the removal can be executed.

Both the applicant and the Migration Board have the right to raise an objection with the Migration Court of Appeal against the decision of the Migration Court. Hence, in some cases a decision that was positive for the applicant was overturned by this appellate court.

Once the court decision has become *res judicata*, it cannot be appealed. Only if new circumstances can be presented that had not been available at the time when the original application had been lodged, the case can be reviewed to establish if the new circumstances constitute an obstacle to expulsion. In those cases where impediments to expulsion are based on medical or practical grounds, the Migration Board’s determination of the actability cannot be appealed. In other cases where the impediments are based on new political circumstances, the Migration Board can decide if a new asylum case shall be opened. This decision can be appealed. To avoid immediate forced return an applicant can request the court to issue an interim order. If a new case is opened, which rarely happens, the procedure starts again and the removal order is suspended.

In the primary asylum procedure, most applicants have access to free legal aid. For

³⁶⁶ See the Migration Board’s homepage on www.migrationsverket.se.

³⁶⁷ This is a sharp decrease as in 2007 the percentage of grants of residence permits to asylum seekers was 48%! On the other hand, figures of positive decisions by the Migration Board for 2006 and 2007 have been remarkably high compared with earlier times: 1980-1989 more than 70 %; 1990-1999 around 50 %; 2000: 41 %; 2001: 27 %; 2002: 20 %; 2003: 15 %; 2004: 10 %; 2005: 13 %; 2006: 42 %; 2007: 48 %; 2008: 24 %. The high percentage in 2006 is to be seen in the context of the new law. The new rules on non-executable removals and other provisions are said to have had an enormous impact on the Migration Board’s decisions. But then the Migration Court of Appeal and a new director-general at the Migration Board went into reverse with a number of restrictive guiding decisions that have led to a decrease in positive decisions.

applications deemed “manifestly unfounded” legal aid can be denied. For applications raising obstacles to the execution of valid removal orders, legal aid is only granted in the rare situations when a new case is opened.³⁶⁸ In the administrative procedure lawyers are paid by the Migration Board and play an important role. In fact, it is them who meet the asylum seeker for the first “interview”. The Migration Board later then only deals with arguments and evidence brought forward by the lawyer. Contradictions in statements from the lawyer and the applicant usually are detrimental to the applicant’s credibility. Despite this important role some lawyers are either not qualified or do not have much interest in the cases of their clients.

Negative decisions causing irregular stay

If the Migration Board has found the asylum claim unfounded and the decision has become effective, another unit of the Migration Board (with the double-role of being responsible for “Integration and Return”) will try to persuade the applicant to organise voluntary return and give the necessary assistance. If the applicant is found to be non-cooperative the case will be handed over to the police who might execute the expulsion order by force including detaining the applicant. Among the police districts in Sweden there is a wide variety of practice. Some districts are known to be very harsh; others are even cooperating with NGOs.

Even if a person is recognised and granted a residence permit, the decision can be revoked on the ground that the previous reasons for issue have ceased to exist. According to information from FARR,³⁶⁹ Afghans used to receive residence permits because it was not possible to return them. But following an agreement with the Afghan government, forced return has now become possible, which causes the danger of withdrawal of residence permits and turning the stay into irregularity.

³⁶⁸ This and the following information have been received from Ms Emelia Frennmark during an interview in Stockholm on 26 March 2009 (hereinafter referred to as “Frennmark interview”). Ms Frennmark is a board member of FARR since 2000. She has years of experience in the work with migrants and refugees both in a vocational capacity (including working for UNHCR) and as a volunteer. FARR is the Swedish Network of Asylum and Refugee Support Groups (*Flyktinggruppernas och Asylkommittéernas Riksråd*), an umbrella organisation for local asylum and refugees support groups, and was founded in 1988. Among their members are about 20 local committees and some other associated organisations as well as a number of experienced refugee lawyers. The local groups assist asylum seekers in their recognition procedure but work also with cases of persons in need of protection who are not recognised by the state. About FARR see also their homepage on www.farr.se.

³⁶⁹ Frennmark interview.

*Without a “personnummer”, cut off from almost everything*³⁷⁰

Many irregular migrants can manage to survive in Sweden by relying on family and friendship networks as long as they do not get ill and the burden does not become too heavy. Some of them find jobs on the black labour market. This is especially true in cases of “overstayers” from Latin America or the Philippines.

In Sweden, every person with a right to stay in the country – be it a Swedish national or a foreigner – gets a personal identification number (in Swedish: *personnummer*). This number is the precondition for almost everything: renting an apartment, getting a legal job, opening a bank account, receiving medical assistance, etc. Foreigners only get a personal identification number if they have obtained a residence permit. Once they got the residence permit from the Aliens Office, they can go to the Tax Office (which also acts as sort of a registry office) and be issued with their *personnummer*. The number automatically becomes invalid if the residence permit expires. Asylum seekers during the recognition procedure only get a temporary registration number on their LMA cards, as their basic needs are met by welfare assistance from the Swedish Migration Board.

Hence, if the asylum procedure finally has a negative result or if a person has never applied for asylum, a foreigner will not have a *personnummer* and therefore be virtually cut off from access to any public service. Details of this situation and their consequences will be discussed in section 2.

1.3 Excursus: Eritrean asylum seekers

At the time when this chapter was written (March-April 2009) treatment of asylum seekers from Eritrea was widely debated in Sweden. The recognition rate of Eritrean asylum seekers is comparatively high because about 60 percent of them are granted a form of protection in Sweden.³⁷¹

Nevertheless, despite UNHCR recommendations to refrain from all forced returns to Eritrea as well as some warnings from human rights organisations,³⁷² some failed asylum seekers have been forcibly returned to Eritrea recently where they faced, inter alia, the danger of forced conscription to the military service or, as “traitors”, incommunicado detention and torture. Forced return has become possible since the Eritrean embassy issues travel documents.³⁷³

³⁷⁰ Information from Hermann interviews.

³⁷¹ Numbers for 2008, see www.migrationsverket.se.

³⁷² See, e.g., Amnesty International, Urgent Action No 194/08, EUR 23/001/2008, 4 July 2008.

³⁷³ “For about one year the Eritrean embassy is still more cooperative. In the past they did not issue the necessary travel documents”, a Swedish newspaper quotes Hans

The fear of expulsion to Eritrea has, in some cases, caused mental problems; in 2005 one person committed suicide. Some Eritreans went into hiding.³⁷⁴ The practice of forcible return to Eritrea has been met with some criticism in the general public after the arrest, in September 2001, of the Swedish-Eritrean journalist and playwright Dawit Isak in Asmara. Since then, a campaign for his release ("Free Dawit"),³⁷⁵ supported by three Swedish newspapers, has raised some awareness about the poor state of human rights in Eritrea. Nevertheless, the Swedish government has not yet announced a general ban on forced return to this country.

2. Relevant Asylum and Aliens Laws

Major provisions regulating the status of foreigners in Sweden, the forms of residence permits and the subsequent rights, the refugee definition and the asylum procedure, legal remedies against decisions of the authorities, control and coercive measures, etc. are laid down in the *Aliens Act* which came into force as of 31 March 2006.³⁷⁶ The *Aliens Ordinance*³⁷⁷ regulates some of the issues in more detail. Reception conditions for asylum seekers and other aliens are further determined by provisions in the Act on the reception of asylum seekers,³⁷⁸ the Ordinance on the reception of asylum seekers,³⁷⁹ and the Ordinance on state compensation for asylum seekers.³⁸⁰ Other details are regulated in numerous separate acts, ordinances or regulations.³⁸¹

Generally speaking, a legal stay in Sweden for more than three months by a foreigner who is not a national of a European Economic Area (EEA) requires a valid passport and a residence

permit (unless a visa has been granted for a longer period). In accordance with the legal definition³⁸² a residence permit is a permit to stay in Sweden for a certain time (temporary residence permit) or for an unlimited time (permanent residence permit). Reasons for issuing a residence permit can be, inter alia,

- the stay in Sweden of a recognised refugee or person otherwise in need of protection,
- resettlement of refugees,
- if an international treaty body orders Sweden to do so,
- family ties to Sweden (including intention to marry or to enter into cohabitation or to undergo a paternity investigation),
- the foreigner being of Swedish origin or having lived in Sweden on a residence permit for a long time,
- in exceptional cases other special ties with Sweden,
- permanent employment in Sweden if the position cannot be taken up by a jobseeker in Sweden or in another EEA state,
- "exceptionally distressing circumstances" calling for the foreigner to be allowed to stay in Sweden, for example state of health, adaptation to Sweden or situation in the country of origin,³⁸³
- studies,
- "if there is an impediment, which is not of a lasting nature, to enforcement of a refusal-of-entry or expulsion order".³⁸⁴

During a refugee recognition procedure an asylum seeker does not need a residence permit but is issued with a "LMA card".

A failed asylum seeker or another foreigner who does not have a residence permit is not issued with any other document (like a "toleration" as in Germany) even if the person is not forcibly returned. The practice of issuing a residence permit in cases with "exceptionally distressing circumstances" or "impediments to enforcement of an expulsion order" will be discussed below in Section 4.

3. Dimensions of destitution

3.1 Social assistance

The amount of social assistance granted to asylum seekers who do not have their own

Rosenkvist, head of the Aliens Unit at the National Police Department, as saying (see "Utvisade riskerar tortyr i Eritrea", Dagens Nyheter, 30 March 2009).

³⁷⁴ This information came from Mr Ginbot Abraha during an interview in Stockholm on 29 March 2009 (hereinafter referred to as "Abraha interview"). Mr Abraha is an activist for an independent civil society group called "Eritreans for Democracy and Human Rights". Since 2003 his organisation supports Eritrean asylum seekers in their procedures, provides decision-makers with information on the situation in Eritrea and advocates a ban on forced returns to this country in line with UNHCR recommendations. Mr Abraha is also the author of a handbook for asylum seekers in Sweden.

³⁷⁵ See www.freedawit.com.

³⁷⁶ Utlänningslag (2005:716). It should be noted that Swedish laws are cited by the year and the page of the publication in the Swedish Code of Statutes (Svensk författningssamling – SFS). Hence, the Aliens Act which was published in the 2005 SFS volume on p. 716 is usually cited as "lag 2005:716".

³⁷⁷ Utlänningsförordning (2006:97).

³⁷⁸ Lag (1994:137) om mottagande av asylsökande m.fl.

³⁷⁹ Förordning (1994:361).

³⁸⁰ Förordning (2002:1118) om statlig ersättning för asylsökande m.fl.

³⁸¹ See Örjan Edström, Final Report on Sweden and Final Table on Sweden done by the Odysseus Network for the European Commission on the implementation of the Directive on Reception Conditions for Asylum Seekers. 26 October 2006.

³⁸² cf. Chapter 2 Section 4 of the Aliens Act.

³⁸³ cf. Chapter 5 Section 6 of the Aliens Act.

³⁸⁴ cf. Chapter 5 Section 11 of the Aliens Act.

means and are not earning money by work is quite low.³⁸⁵ Assistance is given in the form of daily allowances which shall cover all necessary expenses including clothing and shoes, contributions to the costs of medical and dental treatment (see below under 3.2 Health), toiletries, leisure activities, etc.

For those who have arranged their own accommodation or are staying in self-catering housing the daily financial assistance is calculated as follows:

Single adults	71 SEK	≈ 6.50 €
Couples living together (per person)	61 SEK	≈ 5.58 €
Children (0-17; per person)	37-50 SEK	≈ 3.40 – 4.60 €

For asylum seekers living in accommodation provided by the Migration Board with meals included the daily allowance is:

Single adults	24 SEK	≈ 2.20 €
Couples living together (per person)	19 SEK	≈ 1.74 €
Children (0-17; per child)	12 SEK	≈ 1.10 €

Failed asylum-seekers and undocumented migrants do not receive any allowances – with one exception: undocumented migrant children who had previously been asylum seekers have a right to receive social assistance until they turn 18.

Doubts about the identity of a person or the perception of a person as being “non-cooperative” can result in the reduction or even complete withdrawal of social assistance to adults (assistance to children must not be reduced). This can bring a family into a situation of having to live only from the money they receive for the children.³⁸⁶

3.2 Health

Asylum seekers during their recognition procedure, as well as those whose applications have been rejected and undocumented

migrants, may receive medical and dental treatment paid for by the state only in “emergency” cases. The definition of “emergency” in the relevant regulation³⁸⁷ is not very clear. Sources defined “emergency cases” as being those where an illness is “very serious, life-threatening, a disease which cannot wait”.³⁸⁸ Even in these cases the medical treatment is not completely free of charge. For any visit or examination in a health centre or hospital, an adult pays 50 SEK (approx. 4.50 €) and another 50 SEK in the pharmacy when buying a prescribed medicine. To the costs of medical transportation they must pay a contribution of 40 SEK (approx. 3.66 €). If the costs exceed 400 SEK (approx. 36 €) in a half-year the person can ask the Migration Board for a special allowance.³⁸⁹

In all other cases the state will not pay for medical treatment. The ill persons nevertheless may receive medical assistance but have to pay the full costs by themselves. This can result in major problems. Ms Vestin from Save the Children Sweden cites the example of two young girls (about 17 years old) who became pregnant. They had not previously been asylum seekers hence they could not receive official assistance. The costs for the preparation at the midwife’s were about 1,500 SEK each (approx. 137 €), the delivery in the hospital cost about 25,000 SEK each (approx. 2,287 €). If there had not been the help of NGO networks, the girls would not have known where to find the necessary means. This is not an isolated case. In fact, Ms Vestin says, “We are very concerned about the situation of young pregnant women who are undocumented migrants. They often do not go to hospital because of fear of the bills.”

On the other hand the Eritrean activist Mr Abraha recalls a case in which a man who was denied access to the asylum procedure in Sweden under the Dublin regulation suffered from severe problems with his liver and was about to die when he finally sought treatment in a hospital. Staff not only treated him accordingly but even transported him by helicopter to another hospital. The man never received a bill.³⁹⁰ Hence Mr Abraha and other sources believe the practice with regard to health care to be very much dependent on the policy of the hospital and the regional government running it.

Another problem is that, as Miguel’s story illustrates, undocumented migrants fear being reported to authorities, notably the police, by

³⁸⁵ The following information was taken from Ginbot Abraha, A Handbook for Asylum Seekers in Sweden. Ed. by the National Thematic Network Asylum & Integration. 2007 (hereinafter referred to as “Abraha, Handbook”), pp. 23 f.

³⁸⁶ Information from interview with Ms Sanna Vestin, Stockholm, 27 March 2009 (hereinafter referred to as “Vestin interview”). Ms Vestin is a journalist and long-time coordinator of the “Utanpapper” (Swedish for “Undocumented”) project as well as of the Helpline with Rädda Barnens (Save the Children Sweden).

³⁸⁷ Agreement between the Swedish state and Organisations of County Councils on health care for asylum seekers and others.

³⁸⁸ Vestin interview. Her information was confirmed by Mr Abraha and Mr Joseph in the respective interviews with them.

³⁸⁹ See Abraha, Handbook, p. 24.

³⁹⁰ Information from Abraha interview.

medical staff and thus often refrain from seeking medical assistance even in very serious cases. Only a small number of organisations, including Médecins du Monde and the Swedish Red Cross, offer health care services.

Currently, the Swedish state's policy with regard to access to health care has met some criticism within the country as well as internationally. A number of medical professional organisations have joined NGOs and trade unions in a campaign calling for asylum seekers and undocumented migrants to receive the same health care as Swedish nationals.³⁹¹ The UN Special Rapporteur for the right to health, Mr Paul Hunt, has criticised the Swedish policy to be not in conformity with the country's international human rights obligations.³⁹²

3.3 Housing and shelter

During their recognition procedure, asylum seekers can choose whether they want to live in their own accommodation or in housing arranged for by the Migration Board.

Failed asylum seekers and undocumented migrants have to organise accommodation by themselves. As in Miguel's case rents can be very high, especially in cities like Stockholm. Apartments are often very overcrowded. Mr Joseph of Caritas Sweden recalls having seen an apartment where a room of about 20 m² was crammed full with ten beds. Each inhabitant had to pay 2,000 SEK per month (approx. 183 €). An additional payment of 500 SEK (approx. 45 €) was due if a person wanted to be registered under the apartment's address. In another three-room apartment Mr Joseph found 18 subtenants living.³⁹³

A particular problem is that for any procedure a person needs a fixed address; this is not possible to produce if the person lives here and there. As a result, a black market with addresses has recently been established with apartment addresses being sold for high prices.³⁹⁴

3.4 Work

A foreigner who wants to work in Sweden usually needs a work permit. An asylum seeker during the recognition procedure may get permission to work in form of an exemption

from the work permit requirement (AT-UND).³⁹⁵ Proof of an AT-UND is added to the asylum seeker's LMA card if the person meets the following requirements:

- The Migration Board judges that it will take longer than four months to decide in the asylum case.
- The person has proven his or her identity with ID documents, i.e. documents showing a photograph, name, date of birth and citizenship of the holder. The document must be issued by an official agency of the country of origin.

The condition mentioned in the second bullet-point is especially difficult to meet for asylum seekers who very often must flee without carrying any official documents. Hence, legally working during the recognition procedure is not always possible.

If an application for asylum is rejected and the expulsion order has taken legal force, the asylum seeker can apply within two weeks to the Migration Board for a work permit. A permit can be granted if:

- The person was employed for six months during the waiting period and the employment will last for at least 12 additional months after the date of application.
- The earnings from employment are sufficient for self-support.
- The terms of employment are at least equal to the collective agreement or the customary terms for the occupation or the industry.
- The relevant union has been given the opportunity to state an opinion about the terms of employment.
- The person holds a valid passport that will not expire until after the permit expires.

The work permit is combined with a residence permit.

According to information from the Migration Board³⁹⁶ these strict regulations have so far resulted in 66 of the 338 applications dealt with until 1 April 2009 being granted a work permit and the subsequent residence permit.

Without being able to obtain work permits, (failed) asylum seekers and undocumented migrants like Miguel are forced to look for employment in the black labour market even if,

³⁹¹ Rätt till vård-initiativet (Right to Health Care Initiative). See www.vardforpapperslosa.se/english.asp.

³⁹² See Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, on his mission to Sweden, UN Doc. A/HRC/4/288/Add.2, 28 Febr. 2007, paras. 71 et seqq.

³⁹³ Joseph interview, confirmed by Hermann interviews.

³⁹⁴ Information from Hermann and Joseph interviews. See also "50 asylsökande – 44 kvadratmeter". Svenska Dagbladet, 29 March 2009.

³⁹⁵ This and the following information draw largely on Migrationsverket, Working in Sweden: Information for current and former asylum seekers. December 2008 (on www.migrationsverket.se).

³⁹⁶ From their website www.migrationsverket.se.

under Swedish law, working without a permit is a crime. These jobs are usually underpaid and only temporary and some employers clearly take advantage of undocumented migrants' situation. Hence, Swedish trade unions together with some NGOs, are now calling for the criminal sanctions against undocumented migrants who work to be abolished, and for penalties on exploiting employers to be increased.³⁹⁷

3.5 Education

Asylum seeking children have a right to go to school in Sweden, but not a duty. Hence it depends on the parents whether they send their children to school or not. For undocumented children there is no law regulating this issue. There is neither a legal right nor a ban.³⁹⁸ A hindrance might be that schools do not receive state money for undocumented children. Hence it depends heavily on the regional government's and individual school's policy as well, as on the parents' willingness, whether an undocumented migrant child can go to school or not.³⁹⁹

What can make the situation even more complicated is that an old section in the Aliens Ordinance⁴⁰⁰ stipulates a duty of the local education committee to inform the police about every child enrolled for the first time in a school and who is staying in the country without a residence permit or who has applied for leave to remain. Neither the regulation's wording nor its application is very clear and there are doubts that reporting a child to the police would not constitute a breach of the professional secrecy. It is clear that police can come into a school and ask for the whereabouts of a named person and, although this rarely happens, it is known among the parents as a threat.

3.6 Life planning

In this situation of destitution one of the major problems failed asylum seekers and undocumented migrants face in Sweden is, as a Catholic parish caretaker has put it, "the complete lack of perspectives. Neither can they

return to their countries of origin nor can they build up a normal life in Sweden."⁴⁰¹

In addition there is a constant fear of being forcibly removed. This causes mental problems, and as it has been mentioned above, in the case of one Eritrean failed asylum seeker, has resulted in a suicide.

The situation is especially difficult for children to deal with. A special problem for them is the splitting up of families, be it during the flight, in the context of the migration or asylum processes in Sweden or by the execution of expulsion orders. The very restrictive policy with regard to family reunification in particular causes a lot of problems for children. "The authorities do not care", Ms Vestin of Save the Children says. "Sometimes the practice even hits a racist note."

Undocumented migrant children suffer from a lot of psychological problems caused by, as Ms Vestin puts it, "the burden they came with". Instead of being relieved from this burden in Sweden, their situation in the country only compounds the psychological stress.⁴⁰²

3.7 No removal and no way out of the "vacuum"

After an asylum application has been rejected and the decision has become effective, a new application for a permanent residence permit can be lodged on the grounds that there are permanent obstacles against return.⁴⁰³ But in practice however, this does not work because the Swedish Migration Board does not pay enough attention to the circumstances of the individual case. Many Somalis, for example, have been living in Sweden after the rejection of their asylum claims who could neither be returned nor were issued permanent residence permits. For them, as FARR has put it, "it's like a vacuum." In accordance with law, an expulsion order expires after four years and the respective person can obtain a permanent residence permit if still staying in Sweden. But it should be pointed out that this is only true in cases where authorities do not assume that obstacles against return are the respective person's own fault. If a person is found to be "non-cooperative" or had gone into hiding, even after four years, a permanent residence permit will not be granted. According to sources, the "non-cooperation" argument is used extensively. In some cases persons were accused of being non-cooperative because their respective embassies refused to issue travel documents.

³⁹⁷ See "Swedish unions fight exploitation of illegal workers". Union Renewal, 4 October 2008.

³⁹⁸ In August 2009, the Swedish Minister for Education took an initiative and appointed an investigation committee to lay the ground for a legal reform that allowed undocumented migrant children to go to school. The Minister promised that the proposal will come into effect in the winter of 2010/2011. See Sveriges Radio: Undocumented Migrant Children May Attend School. 16 August 2009, on www.sr.se/cgi-bin/international/nyhetssidor/artikel.asp?nyheter=1&programid=2054&Artikel=3035124.

³⁹⁹ Hermann, Joseph and Vestin interviews.

⁴⁰⁰ Chapter 7 section 1 second paragraph number 4 of the Aliens Ordinance.

⁴⁰¹ Sr M Elisabeth Büning, St Eugenia Parish of Stockholm, in an interview on 27 March 2009.

⁴⁰² Both quotations are taken from the Vestin interview.

⁴⁰³ The following information is based on Frennmark, Hermann, Joseph and Vestin interviews.

Another obstacle is that to file a new application the person must bring forward new evidence and give reasons why s/he was not able to present it earlier. But in fact usually the Migration Board officers “don’t even listen”⁴⁰⁴ and refuse. Unfortunately, the Court of Appeal has ruled that the length of time a person has been living in Sweden is not sufficient a reason to constitute a right to a residence permit. Hence, especially in cases where persons have gone into hiding, the possibilities for a legalisation are very limited.

As it has been shown in Section 2 – Relevant Aliens and Asylum Laws – there is a provision in the Swedish Aliens Act calling for a residence permit to be issued if the foreigner in question would, in case of his or her expulsion, face “exceptionally distressing circumstances”.⁴⁰⁵ The clause is generally interpreted as covering cases in which a person would not have access to necessary medical treatment in the country of origin or if, for example, s/he has to fear persecution by their own family. According to official statistics for the year 2008, the Swedish Migration Board has found in 1,571 cases enough reason to apply this provision. Compared with a total of 33,845 decisions, this is a percentage of about 4.6. Hence use of the clause by the Migration Board is quite restrictive.

4. Conclusions and recommendations

4.1 Consequences of the State's laws and policies resulting in destitution

Social assistance

1. For asylum seekers during the recognition procedure the amount of social assistance is very low and does not cover all needs for daily life.
2. Failed asylum seekers and undocumented migrants do not receive any social assistance at all.

Access to health

3. For failed asylum seekers and undocumented migrants access to health care is in reality non-existent if they cannot pay the full costs of the treatment by themselves.

Housing / shelter

4. The urgent need for housing results in the cases of (failed) asylum seekers and other migrants being exploited by landlords who demand excessive prices for overcrowded rooms.

Work

5. Because of the restrictive legal provisions, failed asylum seekers and undocumented migrants often cannot obtain work permits and therefore rely on irregular jobs that are seriously underpaid and not stable.

Education

6. As migrant children do have a right to go to school but schooling is not compulsory, their school attendance and admittance is not sufficiently ensured.

No ways out of destitution

7. Even if the law provides for some ways of regularisation, the practice shows that in most cases they cannot be used. This results in a continuing life of destitution without any real perspective of a way out of it.

For the Swedish society

8. The complete exclusion of undocumented migrants from enjoying basic human rights shows the negative side of a welfare state. It creates new invisible borders within the Swedish society. The welfare system is in danger of being eroded from the bottom.
9. Sweden does not completely fulfil its international obligations to respect the human rights of all persons being subjected to their jurisdiction.

4.2 Recommendations

1. Sweden should ensure that failed asylum seekers and undocumented migrants can really enjoy their basic human rights as long as they are living in the country.
2. The Migration Board should change their policy to ensure that all persons being in need of protection or who cannot return to the respective countries of origin are able to obtain a residence permit.
3. Swedish decision makers should consider establishing a “hardship case commission” who, independently from the Migration Board, can review cases in which particularly deplorable circumstances constitute an obstacle to return.
4. With respect to social assistance the amount of financial support should cover the factual costs of daily life.
5. For those who do not have the necessary means, access to health care should completely be free of charge.
6. Schooling should be mandatory for all migrant children and admittance to schools be ensured.

⁴⁰⁴ in accordance with Frennmark interview.

⁴⁰⁵ Cf. Chapter 5 Section 11 of the Aliens Act.

7. Access to housing should be provided especially for those who cannot afford the rents demanded for on the free market.
8. Law should be amended to ensure that there is no duty of officials in schools, hospitals or similar to breach their professional secrecy and report undocumented migrants to the police or the migration authorities.

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Case studies in the United Kingdom

1. Case Study

1.1 A typical case

– Adam, rejected asylum seeker from Ethiopia, 25 years –

Adam⁴⁰⁶ came from Ethiopia to the UK in December 2004 with a fake passport. In Ethiopia he and his father had been unlawfully arrested and imprisoned for 8 months. The state authorities persecuted Adam because of his ethnic origins. During his time in prison Adam was tortured; the police officers broke his knee twice. The same officers stabbed his father to death, and cut his body up. After Adam was tortured he woke up in the hospital with severe injuries. He managed to escape from the hospital and fled to the Ethiopian border in a car. He drove all the way to Nairobi and with the assistance of a people smuggler he was put on a plane to the UK. His girlfriend at that time paid a large sum of money for his escape from Ethiopia. Adam thought that he was going to the US where his sister lives, but instead he arrived in the UK.

Adam directly applied for asylum upon arrival. After approximately 6 months the immigration authorities refused his asylum claim. The Home Office did not believe his asylum story. He did not appeal against this negative decision because his solicitor wanted money for proceeding with the appeal, money he did not have. Adam first stayed in government provided accommodation in Leeds when he was within the asylum procedure. He had to leave this accommodation when his claim was rejected. No attempts have been made by the State authorities to remove Adam to Ethiopia. For a certain period of time he stayed at the house of an Ethiopian woman. They started a relationship together. However, she wanted him to become Muslim, which he refused. Adam was then forced to leave and ended up on the streets again. Adam was sleeping on the streets for 6 months while he was still physically ill from his torture in Ethiopia. Not only did he have a severe injury to his knee, which made it difficult for him to walk, but damage was also done to his kidneys. Adam was in need of surgery because of his injured knee, but the doctor cancelled the planned operation because he lived on the streets and adequate recovery care could not be guaranteed after the operation. Adam's mental health condition also deteriorated when he was living on the streets. He sometimes visited a homeless centre to get food, and from time to time he received clothing from the Red Cross. During the night he

tried to rest in a church or at Victoria railway station. Adam said: "at the railway station there were a lot of drunken people and there was a lot of fighting going on". The police were at the railway station often, making identity checks and trying to keep order; Adam always ran away because he feared being detained and returned to Ethiopia. At some point he was caught by the police, but they released him onto the streets again. One night at the railway station somebody grabbed him from behind and tried to rape him. Adam did not report this incident to the police because he has no papers and fears being sent back to Ethiopia. He found himself in a downward spiral: he lost his accommodation and ended up homeless; he became very isolated; his physical problems could not be treated and, as a consequence, worsened over time; his mental health problems increased due to the ordeal of living on the streets and the fact that he had been attacked.

At the time of the interview, Adam's request for social support had recently been accepted. He is staying at accommodation provided by the local social services. He shares this accommodation with 6 persons, but he has his own room. "I do not have any rest in my room, my housemates always make a lot of noise" says Adam. Adam receives £30 per week to buy food and other material essentials. However, Adam is unable to buy all the food and other products which he needs. Adam explained that he is too sick to cook and only buys ready meals. He often visits JRS UK to get additional meals and hygiene products. Because of his weak physical condition, Adam has problems with taking care of himself. He is still suffering from his knee injury, but because he is now accommodated a new operation is planned. Further, due to serious internal injuries, including to his kidneys, he has problems with visiting the toilet. Adam's mental health condition is of great concern. During the interview, Adam broke down in tears several times and showed himself to be extremely desperate about his situation. He suffers from Post-traumatic Stress Disorder, and recently started to receive counselling. He also receives sleeping tablets from his GP in order to get some rest during the night. Adam wishes he could undertake a college course, but because of all his problems and his illegal stay in the UK he is incapable of doing so. He is not allowed to access the formal labour market, but nevertheless is too sick to work even if this would be possible. "I am very lonely, I do not have real friends and I do nothing all day and cannot relax. I only visit the hospital or go to JRS UK to eat," says Adam. He has to report

⁴⁰⁶ Name changed for confidentiality purposes.

weekly to the relevant authorities and also has to visit the hospital frequently. Adam has to rely on public transport since he has difficulties with walking and the reporting centre and hospital are not close to his accommodation. Costs for travelling are refunded by JRS UK.

Adam has become very isolated and is living in constant fear. His biggest fear is that one day the police will come to his house to detain him and remove him to Ethiopia. Adam is very sad when he thinks about his life. He says: "I am too confused; my head is too full to think about the future." He says he feels powerless, but is firm about his decision that he does not want to go back to Ethiopia.

1.2 Context of the Case

The story told by Adam is illustrative of rejected asylum seekers who are residing in the UK after their claims have been rejected. His case also shows the difficulties which destitute rejected asylum seekers have when suffering physical and mental health problems. With the use of Adam's case as an example, the specific destitute situation of rejected asylum seekers will be examined in more detail below.

It should be noted that in 2008 the number of destitute persons – among them rejected asylum seekers – who seek help with JRS UK has dramatically increased. This increase – to over 100 persons a week – forced JRS UK to move its day centre facilities to new premises.⁴⁰⁷ At the least this indicates a general rise in the number of destitute persons living in the UK.

During the field trip to the UK, interviews were conducted with rejected asylum seekers who have no asylum procedures pending and those who had lodged a new claim and were either awaiting the authorities' decision on whether to reopen the case, or in whose cases a new procedure was underway. Some rejected asylum seekers had been detained but attempts to remove them had failed. For a long period of time, all of the interviewed asylum seekers had reported weekly to an Immigration Reporting Centre without being removed. Among this group some were receiving a form of limited social support from the State. One interview was conducted with a man who had applied for asylum after having stayed for several years in the UK, and because he had not lodged the application immediately upon arrival he was not entitled to asylum support.

The factors connecting the case of Adam with those of the other interviewees are: having no or limited legal entitlements leading to the inability to meet basic needs; reliance on

charity for survival; being socially excluded; the State's awareness of their presence on the territory; and having no way out of destitution.

2. The relevant law

This section will provide a short description of the protection forms under British law, the legal solutions in cases of non-removal, and the provisions on social assistance. This is useful in providing general legal background information for cases of rejected asylum seekers and asylum seekers who did not apply for asylum as soon as reasonably practicable.

2.1 Relevant asylum laws

According to a legal expert working for the Immigration Law Practitioners' Association (hereinafter referred to as "ILPA")⁴⁰⁸, the laws on asylum in the United Kingdom can be characterised by their complexity, their great volume and amendments on an almost weekly basis.⁴⁰⁹ While the most recent act, the

⁴⁰⁸ The Immigration Law Practitioners' Association was established in 1984 by a group of leading UK immigration practitioners to: promote and improve the advice for and representation of immigrants, provide information to members on domestic and European immigration, refugee and nationality law, secure a non-racist, non-sexist, just and equitable system of immigration, refugee and nationality law. ILPA has more than 1,100 members including lawyers, advice workers, academics and law students. ILPA is regularly consulted by the Government on key issues relating to immigration, refugee and nationality law. For more information see www.ilpa.org.uk.

⁴⁰⁹ Among this bulk of law, the most relevant laws regulating asylum matters in the United Kingdom are:

- Borders, Citizenship and Immigration Act 2009
- UK Borders Act 2007
- Asylum and Immigration Appeals Act 1993
- Asylum and Immigration Act 1996
- Special Immigration Appeals Commission Act 1997
- Human Rights Act 1998
- Immigration and Asylum Act 1999
- The Asylum Support Regulations 2000
- The Asylum (Designated Safe Third Countries) Order 2000
- The Asylum Seekers Reception Conditions Regulations 2005
- Nationality, Immigration and Asylum Act 2002
- Asylum and Immigration (Treatment of Claimants etc) Act 2004
- Immigration, Asylum and Nationality Act 2006
- Asylum and Immigration Tribunal Procedure Rules 2005
- The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005
- Immigration Rules HC 395
- The Refugee or Person in Need of International Protection (Qualification) Regulations 2006

In addition to the laws, there are the Asylum and Policy Instructions (hereinafter referred to as "APIs") which give further detail as to how regulations should be interpreted.

It is worth noting that this complex law notwithstanding, the European Court of Justice has ruled on 30 April 2009 that the UK has failed to fulfil its obligations to implement one of the most important EU directives in this context, the Council Directive 2004/83/EC ("Qualification Directive") in national law. See Migration

⁴⁰⁷ See Independent Catholic News, 23 August 2009: "JRS UK reports 160% increase in destitute persons seeking help". On the internet on www.indcatholicnews.com.

Borders, Citizenship and Immigration Act 2009, was officially designed to simplify immigration law, together with issuing a new Immigration Bill in November 2009, the government started a consultation round on how to further simplify the law. The consultation ended on 3 February 2010.

2.2 Forms of protection

Under its asylum laws and policies, the United Kingdom offers protection in the following three forms:

Grant of asylum

Asylum is granted to a person if the Secretary of State is satisfied that s/he is present in the UK, fulfils the criteria for the recognition as a refugee as laid down in Article 1 (A) 2 of the 1951 Refugee Convention and does not constitute a potential danger to the security of the UK.

Humanitarian Protection

Humanitarian protection is granted to a person if s/he does not qualify as a refugee but substantial grounds have been shown for believing that, if returned to the country of origin, the person would face a real risk of suffering serious harm⁴¹⁰ and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country. Humanitarian protection will not be granted to those who meet the criteria for exclusion from the UK, which include the person's presence not being conducive to the public good because of criminal behaviour or a threat to UK security. S/he may qualify for discretionary leave.

2.3 Legal solutions in cases of non-removal

Short term solution: Discretionary leave

Discretionary leave is a more varied concept and granted to those whose removal would violate Article 8 of the European Convention on Human Rights (ECHR) (the right to private and family life).⁴¹¹ It is also granted to persons whose claims are based on Article 3 ECHR as a result of treatment they would suffer if removed, a medical condition,⁴¹² or severe humanitarian conditions. Other cases for discretionary leave are those where removal

would violate any ECHR article in general or where removal is practically impossible.⁴¹³ Discretionary leave may be granted to those who fall within the 'excluded' category for six months at a time. It is still an open question whether in all cases of non-removal the Government has the duty to grant at least discretionary leave.

Long term solution: regularisation

Those who have been continuously staying in the United Kingdom for at least 14 years and additionally meet requirement such as knowledge of the language and of the life in the UK might be granted indefinite leave to remain (ILR) even if her or his stay has not been (completely) legal.⁴¹⁴

The former policy of not enforcing the removal of parents and their children if the children have been staying in the United Kingdom for 7 years ("Seven Year Child Concession") has been withdrawn as of 9 December 2008. Since this day cases of families with dependent children are considered under Art. 8 ECHR.⁴¹⁵

2.4 The application of the provisions: A low rate of protection

In the UK, the chances of being recognised as a refugee or being provided either with Humanitarian Protection (HP) or a Discretionary Leave (DL) are not very high:

In the third quarter of 2009 (Q3 2009) the UK Border Agency (UKBA) made 7,240 initial decisions on asylum applications. Asylum was granted in 865 cases (12%), in another 680 cases either HP or DL were granted (9%). Compared with previous years, the resulting rate of protection is considerably lower.

It becomes a little higher if the decisions of the Asylum and Immigration Tribunal (AIT) are taken into account. In Q3 2009, the AIT decided on 4,410 asylum appeals against decisions of the UKBA. In 31% of these cases (= 1,345) appeals were successful.⁴¹⁶

The quality of the decisions on asylum application is disputed as among refused asylum seekers are citizens of countries such as Zimbabwe, Sudan and the Democratic Republic of Congo, where widespread human rights violations occur and returned persons might be in danger of being tortured or maltreated.⁴¹⁷

News Sheet, May 2009, p. 9: "Qualification Directive: UK found to have failed to fulfil its obligations."

⁴¹⁰ Serious harm can be the imposition of the death penalty or execution, unlawful killing, torture or inhuman or degrading treatment or punishment of a person in the country of return, or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

⁴¹¹ Especially if the person concerned has been married to another person settled in the United Kingdom for two years before enforcement action commences and where it is unreasonable to expect the spouse to relocate.

⁴¹² Including being unfit to travel.

⁴¹³ Including (de-facto) statelessness.

⁴¹⁴ For details, see www.ncadc.org.uk/resources/Long_Residence_IDI-final_d1.pdf

⁴¹⁵ See <http://www.ncadc.org.uk/OEA-March-2008/Chapter53.pdf>

⁴¹⁶ All numbers taken from the homepage of the UK Border Agency at www.ukba.homeoffice.gov.uk.

⁴¹⁷ See, e.g., on the case of rejected asylum seekers who were forcibly returned to the Democratic Republic of Congo and tortured after arrival in Kinshasa, the article

2.5 Regulations on social support

Asylum seekers must not work unless, through no fault of their own, no decision is made on their application within 12 months.⁴¹⁸ Support and accommodation shall be provided to them by the UKBA while their claims are considered.⁴¹⁹ When an asylum claim has been refused and there is no outstanding appeal, the person concerned is expected to leave the country within 21 days. For single adults and childless couples support and housing are cut off at this point, whereas families with children continue to receive financial support and accommodation. Government policy also limits access for refused asylum seekers to non-emergency free secondary healthcare.

There are very limited circumstances in which former asylum seekers can receive low-level support and accommodation after their claims have been refused⁴²⁰.

Section 4 support

Section 4 of the Immigration and Asylum Act 1999 (hereinafter referred to as "IAA 1999") provides for statutory support to rejected asylum seekers who are considered to be destitute and where a temporary barrier to their return exists. A rejected asylum seeker is eligible for this form of support if s/he appears to be destitute and meets at least one of the following conditions:⁴²¹

- S/He is taking all reasonable steps to leave the United Kingdom or make her/himself able to leave the UK, which may include complying with attempts to obtain a travel document;
- S/He is unable to leave the UK by reason of a physical impediment to travel or for some other medical reason;
- S/He is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
- S/He has made an application for judicial review of a decision in relation to the

"Asylum seekers sent back 'to be tortured'" in The Guardian Weekly, 5 June 2009. Also see the "Briefing paper on destitute refused asylum seekers", issued by the campaign Still Human Still Here in February 2009, on the website <http://stillhumanstillhere.files.wordpress.com/2009/01/briefing-paper-on-destitute-asylum-seekers.doc>.

⁴¹⁸ Paragraph 360, Immigration Rules (HC 395).

⁴¹⁹ Immigration and Asylum Act 1999, Part VI.

⁴²⁰ See Immigration and Asylum Act 1999, Section 4 and the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 S.I. 2005 No. 930.

⁴²¹ Rule 3(1) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005.

asylum claim and the court has granted permission to proceed; or,

- The provision of accommodation is necessary for the purpose of avoiding a breach of a person's rights under the ECHR (including the situation where an applicant has made a fresh claim).

A requirement to receiving Section 4 support is that the rejected asylum seeker must sign a statement saying that s/he will return to his country of origin when the Secretary of State considers it be safe to do so.

The support provided under Section 4 is comprised of accommodation and subsistence vouchers. The accommodation providers supply the vouchers, and the exact nature of the vouchers is left at their discretion. The interviewed migrants informed us that currently they are receiving weekly vouchers worth £35.

Section 55 of the Nationality, Immigration and Asylum Act 2002 (hereinafter referred to as NIAA 2002") prohibits providing support under Section 4 to asylum seekers who did not apply for asylum as soon as reasonably practicable after arrival in the UK. However, in those cases where the application of this Section would amount to a breach of a person's Convention rights, Section 4 support may be granted to the extent necessary to avoid such a breach.⁴²²

Support for families

Families with minor dependants under 18, who were in receipt of asylum support under Section 95 of the IAA 1999 and whose claims were finally refused, continue to receive support according to Section 94(5) of the IAA 1999. Continued support is given until the family leaves the UK or until the youngest child reaches the age of 18. In cases where the only minor dependant is born after the negative decision on asylum has been received, the family will not be eligible for continued asylum support.

Support in exceptional cases

Under the general laws on social welfare, rejected asylum seekers can also be eligible to receive statutory support. Rejected asylum seekers with care needs in excess of destitution can benefit from special provisions:

According to Section 21 of the National Assistance Act 1948⁴²³ persons who are in

⁴²² Section 55(5) NIAA 2002. In their ground-breaking judgement in *R vs. SSHD ex parte Limbuela* [2005] UKHL 66 of 3 November 2005, the House of Lords, on the base of human rights arguments, upheld the Appeal Court's ruling that the government could not deny support for asylum seekers who had not filed their claim as soon as "reasonably practicable" if they were also demanding accommodation.

⁴²³ According to a legal expert from the ILPA, those who have not applied for asylum, but have other

need of care and attention which is not otherwise available to them “by reason of age, illness, disability or any other circumstances” can call upon their local authority for housing and financial support.

A similar type of community support can also be requested in view of a child’s well-being. Under Section 17 of the Children Act 1989, services may be provided by a local authority “for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child’s welfare.”

The NIAA 2002 provides that certain classes of persons are not eligible for these two types of support, unless support is necessary to avoid a breach of their rights under the ECHR. The classes of ineligible persons include: rejected asylum seekers who are not co-operating with removal directions, and persons unlawfully staying in the country who are not asylum seekers.⁴²⁴

3. Dimensions of destitution

This part will give a detailed overview of what it means to be destitute for rejected asylum seekers and also for asylum seekers who did not directly apply for asylum upon arrival. This part is based upon information provided by the interviewed persons from the focus group, as well as additional information provided by JRS UK and other NGOs.

3.1 Health

“I am feeling down all the time. I often think about suicide. I have nothing and nobody here. You must know that I am very ill. I have HIV and am also diabetic. I suffer a lot.”

– Female rejected asylum seeker from Northern Uganda, 50 years old –

Access to health care

Access to health care for asylum seekers and rejected asylum seekers is regulated under the National Health Service (Charges to Overseas Visitors) Regulations 1989, which were amended considerably in 2004 in order to prevent “health tourism.” The rules and amendments on health care for third-country nationals prove to be very unclear, and the Department of Health has tried to resolve this by publishing policy guidelines on its website.⁴²⁵ Nonetheless, confusion remains among medical staff. Within the UK system, access to health care is connected to the entitlement to receive medical treatment free of charge.

applications regarding residence pending with the Home Office are also eligible for this kind of statutory support.

⁴²⁴ Schedule 3 NIAA 2002.

⁴²⁵ <http://www.dh.gov.uk/Home/fs/en>.

The general rule is that a third-country national must be lawfully resident in the UK for over 12 months to be given free access to health care. Exceptions are only made in cases of emergency. Furthermore, free health care is only provided for:

- Family planning;
- Treatment of sexually transmitted diseases;
- Court ordered psychiatric care and care provided under the Mental Health Act 1983; and
- Diseases that might pose a threat to public health.⁴²⁶

Treatment for HIV/AIDS is not exempted from charges; only testing and counselling are free.⁴²⁷

The Department of Health has issued policy guidelines on access to health care for asylum seekers and rejected asylum seekers. Pursuant to these policy guidelines, asylum seekers who did not apply for asylum directly upon arrival and who are without asylum support have access to primary and secondary care free of charge, but must pay for prescriptions unless exempted. Further, according to these guidelines, General Practitioners (hereinafter referred to as “GPs”) are not obliged to register rejected asylum seekers at their practice but it is left to their discretion as to whether they accept such people as their patients.⁴²⁸ Rejected asylum seekers are eligible for emergency treatment *within primary care* free of charge. With respect to secondary care, rejected asylum seekers are generally not eligible for free hospital treatment.⁴²⁹ There are two exceptions to this rule: free medical care is provided in cases of emergency treatment and in cases of completion of hospital treatment, which started before the asylum claim was refused.⁴³⁰ This type of treatment should always be given to rejected asylum seekers regardless of their financial

⁴²⁶ Regulation 3 of the National Health Service (Charges to Overseas Visitors) Regulations 1989, as amended in 2004.

⁴²⁷ Regulation 3(d) of the National Health Service (Charges to Overseas Visitors) Regulations 1989, as amended in 2004.

⁴²⁸ The policy guidelines refer to Health Service Circular 1999/018 in this respect. The rules stated in the Department of Health’s policy guidelines apply to all rejected asylum seekers, regardless of whether they receive Section 4 support.

⁴²⁹ This exclusion has been declared unlawful by the High Court on 11 April 2008 in *R (on the application of A) v. West Middlesex University Hospital NHS Trust*, [2008] EWHC 855 (Admin), available at www.unhcr.org/refworld/docid/4816f7832.html, but judicial review has been granted.

⁴³⁰ According to the Department of Health’s guidelines this concerns “immediately necessary treatment to save life or prevent a condition to become life threatening”.

capacity or eligibility for free care. Recovery treatment following emergency care is only given as far as the medical staff considers this to be reasonable. The guidelines make it very clear that any treatment received after the claim has been finally refused shall be chargeable.

Rejected asylum seekers might qualify for the NHS low-income scheme.⁴³¹ However, conditions upon which it is issued are not clear. Qualification for assistance does not entitle rejected asylum seekers to receive medical treatment, but only allows them to receive financial support after they have been accepted for such treatment.

Access to health care in practice

A coherent practice regarding the access to health care for rejected asylum seekers and other illegally staying third-country nationals does not exist, due to a lack of clear rules and the wide margin of discretion left to GPs. This explains why some of the interviewed rejected asylum seekers received primary care and others did not. Thus it is not surprising that among the interviewed rejected asylum seekers, great confusion and lack of knowledge existed with respect to their rights to receive health care. Sometimes they did receive medical treatment free of charge, while in other situations they had to pay. The medical specialist working at Southwark Day Centre for Asylum Seekers (hereinafter referred to as "SDCAS")⁴³² is of the opinion that rejected asylum seekers have difficulties registering with GPs. On the basis of the information provided by NGOs, rejected asylum seekers who receive Section 4 support or another form of social support from the State have fewer difficulties in registering with a GP than rejected asylum seekers who are left without any form of support. Further, according to the Refugee Council⁴³³, many GPs are misinterpreting the

current medical legislation and policy guidelines. This view was shared by other NGOs. Many GPs believe that they are not allowed to register rejected asylum seekers at their practice, while according to the rules they are left with discretion to do this. Due to the unclear rules, the assistance of NGOs is sometimes necessary to guarantee access to medical services for rejected asylum seekers. "One call from us can make the difference", says SDCAS.

According to the Refugee Council, vulnerable groups especially, such as pregnant woman, diabetes patients and cancer patients, should have free access in all circumstances to secondary care.

Furthermore, information from an interview with a rejected asylum seeker and provided by Notre Dame Refugee Centre⁴³⁴ shows the lack of a fixed address to be a reason for many GPs for refusing to register a rejected asylum seeker. Another reason for refusal is, according to SDCAS, the fact that often a rejected asylum seeker is unable to completely understand English. Generally, emergency care is provided. Nevertheless, according to the medical specialist of SDCAS, in an individual's case whether emergency care is provided or not depends on the hospital in question. Being homeless in particular can be a reason to deny emergency care because the attending doctor must ascertain that adequate care is provided after the surgery, which is not possible if the rejected asylum seeker is homeless.

Rejected asylum seekers who receive emergency treatment, either within the primary care system or at the hospital, normally do not receive any form of follow-up treatment. According to SDCAS continuity of care is affected by the status of the rejected asylum seeker. JRS UK gave a striking example: a rejected asylum seeker was operated on for a bone fracture in his leg and a cast was put on the leg. However, later the cast was not removed by the hospital because this was not considered to be emergency care.

Furthermore, although treatment is received in hospital, many rejected asylum seekers must

voices to be heard in the UK and abroad, keeping them high on the political agenda and discussed in the media, producing authoritative information on refugee issues worldwide, including reports, and statistics and analysis.

⁴³⁴ Notre Dame Refugee Centre is part of the Notre Dame de France community in London. The Centre welcomes all asylum-seekers and refugees regardless of age, sex, ethnic origin or faith, and offers: a warm welcome, advice, advocacy and representation with regard to housing, benefits and social services provided by qualified advice workers, a first-stop immigration advice surgery run by immigration lawyers, a health service (presence of a nurse), a counselling service, provision of various support services, including interpreting, home visits, and accompanying asylum seekers and refugees to interviews and appointments.

⁴³¹ They will need to complete a so-called HC1 form.

⁴³² Southwark Day Centre for Asylum Seekers runs 3 day centres in Southwark (Copleston Centre, Peckham Settlement and Crossway) offering the following free services to refugees and asylum seekers: a hot meal, advice & information, referral, advocacy & sign-posting, practical support, English classes, refugee health advice & health talks, outreach, arts & crafts workshops, social events, cultural celebrations, day trips, sports activities, foreign newspapers, and a clothing & food parcel stall.

⁴³³ The Refugee Council is the largest organisation in the UK working with asylum seekers and refugees. The organisation not only gives direct help and support, but also works with asylum seekers and refugees to ensure their needs and concerns are addressed. Their services include: giving advice and support to asylum seekers and refugees to help them rebuild their lives, working with refugee community organisations, helping them grow and serve their communities, caring for separated children to help them feel safe and supported in the UK, offering training and employment courses to enable asylum seekers and refugees to use their skills and qualifications, campaigning and lobbying for refugees'

pay for the medicine they need for recovery. Also the medical specialist working for SDCAS stated that in the framework of emergency care only the bare minimum of medical care is provided. One female rejected asylum seeker explained that a week before her interview she was vomiting all the time and was brought by ambulance to the hospital. She did not receive a medical examination; she was sent home again with some medicine, without a follow-up appointment being made.

Being charged for medical care is an obstacle to receiving adequate treatment and medication. Some have been asked by their GPs to pay the medical bill, while others received free medical care in the GP practice. One of the female rejected asylum seekers interviewed had to turn to charity to be able to visit the dentist; her church paid the bill for her. According to the Notre Dame Refugee Centre, many rejected asylum seekers do not receive the medicine that is prescribed to them due to the fact that they are obliged to pay but cannot afford it. For rejected asylum seekers who do not receive Section 4 support it is difficult to receive financial support for medicine.⁴³⁵ Due to the charges for medicine, rejected asylum seekers do not receive the medicine they need or receive insufficient medicine. One female asylum seeker, who received insufficient medication for her back pain, was looking for alternative ways to secure medicine and the family she was staying with bought medicine for her when they were in Belgium.

Mental health condition

The great majority of the rejected asylum seekers interviewed reported having mental health problems. A poor mental health condition is common for many rejected asylum seekers; this was confirmed by the contacted NGOs. A great number of interviewed rejected asylum seekers were very emotional, desperate and in a confused state during the interview. The type of mental health problems identified by the NGOs and the interviewed rejected asylum seekers are:

- Depression,
- Stress and stress-related problems, such as headaches and memory loss,
- Exhaustion,
- Insomnia,
- Anxiety attacks,
- Post-traumatic Stress Disorder.

In the view of Notre Dame Refugee Centre, rejected asylum seekers with mental health problems are extremely vulnerable.

Most rejected asylum seekers interviewed considered the insecurity of their stay in the UK and their destitute situation in which they are entirely dependent on others to be the cause of their mental health problems. Many live in constant fear of being detained and removed from the UK, causing high levels of stress. Some also referred to their years of destitution as “wasted years” during which they could not develop themselves through work or education. According to the medical specialist working for SDCAS a large number of rejected asylum seekers lose hope that their situation will improve, leaving them in severe depression. A female rejected asylum seeker confided that she was thinking a lot about suicide. She is always in a state of fear because of the risk of being returned and she considers the years in destitution to be wasted. She also said she is very depressed because the £30 per week of social support she receives is not enough and she cannot eat well. As a diabetic and HIV positive, this is even more worrying.

Other causes of mental health problems are the traumatic experiences in the countries of origin. Some of the interviewed rejected asylum seekers had seen their family members killed or were victims of torture. A female asylum seeker stated: “I saw my father getting killed with a machete. I have flashbacks all the time of this.” Another male rejected asylum seeker was separated from his family. The family is staying in a refugee camp and very occasionally he receives information regarding their well-being. Being separated from his family and not knowing exactly how they are doing makes him very depressed. He cannot sleep anymore. He receives tablets for his depression. According to JRS UK, the mental health problems of rejected asylum seekers worsen over time since no adequate medical care is provided. The Notre Dame Refugee Centre also stated that mental health problems are sustained because of a lack of medical treatment.

Rejected asylum seekers run a high risk of ending up in a downward spiral regarding their mental health. Not only have many been going through traumatic experiences in their countries of origin for which no adequate treatment is received, but in addition the ordeal of living in abject poverty in a foreign country, separated from friends and family, has a severe negative impact on their mental health condition. Several rejected asylum seekers are on medication to treat their depression. Some indicated that they want to be occupied all day in order to forget their problems, but that they were not allowed to work legally. Because of the high numbers of

⁴³⁵ The rules on financial assistance are not applied in a consistent manner regarding rejected asylum seekers.

rejected asylum seekers who have mental health problems, SDCAS has set up a volunteers programme in which these persons can participate. In the same way, some rejected asylum seekers work at JRS UK as volunteers for structure for the day, as a means to forget their problems and increase their self-esteem.

Physical condition

According to SDCAS, the majority of rejected asylum seekers suffer so much in their daily life of destitution and have so many problems that they do not see health as a priority. Many neglect any health problems for this reason. Most rejected asylum seekers have a weak physical condition, which worsens the longer they live in destitution. Causes of a weak physical health condition are, in view of the NGOs spoken to:

- Bad housing conditions or being homeless,
- The fact that they do not receive sufficient food or healthy food.

SDCAS was of the opinion that because of the dreadful living conditions, some rejected asylum seekers suffer from malnutrition, bad teeth or viral infections. Sick rejected asylum seekers who are living on the streets are the most vulnerable group. It is difficult for homeless persons to maintain hygiene standards and to access health care. At the medical service of the Notre Dame Refugee Centre a great number of visits concern abdominal pain, backache, high blood pressure, oral health problems and pregnancy. Among the interviewed migrants physical medical problems concerned knee and back problems, infection of the internal organs, diabetes and HIV. Rejected asylum seekers with chronic diseases are the most negatively affected by the UK health system that allows only limited health care. These rejected asylum seekers lack continuous care, which results in a deterioration of their health situation.

Medical care provided by NGOs

Because of the limited and inadequate care offered by the national health system in the UK, many rejected asylum seekers and irregular migrants have no choice but to rely on the very basic health care offered by NGOs, such as refugee organisations and homeless centres. Both the Notre Dame Refugee Centre and SDCAS provide medical services. Due to financial constraints the services provided are very limited and mainly consist of initial screenings and assistance in accessing public health care. For example, the Notre Dame Refugee Centre has a health support centre for asylum seekers and refugees who have difficulties accessing GP practices. They

provide medical advice and counselling, assist in registering with local GPs and refer to a homeless centre for medical care.

3.2 Housing/Shelter

"I am staying at the house of a family for two years now. They come from the same country as me and I have met them in church. I have to share the bed with the children. Only sometimes they give me food, but I am very happy that I can stay at their place. I do not know for how long I can stay. I applied for Section 4 support, but they refused me. They said I already have accommodation."

– Female rejected asylum seeker from the Democratic Republic of Congo, 31 years old –

Right to housing

Asylum seekers whose claims have been finally refused may be entitled to receive housing provided by the State if they are considered to be destitute. Housing can be provided under the support provided by NASS as well as by Social Services. Irregular migrants who have applications pending at the Home Office may also qualify to receive support from Social Services in terms of housing.

Housing provided by the State

The housing provided by the State to rejected asylum seekers as part of asylum support from Social Services is below the normal housing standards. All of the consulted NGO representatives share the opinion that housing provided on the basis of Section 4 is very bad. Notre Dame Refugee Centre described the State's accommodation as being "substandard". Often the basic essentials are missing: no furniture, kitchen utensils etc. JRS UK occasionally gives money to persons on Section 4 support so that they can buy the necessary items.

Almost half of the interviewees stayed in accommodation provided by the State, of which half were on Section 4 support and the other half on Section 21 support. None of them were satisfied with their housing situation. Complaints concerned the sharing of rooms, lack of privacy, location, lack of proper heating and safety considerations. It is very common that those who are provided housing on the basis of Section 4 have to share a room with two or three other persons, or if they have a room for themselves they must share the kitchen and bathroom with about six other persons. "Even single mothers and old persons must share rooms", says Notre Dame Refugee Centre.

The state housing is in some cases located far out of the city centre. One of the interviewed rejected asylum seekers resides near Heathrow airport. Taking into account the fact that

rejected asylum seekers are under a duty to report weekly to the immigration officers and often are given no travel money for this purpose, the location of their accommodation is of great importance. Equally, medical requirements should influence location. A female rejected asylum seeker, a HIV patient, had asked for accommodation closer to the hospital since she is a regular visitor and unfit to travel long distances. The authorities refused this request without giving a clear reason for their decision. Further, several interviewees expressed feeling insecure in their own house, due to the conduct of their roommates. Or as one female rejected asylum seeker put it: "I am feeling a stranger in my own house." One interviewee said that his roommate drinks a lot and comes home late; for this reason he has problems sleeping.

The complaints raised by the interviewees with the relevant authorities were never seriously dealt with; no responses were received or refusals were made without giving any reason.

Staying at a friend's place

A great majority of rejected asylum seekers have to improvise when it comes to securing a place to sleep. Many rely on their friends for accommodation, otherwise they would end up on the streets. This high dependency on friends was also reflected in the interviews; many informed us that a friend was offering them a place to stay for the night. Most of the time the friends are from the same country of origin. According to Notre Dame Refugee Centre, many rejected asylum seekers move around from one friend to another.

Often the conditions of stay are extremely bad. Although the interviewed asylum seekers in question made it clear that they were very happy with the fact that a friend was willing to help them, several complained about their housing situation. A female rejected asylum seeker who is staying with a family said she had to share the bed with the children and to beg for everything from food to hygiene products. She has been living in this poor condition for almost two years. This story is not uncommon; according to JRS UK many rejected asylum seekers share beds at friends' homes or are even forced to rest on kitchen floors during the night. JRS UK also informed us that some rejected asylum seekers prostitute themselves for a bed.

Furthermore, insecurity regarding the duration of the stay at their friend's place, and feelings of being not welcome, were for some of the interviewees matters of great concern. Many also felt ashamed about having to rely on their friends for housing. The high dependency on the goodwill of others makes the rejected asylum seeker extremely vulnerable. One of

the interviewees said that his friend will move to another city soon and he is desperate about finding another place to stay. Another interviewed asylum seeker ended up on the streets after he had been staying for several months at a friend's house. He met a woman with whom he entered into a relationship. After they broke up, he had to leave the house immediately and ended up sleeping on the streets for 6 months. The stories told by the interviewees show the impact of this situation of dependency on the establishment and maintenance of personal relationships.

Sleeping on the streets

Apart from staying with friends, many rejected asylum seekers have nowhere to go and they have no other option left other than to sleep on the streets. JRS UK estimates that around 25 to 30 % of the asylum seekers whose claims were rejected become homeless at some point. No shelter facilities are offered in the city centre of London meeting the specific needs of homeless rejected asylum seekers and irregular migrants. "Those rejected asylum seekers living on the street encounter difficulties in accessing shelters and hostels as no public funding is available to cover the costs of their stay", says JRS UK. In view of all NGOs spoken to, there is an urgent need for the provision of emergency housing for homeless rejected asylum seekers.

The rejected asylum seekers interviewed stayed during the night at railway stations, churches or in doorways. SDCAS informed us that some stay in buses to keep themselves warm during the night. Many homeless rejected asylum seekers have mental health problems, do not understand English and also have a great fear of reporting to the police when attacked or threatened. The railway station was described by one of the interviewees as a very dangerous place during the night; there were a lot of drunkards and a lot of fights. He states: "One night they tried to rape me at the railway station. I did not report this incident to the police because I have no papers."

Sleeping on the streets is, for rejected asylum seekers, an awful and stressful experience. It entails a lack of good sleep, difficulty in maintaining hygienic standards and weakening of health conditions. SDCAS informed us that the lack of fixed address blocks the access to several services: for example, it is not possible to register at a GP without a fixed address.

3.3 Food/Clothing

"I eat whatever I can get."

– Male rejected asylum seeker from Cameroon, 36 years old –

Most rejected asylum seekers have no control over access to food and other material

essentials; they rely completely on friends and NGOs for these. Several NGOs, including the ones consulted, provide food packages, lunches or hot meals for rejected asylum seekers. Many of them make use of these services, while some also visit homeless centres for a meal. The lack of control over what to eat on a daily basis is a great cause of stress for many rejected asylum seekers. A result of this high reliance on charity for food is that rejected asylum seekers eat very irregularly. As one interviewee has put it: "I eat what I can get". Another respondent who was staying with a family from the same community reported that she did not receive meals from the family regularly; they only gave her some food from time to time. According to JRS UK, a great number of rejected asylum seekers suffer from malnutrition because they do not receive sufficient or varied food. Often they only get dry food products, and lack vitamin-rich food such as fruit and vegetables.

Rejected asylum seekers who receive Section 4 support or support from Social Services are provided with subsistence vouchers (worth £35) or cash (£30) for the purposes of buying food and other material essentials. Practice has shown, however, that the amount of vouchers or cash received is too low to meet all nutritional and other basic material needs. Especially for those who require a medically adapted diet, such as diabetic patients, it is problematic to secure sufficient and appropriate food. For one rejected asylum seeker it is particularly difficult to meet his nutritional needs since his physical medical condition does not allow him to cook his own meals, which means that he has to buy more expensive, already prepared meals or go to a charity organisation. For these reasons, rejected asylum seekers receiving some form of State support must turn to NGOs to obtain supplementary food.

Some NGOs, such as JRS UK, also provide hygiene products like shampoo and shaving material because the social support is too little for rejected asylum seekers to buy these products. As one person being supported under Section 21 puts it: "Receiving £30 a week is not enough to live on. This is not normal, especially not for such a long time. The UK forces people to become prostitutes or to beg on the street. If I would be still young I would sell my body, because at least I would directly get money for it."

Besides the amount of the support received, many interviewed rejected asylum seekers on Section 4 support complained about being given vouchers not cash which could only be used in certain supermarkets, limiting their choices in buying food products and other material essentials. Most of them want money instead of vouchers. According to information

provided by the Notre Dame Refugee Centre and JRS UK, many persons for this reason change their vouchers for money for sometimes even half the price of the voucher. One story was told by a male rejected asylum seeker on Section 4 support: he sometimes changes his voucher worth £35 for £20 cash on the informal market, because he wants to send money to his family who is residing in a refugee camp in Kenya. Thus, even the little that he has he wants to share with his family. Another complaint heard was the location of the supermarkets where the vouchers can be used. One female rejected asylum seeker who has HIV and is diabetic said that the supermarket she has to go to with her vouchers is too far away from her house given her medical condition.

3.4 Statutory Support

"I am not happy with the vouchers I receive. The supermarkets are too expensive. The vouchers are not enough for me to buy all the food I need. That is why I sometimes go to JRS to have a meal."

– Male rejected asylum seeker from Democratic Republic of Congo, receiving Section 4 support, 34 years old –

Receiving social support

Among the interviewed rejected asylum seekers, four received social support from the State; either support provided within the asylum system or support provided within the regular social welfare system. All of the interviewees complained about the quality of the housing provided and the weekly amount of vouchers or cash received to buy material essentials. The location of the housing was considered to be too far away, and the amount of voucher or cash support received was considered too low to live on.

Obstacles to receiving Section 4 Support

For many rejected asylum seekers, applying for Section 4 support is not a real possibility because they have to cooperate with return to their countries of origin by signing a statement to this respect. They have a well-founded fear of being persecuted upon return and for this reason do not apply for Section 4 support. In the view of SDCAS, the current legislation on Section 4 support is designed in such a way as to put rejected asylum seekers off. Some rejected asylum seekers do not know how to apply for Section 4 support or are unable to fill in the application form themselves, for example because of language problems. For this reason, the Notre Dame Refugee Centre assists rejected asylum seekers with their applications.

The granting of Section 4 support is not an automatic right if one of the five conditions is fulfilled. NASS has to be satisfied that the applicant is “destitute”.⁴³⁶ According to Notre Dame Refugee Centre, the fact that an applicant for Section 4 support is receiving support from charity or friends might be grounds to refuse the application. This may be so, even if the person only has insecure and irregular access to food or a place to sleep at a friend’s home. One of the interviewed rejected asylum seeker’s application was turned down because she was staying with a family, even though it was uncertain how long she would be able to stay there. According to NASS policy, it is assumed that if the person has been without (state) support for a prolonged period he has access to an alternative form of support and therefore is not destitute. In such a situation, it is up to the applicant to demonstrate that their circumstances have changed and are now without any means of support.⁴³⁷

3.5 Work

“It is important to stay active during the day, otherwise you lose your spirit. But we are not allowed to work. I do not understand this country”

– Male rejected asylum seeker from Ivory Coast, 34 years old –

Right to access the formal labour market

Asylum seekers whose asylum claim has been refused by a final decision have no right to access the formal labour market. Asylum seekers who did not apply for asylum as soon as reasonably practicable after arrival in the UK are also not entitled to take up legal employment.⁴³⁸ The government provides no income support to these two categories, with the exception of Section 4 support and support provided by Social Services under strict conditions. All of the interviewees were aware of the fact that they were not allowed to take up employment in the formal labour market.

⁴³⁶ According to NASS Policy Bulletin 71, “The definition of destitute for the purpose of establishing eligibility for support under section 4 shall be the same as that in section 95(3) of the 1999 Act.”, paragraph 5.2. Pursuant to Section 95(3) of the Immigration and Asylum Act 1999, a person is destitute if

- He does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met) or
- He has adequate accommodation or the means of obtaining it but cannot meet his other essential living needs.

⁴³⁷ Paragraph 5.2 of NASS Policy Bulletin 71

⁴³⁸ In fact no asylum seeker in the UK is entitled to work unless the Home Office takes longer than one year to make a first instance decision in their case.

Working activities

None of the interviewed rejected asylum seekers were, at the time of the interview, engaged in paid activities. Several interviewees declared themselves as physically or mentally not well enough to work or too occupied by their daily problems to be able to look for a job.

On the basis of the information provided by the NGOs, some rejected asylum seekers managed to find a job in the illegal market in cleaning, construction or the hotel sector. According to the Notre Dame Refugee Centre, some rejected asylum seekers use the IDs of others to circumvent the legislation prohibiting work. In the view of SDCAS, fines and prison sentences have increased for employers who hire third-country nationals not allowed to take up employment in the formal labour market, with the result that it is even more difficult for rejected asylum seekers to find a job in the informal market. Rejected asylum seekers taking up irregular work also run the risk of being exploited, said SDCAS. JRS UK declared that the wages can be far below minimum wage, around £1.20 per hour.

Not being able to work has a negative impact on the well-being of rejected asylum seekers and results in low self-esteem, frustration about the inability to participate in society, lack of structure during the day and high levels of boredom. Some of the rejected asylum seekers confided that during the day they have nothing to do and just sit at home or visit an NGO or church for social contact. For those rejected asylum seekers interviewed who had followed higher education or had a good profession back home, the fact that they are not permitted to work is even harder to accept. Among the interviewees were a former teacher, a shop owner, a staff member of a peace organisation and a medical student, who all felt upset about not being able to do something with their skills. As an alternative to paid work and to improve the general well-being, SDCAS and JRS UK sometimes offer voluntary work to rejected asylum seekers.

3.6 Transportation

“Every week, again and again, I have to report myself. I have no money, I only have - how do you call them - these vouchers. These officers do not care how I get there. I am happy there is JRS; they always give me money to buy a transport ticket.”

– Female rejected asylum seeker from Cabinda, 40 years old –

Rejected asylum seekers receiving Section 4 support must comply with the reporting duties set by an immigration officer or the Secretary of State. In practice, most rejected asylum

seekers have to report on a weekly basis to a reporting centre as part of the return's process. Some, however, are asked to report monthly, twice weekly or even daily. Most asylum seekers diligently comply with their reporting duties, even though they do not have the finances themselves to travel to the reporting centre. Rejected asylum seekers without any state support have no income at all. Due to the voucher system, rejected asylum seekers on Section 4 support are left without any cash. Nevertheless, travel to the reporting centre is not covered by Section 4 support. These rejected asylum seekers are expected to walk to the centres, which are often located several miles from the accommodation provided by the State. Provision is made under Section 69 of the NIAA 2002 to assist with the cost of travel to reporting centres. However, the granting of such travel support is discretionary, and, as the practice of the NGOs regarding refunding travel tickets shows, most rejected asylum seekers are not eligible for State funded travel support. JRS UK's annual budget for 2007 on refunding travel tickets was £13,000; though they expected to spend 25%-50% more, as in 2006 they also spent around 33% more. The demand for travel money is very high and is increasing over time. All of the interviewed rejected asylum seekers made use of this service at the time of the interview, and no one received travel support from the State. In particular, for those interviewees who were severely ill and unable to walk long distances, the travel support received from the NGO was the only way they could comply with their reporting duties.

Not only do rejected asylum seekers need to travel to comply with their reporting duties, visits to the hospital or a solicitor in most cases require the use of public transport. In these cases, JRS UK also provides money for transport. All interviewed rejected asylum seekers expressed that the travel money provided to them is very important. In particular, a female rejected asylum seeker, a HIV patient, regularly has to visit the hospital and did not know what she would do without the financial assistance for travelling.

3.7. Life Planning

"I was forced to leave my country. I was seeking protection, but I have found no protection here. When I arrived in the UK my life stopped. I have no goal in life anymore. I have nothing here, and I am without friends and family (crying). I do nothing all day. I do not have any choice. In this situation I am not able to find a man and to start a family. I am just waiting for a decision. I am so confused. I do not know what is wrong with this country."

– Female rejected asylum seeker from Democratic Republic of Congo, 31 years old –

Most of the interviewed rejected asylum seekers were very desperate about the situation they found themselves in. They felt they were not in a position to take important decisions regarding their lives and were waiting for the authorities to make a decision regarding their asylum claims, if any, or action taken regarding their return. All of the interviewees believed that they had no other choice than to remain in their situation of destitution.

Return to their respective countries of origin is not an option for various reasons. Most rejected asylum seekers have lost everything in their countries of origin. For the greatest number of interviewed rejected asylum seekers the fear of persecution was an obstacle to return to their respective country of origin. Many interviewees had to flee their countries of origin because they experienced horrific events, such as torture, unlawful detention, witness of family members being killed, outbreak of ethnic conflicts or civil war. Some had been members of the opposition party or their life was at risk because of their ethnic background. One of the rejected asylum seekers said that he is unable to return to Congo because of his Tutsi background. Before he fled he had worked at a peace and justice organisation and for this reason and his ethnic background he was attacked by rebels originating from Rwanda. He had been arrested and detained, but he was released from prison due to the assistance of the MONUC peacekeeping force. He received money from them to flee the country. His family also managed to escape the country and is currently residing in a refugee camp. This case illustrates that even though rejected asylum seekers live in dreadful conditions in the UK, return would never be an option for them. Thus, destitution does not influence the decision of return.

Other obstacles to return described by the interviewees were: medical reasons (one interviewee was a HIV-patient), the impossibility to obtain identity documents, the current unstable situation in the country of origin and the loss of ties with the home country after a more than 10 years of stay in the UK. One asylum seeker from Zimbabwe who applied for asylum after residing for several years in the UK did so due to the currently unstable situation in Zimbabwe, as well as regularisation because of his prolonged stay in the UK. Not only did he lose his ties with his home country – he left the country at the age of 16 and has not been back for 14 years – the unstable situation in Zimbabwe is also an obstacle to his return. At the time of the interview, he was awaiting the decision upon

his asylum claim as well as the decision upon his application for regularisation.

The NGOs confirmed that most rejected asylum seekers are unable to return to their countries of origin for practical reasons or fear of persecution. According to JRS UK, the most common obstacles to return are the lack of travel documents, the fear of being persecuted, unsafe country of origin and the absence of a safe travel route to the country. The Home Office is aware of the presence of a great majority of rejected asylum seekers in the country, since they report weekly to the authorities. Yet, these rejected asylum seekers are living for long periods of time in dreadful living conditions and are not being removed. According to JRS UK, the great majority of rejected asylum seekers they meet fulfil their reporting duties and have the hope that they will ultimately receive residence status. Some have been living in this limbo situation for more than 8 years. Also, Notre Dame Refugee Centre noted that by reporting on a weekly basis, rejected asylum seekers still feel part of the system and this gives them hope. JRS UK states that the Home Office sometimes issues country guidance according to which rejected asylum seekers are not to be removed to that country, without, however, altering their status. The Notre Dame Refugee Centre pointed out the incompetence of the Home Office in handling all the cases of rejected asylum seekers efficiently and within a reasonable time. In some cases, a Member of Parliament intervenes in order to prevent a rejected asylum seeker from being returned, says the Refugee Council.

Living a life in destitution

The majority of the interviewees consider their period spent in destitution and insecurity of stay as wasted years. They see time passing by while their stay in the country remains irregular and without any improvement to their living conditions. As one rejected asylum seeker put it: "my life is at a stand-still at the moment." Many of the rejected asylum seekers expected to be protected when they arrived in the UK and are in disbelief and highly upset about how the authorities have treated them. In the interviews all said that they could not understand why their claims for asylum were not accepted, and, for those who had been detained, they were highly upset that they had been treated as if they were criminals. During the interviews a lot of complaints were made about the legal representation of their cases at first instance and at appeal levels. Many interviewees have had a number of solicitors and felt that they have received poor legal representation during their asylum process.

In general, their stay in the county has been a very negative experience for the rejected asylum seekers interviewed; they do not feel as if they have been treated like human beings. The daily struggle to meet basic needs and having to rely on others for this purpose is, for the interviewees, a great source of stress, resulting in depression, sleepless nights, anxiety attacks and utter desperation. The majority were unable to find ways to relax and forget about their problems. As one rejected asylum seeker from Northern Uganda stated: "Nobody is protecting me. I have no work, no house, and no money, nothing to do all day and have to report weekly. This is another form of torture to where I escaped from." Not only is the fact that the interviewees live in abject poverty and have to rely on others for everything they need horrific, but the fact that there is no clear prospect of a change in this situation is unbearable. Many interviewees have been living for long periods, even some for several years, in destitution without an end in sight. They feel that they are missing out on life. "Living in the meantime in this situation where I have nothing and no security I can somehow cope with, but "meantime" is not coming to an end," says one rejected asylum seeker. Several of the interviewees expressed that they are exhausted and want to settle down, start a family, just lead a normal life. While some of the interviewed rejected asylum seekers clung on to their hope for change in order to carry on, several rejected asylum seekers appeared to have lost all hope, or even the will to survive, and expressed having no purpose in life any more. Most of the interviewees feel mentally exhausted, and in the words of one rejected asylum seeker: "no one wants you, in the end you are just desperate." One rejected asylum seeker often thought about committing suicide, since she saw no prospect for a change in her situation.

JRS UK recognised that rejected asylum seekers living in destitution have two needs which go beyond the material: to have a purpose in life and to have some sense of belonging and to socialise with others. Rejected asylum seekers are living a life at the margins of society. SDCAS describes them as being "very isolated." A significant number of interviewed rejected asylum seekers expressed the wish to participate in society by working or studying. Several of the rejected asylum seekers felt that they are leading "hidden" lives and felt neglected by society. "I prefer to stay inside all day. I do not feel safe outside," said one female asylum seeker. Extreme boredom was often heard in the stories of rejected asylum seekers; most of them have nothing to do all day, while other managed to get some structure by engaging in voluntary work or education. Several NGOs based in London

offer language and computer courses. SDCAS provides English classes for free, but many rejected asylum seekers do not manage to attend these courses due to their mental health problems and the difficulties they face in daily life. A female asylum seeker interviewed also said she was very depressed and ill and therefore was no longer able to attend the computer courses. Not only do NGOs provide services to rejected asylum seekers, they also serve a social function. Several interviewees expressed feeling very lonely and having few social contacts. Most of them do not have real friends or family to talk to, but some rejected asylum seekers said they have some friends in a similar situation who they either meet during drop-in hours at an NGO or at the church. A major reason for them to visit NGOs is to socialise and meet people who are in a similar situation.

The risk of being detained and having to report every week was a great cause for stress for most of the interviewees. Many live in constant fear of being detained and returned to their countries of origin. All of the interviewees have to report weekly to the relevant immigration authorities, which they considered to be a very upsetting event. According to the Notre Dame Refugee Centre, rejected asylum seekers are absolutely terrified by this regular reporting. Most interviewees did not feel they were treated with respect when they reported and no information was given by the officer regarding their status. According to one rejected asylum seeker, "Every Friday is hell when I have to report. A new life for another week starts after I have reported myself". One rejected asylum seeker was once kept all day in a reporting centre and questioned about why she did not return to her country of origin. The officers let her go eventually, because she was feeling unwell, being an HIV-patient.

4. Conclusions and recommendations

4.1 Inconsistencies and flaws in the State's law, policies and practice resulting in destitution

Access to health care

1. The rules on the access to health care for asylum seekers and rejected asylum seekers are unclear, which results in a denial of health care in practice. Furthermore the lack of a fixed address can be an obstacle in exercising the right to health care. Rejected asylum seekers only have free access to emergency care within primary care and secondary care; a charge is made for other medical treatment.

Social Support

2. The current system for rejected asylum seekers is too disintegrated, and, taken as a whole, leads to unfair results. For example, the location of housing is essential with respect to the location of the supermarkets at which food vouchers can be used, or, in case of a rejected asylum seeker undergoing medical treatment, the location of the nearest hospital. Another example would be the requirement of weekly reporting, while the majority of rejected asylum seekers have no cash and travel expenses are not refunded in practice.

This system is designed to put rejected asylum seekers off through its eligibility criteria, slow and unclear decision-making processes and a low quality of services provided where complaints are not adequately addressed.

3. The UK does not provide automatic continued (asylum) support such as accommodation and food for rejected asylum seekers until the moment of return.
4. The provision of Section 4 support is subject to the duty to cooperate with return, and the eligible criteria leaves too much room for discretion ("being destitute").
5. Section 4 support or support provided by social services is too little to live on.
6. Only in very limited cases – to avoid breach with the European Convention on Human Rights – is (asylum) support granted to asylum seekers who did not apply for asylum directly upon arrival.
7. Many rejected asylum seekers are under a duty to report on a weekly basis to a reporting centre, without having a clear right to have their transport costs covered.
8. Rejected asylum seekers on Section 4 support do not receive cash but rather subsistence vouchers.

Return

9. The return policy and practice of the UK has its limitations; not all rejected asylum seekers can be removed.

4.2 Consequences of the State's laws, policies and practice

1. Limited access to health care and living in destitution negatively affects the health condition. The general health condition weakens over time and medical problems are not adequately treated.
2. Being forced into destitution with no way out leads to severe mental health problems,

loss of a purpose in life and low self-esteem.

3. Many rejected asylum seekers do not receive Section 4 support because they fear being persecuted upon return and do not want to cooperate with the state authorities regarding their return.
4. For society
5. NGOs are fulfilling typical State tasks such as the provision of housing, food supply and medical screening in order to minimise the effects of destitution as much as possible. In many cases, the services of the NGOs are essential for the survival of destitute rejected asylum seekers and asylum seekers without asylum support. The NGOs also take up this role for rejected asylum seekers who do receive some form state support, but which is not sufficient for subsistence.
6. Destitute rejected asylum seekers are socially excluded and unable to contribute to society, since they are prohibited from working. Society does not benefit from their skills. Moreover they are being de-skilled, by not being able to exercise their skills regularly.
7. A growing number of “third-class citizens” is created who are staying in the UK for long periods without being removed.
8. Return
9. The withholding of all forms of support leading to destitution does not encourage return. Many rejected asylum seekers and asylum seekers who filed a late asylum claim prefer to remain in their destitute situation than to return to their countries of origin.

4.3 Recommendations

Medical care

1. Free and full access to healthcare in all cases throughout the entire stay of the asylum seekers and rejected asylum seekers in the UK.
2. Clarification of the rules and training of medical staff on rights to health care for asylum seekers and rejected asylum seekers.

Social Support

3. Continued asylum/social support should be given to rejected asylum seekers until the moment that they have left the British territory, or they should be given the right to work in order to support themselves. Alternatively, Section 4 support should not be made subject to the condition that

rejected asylum seekers cooperate with their return.

4. Transport costs made in order to fulfil reporting duties should be refunded automatically by the relevant authorities.
5. Financial support in cash should be given instead of vouchers.

Residence Rights

6. If return cannot be enforced within a reasonable period of time a third-country national should be given a residence permit with a full set of social rights.

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Destitution: A European Phenomenon

1. Destitution is widespread among different groups of third-country nationals in Europe

Destitution is a phenomenon experienced by many third-country nationals within Europe, regardless of their status.⁴³⁹ The country visits to Belgium, Germany, Ireland, Italy, Malta, Portugal, Romania, Spain, Sweden, and the United Kingdom revealed a wide variety of these migrants with different legal backgrounds.

Among the cases of destitution from the countries described in this report, three major groups can be identified: asylum seekers in the appeals phase (i.e. either with or without residence rights), rejected asylum seekers and irregular migrants. With respect to the last two groups – rejected asylum seekers and irregular migrants – either they are illegally staying on the territory or their stay on the territory is “tolerated” i.e. they are allowed to remain on the territory without the granting of residence rights.

2. Destitution as a downward spiral

One interviewee has described destitution as living in limbo or in an impasse. Another metaphor could be the downward spiral. Destitution and its effects on migrants worsen over time. For a significant number of forced migrants the starting point of destitution is the loss of residence rights granted under asylum or foreigners law.⁴⁴⁰ Loss of residence rights is in principle accompanied with the loss of legal entitlements to housing, food supply and financial support. Yet, in some cases entitlements to state support continue to exist after the loss of residence rights. These entitlements are either based upon law or practice.

On the other hand, migrants who have lost their residence rights and subsequently their entitlements to State support suddenly find themselves in abject poverty and have to knock on the doors of friends, community members and NGOs for their survival. The human costs of destitution, increasing over time, are tremendous: health deteriorates in the long run due to malnutrition and limited access to health

care, feelings of loneliness and desperation increase the longer the period spent in destitution, the risk of ultimately ending up on the streets is very high, and migrants are pushed into depression due to the daily struggle for survival and no prospect for change.

No story of the downward spiral of destitution is similar, but various links between the dimensions and the spiral further into destitution can be discerned. One interrelation is between housing and health: having no fixed address is an obstacle to accessing health care for medical treatment. By not receiving the necessary treatment, the medical condition of the homeless migrant endures and worsens over time. Further, living in poor housing or being homeless negatively affects the health condition. Other linkages are between health and work: if a destitute migrant has poor health this forms a hindrance to finding work. One outstanding element crucial to the severity of destitution and a major contributor to the downward spiral of destitution is the mental health problems suffered during destitution. The longer the periods spent in destitution, the more unbearable the migrants consider the situation and the more likely it is that they incur severe mental health problems such as depression and suicidal thoughts. Many destitute migrants suffering from depression expressed that their condition prevented them from carrying out daily activities such as working or following a language or computer course at an NGO. Many mentioned having problems concentrating. They also become more and more isolated since their mental health problems are so overwhelming that they are not in a position to establish and maintain social contacts.

3. Common threads of destitution

3.1 Health

Legal entitlements to health care are limited

A comparison of even just a few of the case studies reveals, as the following table shows, that with regard to the access to health care the situation is quite diverse across the European Union:

⁴³⁹ As the legal situation of EU citizens differs much from those of third country nationals, the report does not analyse the situation of the former group. It should be noted, however, that in some countries such as Ireland a large group of EU citizens also live in destitution.

⁴⁴⁰ There are also country-specific situations where destitute migrants do not lose their residence rights but end up in destitution due to a change in their legal situation, or where even before loss of residence rights a situation of destitution exists.

Table 1: Access to health care free of charge

Country	Asylum seekers during their procedure	Rejected asylum seekers & holders of a "toleration"	Undocumented migrants
Belgium	Yes	Only emergency care	Only emergency care
Germany	Only in cases of "acute" illness/pain, no treatment of "chronic" diseases		
Italy	Yes	In fact no	In fact no
Malta	Yes	In fact no	In fact no
Portugal	Law says yes, but many factual obstacles		
Romania	Only emergency treatment for up to 3 days		
Spain	Yes	Depends on regulation in the certain province, e.g. Madrid no, Valencia yes	Depends on regulation in the certain province, e.g. Madrid no, Valencia yes
Sweden	Only in emergency cases		
United Kingdom	Primary: Yes (GP discretion) Secondary: Yes	Primary: Yes (GP discretion) Secondary: Only in emergency cases. Unclear	

Despite this diversity, some several common threads can be discerned throughout Europe. Access to health care provided under the national laws of the countries visited is very limited for destitute migrants. The already restricted access to health care under the national laws is even more limited in practice; many obstacles exist which lead to a denial of access to health care even if a right to access health care exists. Destitute migrants who are illegally staying or whose stay is tolerated on the territory in particular only have access to emergency health care free of charge. A positive exception is the policy applied in some Spanish provinces where health cards covering all necessary costs for medical care are issued to all persons in need irrespective of their status.

What is to be exactly understood by emergency health care is not defined in detail in the laws of the countries visited. Different connotations are used, such as the right to receive medical treatment in cases of "acute illness and pain" in Germany and the notion of "urgent medical care" in Belgium. Since no detailed legal definitions are given in the laws, the interpretation is either left to the medical staff or the administration responsible to assess requests for medical treatment by third-country nationals.

Receiving medical treatment within primary or secondary care other than emergency treatment is only possible upon payment of the medical bill or if the third-country national concerned is in the possession of health insurance. Given the fact that destitute migrants

without residence rights lack sufficient financial resources for payment and are not eligible for public health insurance, access to health services is in fact limited to emergency health care.

For asylum seekers in appeal, access to health care is broader than emergency health care. However, complex administrative procedures should be followed in order to obtain access. In the UK for example, asylum seekers are entitled to access primary and secondary care. Yet, no full access is provided.

The administrative procedures that should be followed before a destitute migrant can actually access the medical services proved to be very complex in all of the countries visited. The whole administrative process was very bureaucratic and took a long time. In several countries destitute migrants with medical requirements first need to obtain a health card or medical certificate before access to health services is made possible. The illogical and complex system is best shown in Belgium: irregular migrants and rejected asylum seekers as a general rule first have to obtain a medical certificate from a doctor indicating their medical need, which should be handed over to the social welfare office for assessment. Only after its approval can they then consult the same doctor again for actual treatment.

Destitution has a negative impact on physical and mental health

A significant number of NGOs in the various countries expressed great concern about the physical and mental health condition of destitute migrants. This is a worrying situation. Having mental health problems forms part of a downward spiral and negatively affects all other aspects of life, such as the ability to work. Living in abject poverty, separated from friends and family in a foreign country, being almost entirely dependent on others to meet basic needs and the insecurity of stay causes high levels of stress and pushes migrants into depression. Among the group of rejected asylum seekers and asylum seekers in appeal with whom interviews were conducted, many confided having experienced traumatic events in their countries of origin which mentally damaged them and for which they did not receive psychological assistance. Mental health problems common to destitute migrants are: depression, insomnia, suicidal thoughts, post-traumatic stress-disorder and stress-related problems such as lack of concentration, memory loss and headaches.

Destitution weakens the physical health of migrants. To live in destitution implies living in poor housing, or, even worse, to be homeless. Often the housing where destitute migrants reside is overcrowded and buildings are not

poorly maintained. When homeless it is difficult to maintain hygienic standards. Destitute migrants in these situations are susceptible to infectious diseases. In addition, a great number of destitute migrants eat irregularly because they entirely depend on what is given to them by others. Thus they do not eat a varied enough diet and do not get all the nutritional requirements. In some cases this has led to malnutrition. Furthermore destitute migrants with diseases only seek medical treatment at a late stage when the disease has worsened. The medical condition of those with chronic diseases such as diabetes is sustained and worsens over time, since continuous medical treatment and medicine are not guaranteed.

3.2 Accommodation

Here again the situation across the European Union is quite diverse, as the following table shows:

Table 2: Access to accommodation in 9 EU Member States

Country	Asylum seekers during their procedure	Rejected asylum seekers & holders of a "toleration"	Undocumented migrants
Belgium	Yes	No after expiration of removal order, but exceptions possible	No, with the exception of families with minor children
Germany	Yes	Yes	In fact no
Italy	Yes, but not in the appeals stage	In fact no	In fact no – Renting out to an undocumented migrant can be a crime!
Malta	Yes	Yes, but under bad conditions	Yes, but under bad conditions
Portugal	Yes	No	No
Romania	Yes	No	No
Spain	Yes, but only in ordinary, not in admissibility procedure	No	No
Sweden	Yes	No	No
United Kingdom	Yes	No (contested).	No

The right to housing for migrants with residence rights or a tolerated stay on the territory differs between countries. In Germany (holders of tolerations) and Malta (asylum seekers in appeal with a legal stay) they are entitled to public housing. Striking examples where the stay on the territory is allowed, yet no right to public housing exists are Portugal (asylum seekers in appeal) and Romania (holders of tolerations). Also, for migrants with an illegal

stay on the territory the legal entitlements to housing differ. In cases where housing is offered by the State to irregular destitute migrants this is either based upon practice,⁴⁴¹ where stringent conditions apply⁴⁴² or where housing is only provided in a limited number of clearly defined cases.⁴⁴³ What is common for those countries that do offer accommodation to migrants with an irregular stay is that these migrants fear detention and removal because they reveal their identity to the public authorities. In Germany, for example, the law provides for accommodation in case of need, but the public servant processing the request for housing by an illegally staying third-country national has the duty to report the applicant to the immigration authorities. Thus, even though an entitlement exists, the destitute migrant is denied the benefits in practice because of her or his illegal stay in the country.

Uncertain housing and poor living conditions

The housing arrangements of destitute migrants are insecure and in most cases sub-standard and unhealthy. Due to the limited possibilities of accessing housing and the fear of being reported to the authorities in those cases where a right to public housing exists, migrants almost entirely depend on charity for housing. It is not the State, but NGOs, religious institutes, friends and community members who provide accommodation. In Italy, a private landlord who rents out to a migrant without a residence status can even be arrested! Not all destitute migrants are fortunate enough to make use of the housing support offered by others: many end up on the streets. A great number of NGOs spoken to expressed grave concern about the housing situation of destitute migrants and reported many cases of homelessness. Not being in a stable housing situation causes high levels of stress. What makes destitute homeless migrants particularly vulnerable when compared with homeless nationals is the fact that they are staying in a foreign country, often do not know the language and have more difficulties locating the services provided to homeless people. Furthermore, destitute migrants have difficulties accessing public shelter facilities. Only a few shelter facilities exist that allow third-country nationals to stay during the night. In Portugal, for example, public shelters generally do not accept rejected asylum seekers or irregular migrants; only in exceptional circumstances might they stay for one or two nights.

⁴⁴¹ In the case of Malta with respect to rejected asylum seekers.

⁴⁴² In the UK the provision of housing to rejected asylum seekers is made subject to the duty to cooperate with return.

⁴⁴³ In Belgium, rejected asylum seekers and irregular migrants with minors are entitled to remain in public reception centres.

In those countries where rejected asylum seekers and irregular migrants have the possibility to remain at public accommodation centres, many complaints were made about the quality of housing. In particular in the UK and Malta the accommodation provided was described by the NGOs and the interviewed destitute migrants as sub-standard. Common complaints were: overcrowding, lack of privacy, sharing rooms, remote locations, the existence of social tensions, and complaints not being adequately addressed by the management.

Of particular concern is the condition of destitute migrants with serious mental health problems. These are the ones falling through the cracks in the system. The State does not provide special care to these cases, while NGOs do not have the resources or skills to adequately deal with them. Often their mental health situation is so serious that they cannot be hosted by NGOs for the safety of other residents; they are the “remaining cases” that usually end up on the streets.⁴⁴⁴

The findings show that housing is key to accessing other services and the loss of a fixed address has serious consequences. In Romania, the loss of a fixed address results in the loss of a tolerated stay on the territory. It might also lead to a denial of health services. In the UK the lack of a fixed address might be reason for medical staff not to undertake an operation in hospital in case recovery care is required afterwards, which cannot be guaranteed in the cases of homelessness. Lastly, to have a fixed address is important for maintaining contacts with relevant state authorities regarding residence or social rights, or to maintain contacts with lawyers.

3.3 Work/Social Welfare

Destitute migrants are excluded from the formal labour market

Migrants with an illegal stay on the territory are prohibited from accessing the formal labour market. Among the groups of migrants with a legal or tolerated stay on the territory, only some are offered the legal possibility of entering the formal labour market.

Table 3: Access to the formal labour market

Country	Asylum seekers during their procedure	Rejected asylum seekers & holders of a “toleration”	Undocumented migrants
Belgium	Yes, but not if appealing to the Council of State	No	No
Germany	Yes, after one year and subsidiarily	Yes, after one year and subsidiarily	No
Italy	Yes, after six months, but not in appeals stage	No	No
Malta	Yes, after one year	Yes, but inferior	No
Portugal	Yes, if not in appeals stage	No	No
Romania	Yes	No	No
Spain	Yes, after six months	No	No
Sweden	Law says yes, but factual obstacles	Yes, under certain circumstances	No
United Kingdom	Yes, if having applied for asylum as soon as reasonable practicable	No	No

However, in most countries the formal labour market is not automatically accessible as usually a work permit must be obtained. This is not easy. The following obstacles have been identified: the processing of a request for a work permit takes a long time, a fee is requested,⁴⁴⁵ the subsidiarity principle is applied,⁴⁴⁶ or the laws and procedures are unclear.⁴⁴⁷ The result is that only a few migrants manage to have legal access to the labour market.

Furthermore, few migrants are entitled to financial support, which is most often provided in cases where the destitute migrants stay at public accommodation centres. In fact, many destitute migrants are cashless. Thus, given the fact that they have no right to access the formal labour market and no or limited financial support in most cases, destitute migrants have no or low incomes depending on their success in finding a job in the informal market.

⁴⁴⁴ In Romania, for example, JRS Romania had to terminate the stay of one of the beneficiaries of its accommodation centre after his mental health problems became so serious that he posed a threat to the other residents.

⁴⁴⁵ In Malta a fee has to be paid every three months for which the work permit is issued.

⁴⁴⁶ In Germany, where the subsidiarity principle is applied to migrants whose stay is tolerated in the territory, a work permit may only be issued in case it is established that no German citizen, EU citizen or third-country national with a residence permit is available for the position for which a work permit is requested.

⁴⁴⁷ This is the case in Italy.

Forced into the irregular market to generate income

A consequence of the legal prohibition to work for most of the destitute migrants within the countries visited and the fact that they do not receive, or only limited, social support is that they have to rely on charity for survival or, additionally, try to find an irregular job to provide them with some form of income. A great number of the interviewees had at some point in time been engaged in irregular employment or were actively seeking an irregular job. The chief motive was that work was seen as a means of subsistence. Another reason often heard was the desire to increase their self-esteem by being active and appreciated.

However, the chances of finding work in the irregular market proved to be, in the majority of countries, very difficult for migrants, especially in the current economic crisis. Possibilities of finding work in the irregular market are very limited: the type of work found is short-term (i.e. per day or several days in a row) and low paid. Those who take up irregular work are prone to exploitation as they must accept all work under any condition.

In all countries visited, irregular work was mostly taken up in the construction sector (by men) or the cleaning and catering industry (women). Being successful in finding work rarely enables the migrant to leave his or her destitute situation behind. The jobs are too insecure, short term and low paid that they do not provide a secure basis and sufficient income to rent private accommodation and buy essential materials. Thus even for those who work, reliance on charity for basic needs remains essential.

Being excluded from the formal labour market has severe negative impacts on the well-being of the destitute migrants. In all of the countries visited the same effects were shown: not being able to work results in high levels of boredom, a lack of daily structure, loss of self esteem and feelings of uselessness and frustration.

3.4 Education

In some EU Member States, migrant children under the age of 18 can go to school although it is not always compulsory:

Table 4: Access to education for children

Country	Asylum seekers during their procedure	Rejected asylum seekers & holders of a "toleration"	Undocumented migrants
Germany	Yes	Yes	In some Länder yes, discussion ongoing
Ireland	Yes	Yes	Yes
Malta	Yes	No	No
Spain	Yes	No	Yes, but difficult to access
Sweden	Yes	Yes	Unclear

Adult migrants without a residence status, on the other hand, are almost completely excluded from education, vocational training or university. In some countries, NGOs at least offer some computer or language classes.⁴⁴⁸

3.5 Lack of possibility to return leads to life in limbo

For destitute migrants, return to the countries of origin is not a viable option. If they are without residence rights they live in constant fear that they will be removed, causing high levels of stress. The reasons for not returning to their respective countries of origin vary. In some cases destitute migrants are so deep in depression that they are not in a position to make any reasoned choice about return. Many distrust the State authorities because of the way they have been treated during their stay in the country. This distrust stands in the way of making informed choices upon return with the assistance of the relevant authorities. Some destitute migrants are living on the streets and are hard to reach. Asylum seekers who are still in the appeals phase have legitimate expectations that some form of protection will be offered by the State, since the relevant authorities have not yet reached a final decision regarding their asylum claim. Asylum seekers in appeal with an illegal stay on the territory are in disbelief about the fact that they are subject to removal. Third-country nationals who have been granted with a toleration share the same feeling; the government officially recognises that obstacles to return exist but accords them no residence rights and insufficient social rights. Many of the interviewed destitute migrants had been detained before and released because the immigration authorities were unable to remove them. A great majority were not informed of the reasons why they were not returned and were left to their own devices without a solution being sought.

⁴⁴⁸ E.g. JRS Ireland.

Many interviewed destitute rejected asylum seekers expressed extreme fear of persecution upon return or stated that their life would not be safe due to the unstable situation in their countries of origin. Many had had traumatic experiences which had made them flee; they are afraid of being exposed to similar experiences upon return, preferring to remain in the situation of destitution in their country of stay even though they find this situation hard to accept.

Other obstacles to return are practical problems, such as the lack of travel documents, unwillingness of the respective embassy to cooperate and the lack of a safe travel route. Again other reasons expressed were of a more humanitarian character, such as loss of ties with the country of origin, family ties with the country of stay having been established, and medical reasons (i.e. the health condition making the person unfit to fly or the lack of adequate medical reception facilities necessary for treatment).

Although differences can be discerned in the countries visited in their return policies in terms of activeness, monitoring (i.e. reporting duties), detention or possible legal instruments used in case of non-removal, the common thread is that those illegally staying destitute migrants who are not being removed by the State live in limbo for long periods of time and are left to their own devices. Some have reported themselves to the relevant authorities as part of the removal process for many years, for example in the UK, without any legal change in their situation.

Therefore destitute migrants live in a state of limbo and none of the classical solutions for

forced migrants are applied to them: Resettlement, Return or Recognition.

4. Civil Society Actors are taking over typical State functions to minimise destitution

Across all countries visited, NGOs, religious institutions, community members and other social actors are providing basic services to destitute migrants in order to minimise the effects of destitution as much as possible. These services are aimed at meeting the most basic needs of destitute migrants necessary for their survival. The actors are thus carrying out typical State functions.

Not only do they provide material essentials, but many serve a social function. A great number of destitute migrants are very isolated and feel lonely; the aforementioned actors offer them the opportunity to meet other people and be given a sympathetic ear.

Due to a lack of financial and human resources, the basic services provided by the NGOs and charity organisations are not anywhere near sufficient to respond to all the demands of destitute migrants. Often requests for assistance have to be turned down. The quality of the services provided is not always adequate. This particularly applies to the health services: the medical treatment provided by NGOs can never be a substitute for the regular health system, particularly in cases of serious chronic disease or when an operation is required. The NGOs role in this respect generally has to be limited to initial screening and referral services.

Human Rights Law Arguments and Policy Positions

The findings of the study concern three areas of policy making: the implementation of human rights policies; the design and implementation of return policies; and the lack of social inclusion policies. The following chapter articulates the concerns of JRS Europe with regards policies in these three areas that lead to severe and prolonged situations of destitution for forcibly displaced persons.

1. Human Rights Law Arguments

This section aims to sum up provisions in international and European law showing that destitution is not only a moral and ethical, but also a human rights problem.

1.1 Relevant international law

In the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**⁴⁴⁹ State Parties have agreed to take steps “with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means” (Art. 2 para 1). Although, therefore, the ICESCR does not contain individual, enforceable obligations, Art. 2 para 2 of the covenant expressly commits State Parties to ensure that exercise of the rights enunciated in the covenant will be without discrimination “of any kind” such as, *inter alia*, colour, national origin “or other status.” This non-discrimination rule allows limitations of the enjoyment of social rights only in so far as they might be compatible with the nature of these rights (Art. 4). Even if a distinction could be justified with objective reasons it must not touch the core of the respective right.⁴⁵⁰

This must be respected in the interpretation and implementation of the relevant national law, especially with regard to:

- Right to Social Security (Art. 9),
- Right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing (Art. 11 para 1),
- Right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Art. 12).

Even if the litigability of the ICESCR in detail is highly disputed, the UN Committee for Economic, Social and Cultural Rights (CESCR) has nevertheless repeatedly highlighted the

⁴⁴⁹ 993 UNTS 3.

⁴⁵⁰ See Joan Fitzpatrick, *The Human Rights of Migrants*. In: T. Alexander Aleinikoff/Vincent Chatal (ed.), *Migration and International Legal Norms*. The Hague et al. 2003, pp. 169-184 <175>.

states' obligation to completely transpose the covenant into domestic law and, in this context, especially to pay attention to the situation of non-citizens.⁴⁵¹ Also, pursuant to Art. 27 of the Vienna Convention on the Law of Treaties, a State Party must not invoke domestic law as justification for failure to perform a treaty.

To discriminate a person in granting rights deriving from the ICESCR also constitutes a violation of the **International Convention on the Elimination of All Forms of Racial Discrimination**.⁴⁵² As the UN Committee for the Elimination of All Forms of Racial Discrimination has stated in their General Comment No. 30, the ICESCR sets forth human rights which states must grant to everybody being subjected to their jurisdiction.⁴⁵³

The **International Convention on the Rights of the Child**⁴⁵⁴ establishes in Art. 3 para 1 the duty of every state to give priority to the best interest of a child in the context of any action a child – being a person under the age of 18 years – is subjected to. This is expressively true also for the area of social welfare. In the cases of migrant children in particular, the following regulations are applicable:

- Art. 20 – Right of an unaccompanied minor to special protection and assistance,
- Art. 23 - Right of a disabled child to special care,
- Art. 24 - Right of the child to the enjoyment of the highest attainable standard of health,
- Art. 26 – Right of the child to benefit from social security, including social insurance,
- Art. 27 – Right of the child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,
- Art. 28-29 – Right of the child to education.

⁴⁵¹ See CESCR General Comment 9 (The domestic application of the Covenant), U.N. Doc. E/C.12/1998/24, 3.12.1998; David Weissbrodt, *Progress report on the rights of non-citizens – U.N. activities*, U.N. Doc. E/CN.4/Sub.2/2002/25/Add.1 (2002), paras 41–46; *idem*, *Prevention of Discrimination – The rights of non-citizens*. Final Report. U.N. Doc. E/CN.4/Sub.2/2003/23.

⁴⁵² 660 U.N.T.S. 195.

⁴⁵³ General Recommendation 30: Discrimination against non-citizens. U.N. Doc. CERD/C/64/Misc 11/rev.3, 12 March 2004

⁴⁵⁴ 1577 U.N.T.S. 3.

In some cases, the **International Labour Organisation (ILO) Convention No. 118**⁴⁵⁵ is relevant as well. A national of a State Party to this convention who is subjected to the jurisdiction of another State Party, irrespective of legal status, enjoys the same rights with respect to some areas of social security as the nationals of the country of reception.

Hence, under international law it is violation of a state's obligations if non-citizens who are asylum-seekers, "tolerated" migrants or irregular migrants, are completely excluded from social welfare, health care, housing, schooling and education for minor and/or access to the labour market.

1.2 Relevant European law

Art. 14 of the **European Convention for the Protection of Human Rights and Fundamental Freedoms** (ECHR)⁴⁵⁶ enshrines the right to freedom of discrimination on the grounds of, inter alia, national origin or "other status". This can lead to a ban on differentiation on these grounds in the context of social security. As the European Court of Human Rights (ECtHR) has ruled in *Gaygusuz*,⁴⁵⁷ a different treatment of national citizens and foreigners violates the ban on discrimination laid down in Art. 14 if it is not grounded on objective and reasonable justification. This is the case if a legitimate aim is not pursued or there is no reasonable relation between the interests of the persons affected on one hand and the aim of the measure on the other. The states enjoy a certain margin of discretion in deciding if and how far differences justify a different treatment. But they must show good cause if a difference in treatment based solely on the nationality is to be compatible with the ECHR. If, e.g., all employees irrespective of their nationality pay unemployment insurance contributions, corresponding transfer payments cannot be refused because of the nationality.

This approach was developed further in *Poirrez*,⁴⁵⁸ where the Court held that a differentiation in the treatment with respect to social benefits between nationals of State Parties to the ECHR or those of State Parties to relevant agreements on reciprocity on one hand and nationals of other states on the other is not justifiable.⁴⁵⁹

The **Twelfth Protocol to the ECHR**⁴⁶⁰ came into force as of 1 April 2005. This brought an expansion of the ban on discrimination with respect to social benefits because Art. 1 para 1 of the Protocol calls for every right guaranteed by law to be granted without discrimination on any of the grounds enumerated in Art. 14 ECHR.

Art. 10 – 20 of the **EU Reception Conditions Directive**⁴⁶¹ lay down minimum standards for the treatment of *asylum seekers*, i.e. of third country nationals or stateless persons who have made applications for international protection in respect of which a final decision has not yet been taken. (Though the directive directly addresses only the treatment of asylum seekers, Member States are free to apply the directive in other cases as well). In accordance with the Directive, asylum seekers have at least the right to

- Schooling and education for minors,
- "Material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence" (Art. 13 para 2),
- Housing,
- Health care,
- Appropriate treatment of persons with special needs.

Relevant for the treatment of "tolerated" migrants are the provisions of Art. 9 in conjunction with Art. 14 of the **EU Return Directive**.⁴⁶² If a Member State decides, for whatever reason, to postpone a removal it shall be ensured that, inter alia,

- Emergency health care and essential treatment of illness are provided;
- Minors are granted access to the basic education system subject to the length of their stay;
- Special needs of vulnerable persons are taken into account.

Member States must transpose the directive into their domestic law by 24 December 2010 at the latest.

⁴⁵⁵ For text and list of State Parties see the ILO website at www.ilo.org.

⁴⁵⁶ ETS No. 5.

⁴⁵⁷ ECtHR, Decision of 16/09/1996 – No. 39/1995/545/631 (*Gaygusuz vs. Austria*).

⁴⁵⁸ ECtHR, Decision of 30/09/2003 – No. 40892/98 (*Poirrez vs. France*).

⁴⁵⁹ Hence, in the decisions of 25/10/2005 (No. 58453/00 - *Niedzwiecki vs. Germany* – and No. 59140/00 – *Okpiz vs. Germany*) the Court held that the German system of granting family allowances differentiating between foreigners with a long-term residence permit

and those without lacks a sufficient reasoning and therefore constitutes a violation of Art. 14 in conjunction with Art. 8 (right to family and private life).

⁴⁶⁰ ETS No. 177.

⁴⁶¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; OJ L 31 (2003), 18.

⁴⁶² 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.

1.3 Resulting principles

Some basic principles can be drawn from the description above:

(1) **Human rights apply to every person, regardless of nationality or legal status.** It is a great misconception to assume that rejected asylum seekers and other destitute migrants whose stay on the territory is irregular do not have any rights at all.

(2) The recognition of the above mentioned human rights in the international instruments imposes **various obligations on the State which are of immediate effect.** In particular, governments are obliged to respect, protect and fulfil human rights.⁴⁶³

The Obligation to Respect entails that governments shall refrain from any action which infringes on rights or which prevents persons from satisfying these rights for themselves when they are able to do so.

The Obligation to Protect entails that governments must protect persons within their jurisdiction from violations of their human rights by others, especially non-State actors.

For the purposes of this study, **the Obligation to Fulfil** is the most important one: it entails that governments must realise the full enjoyment of all human rights to all persons.

Interlinked with these obligations is the right to **Non-Discrimination:** Governments must ensure that all people within their jurisdiction, regardless of their nationality or residence status, can in fact enjoy their human rights.

2. Policy Positions

JRS Europe is deeply rooted in the values of the Gospel and the social teachings of the Catholic Church. Both put the human being at the centre of their attention: the human being that is created in the image of God and deserves to be respected in its dignity and integrity, and also in its social relations as a member of society. From these roots derive the mission to speak out on behalf of asylum seekers, refugees, and other forcibly displaced persons.

The following policy positions base themselves on the human rights law as outlined above and arise from practical experience of frequent encounters and accompaniment. JRS Europe offers the arguments as a contribution to initiate a broad civil society dialogue on destitution, which is still a little known and hidden phenomenon.

⁴⁶³ This Trias of States' Obligations harkens back to Henry Shue, "Basic Rights: Subsistence, Affluence and U.S. Foreign Policy." Princeton, 1980 (2nd ed. 1996).

2.1 Human Rights Policies

(1) JRS Europe is greatly concerned that **the destitute migrants interviewed, including rejected asylum seekers, asylum seekers in appeal, third-country nationals whose stay on the territory is tolerated and irregular migrants are not in a position to fully exercise these rights** in the concrete situations in which they find themselves. However, all of them are human beings who are in the possession of human rights and whose human dignity should be protected at all times.

(2) JRS Europe is concerned by the fact that state practice greatly contributes to this situation: **In sharp contrast to their obligations, EU Member States have adopted laws, policies and practices which exclude migrants – with residence rights, tolerated or irregular stay – to a large extent from accessing essential services** on the basis of legal status, or access to them is made dependent on the duty to cooperate with return. Exclusionary policies are conducted with respect to health care, employment, social benefits, housing, and other services provided in kind such as food and clothing. These obstacles to the exercise of human rights of destitute migrants should be removed.

2.2 Return policies

(3) **It is an illusion to believe that irregular migration can be completely tackled and that all illegally staying third-country nationals can be removed in due time.** This study provides strong evidence that return policies at the national and European level have their limitations in terms of success of actual removals, encouragement of return and the handling of the cases of third-country nationals who find themselves within the removal process. In this sense JRS Europe argues for policies that take into account this reality.

(4) JRS Europe acknowledges that national governments have already identified in their laws and policies some situations in which removal cannot take place but we are deeply concerned about situations **where national governments accept legitimate grounds for non-removal without offering durable solutions to third-country nationals who cannot be removed on the grounds identified by the government.** This study shows: many third-country nationals who are not being removed are left to their own devices. Although some of the barriers to return exist only temporarily, many barriers have a more permanent form in practice.

(5) The findings in this study make it evident that **forcing persons into destitution by withholding legal entitlements to access goods and services does not encourage**

return. It is unreasonable to believe that denying third-country nationals all forms of support and prohibiting the right to access the formal labour market will encourage them to return to their countries of origin.

(6) Where return policies are not fair and efficient, alternatives for return should be found. Rejected asylum seekers and other destitute migrants with an irregular stay should not become victims of a failing return policy; if they cannot be returned, a durable solution should be sought for their cases. JRS Europe argues on the basis of this study that at present a number of laws, policies and practices on return cannot be considered fair and efficient. In particular the procedures that lead to destitution need to be re-examined.

(7) Crucially, if removal is not enforced due to safety reasons, protection should be granted. If a third-country national is not removed because of an unsafe country of origin or the risk that human rights will be violated upon return, protection should be offered by the country of stay. Practice shows that protection is not always granted in situations where these grounds form an impediment to return.

(8) A fully-fledged residence permit should be granted to third-country nationals who cannot be removed. Third-country nationals should not live a life in limbo, without residence rights and basic social rights for an indefinite time. If return cannot be enforced within a reasonable time defined by law, a third-country national should be given a residence status with a full set of rights. Third-country nationals who find themselves living in limbo should be able to leave this situation behind. There are three durable solutions for refugees: resettlement, return and recognition. Destitute migrants living in limbo are offered none of the three solutions. Since resettlement and return are not possible, a solution should be sought in the realm of recognition and integration.⁴⁶⁴

⁴⁶⁴ This view is also expressed in: "Common principles on removal of irregular migrants and rejected asylum seekers", statement by eleven NGOs – inter alia Amnesty International, HRW, JRS, ECRE, PICUM, Cimade - August 2005, <http://hrw.org/english/docs/2005/09/01/eu11676.htm>, according to which: "The execution of the removal order or the return decision should be carried out within a reasonable period fixed by law. Where removal cannot be effected within this period, the removal order or return decision should be cancelled or suspended. Once a removal order or a return decision is cancelled or suspended, the person subject to the order or to the decision must immediately be granted a legal right to remain that allows for the exercise of rights. If, after a reasonable period defined by law, the removal or the return decision cannot be executed, the person subject to the order should have the opportunity to apply for a residence permit. Those persons should never be detained."

(9) "Toleration" of stay on the territory is under no circumstances a durable solution in cases where return is not possible. A toleration to remain on the territory is used as an instrument within the return policies when removal cannot be enforced. Even though under the national law toleration is intended as a temporary measure, it is often issued for long periods of time. "Toleration" only entails an authorisation to remain on the territory: no other rights bestow from it. It is not a residence permit and for this reason does not resolve the case of a third-country national who cannot be removed for reasons which are not of a temporary nature. Toleration should never be issued for long periods of time.

(10) The State has a duty of care for destitute migrants with an irregular or tolerated stay up until the moment of return. JRS Europe is highly critical of practices through which the state shifts this responsibility to civil society actors that then provide essential care to destitute migrants. Firstly, the duty of care is based upon the State's obligation to respect, protect and uphold human rights of all regardless of nationality or status. This is particularly relevant in cases of third-country nationals who are or have been within the asylum procedure, where the State has decided to process their asylum claims and legitimate expectations have been established that care will be provided to them during the procedure, this should be continued until they have left the country voluntarily or have been removed by the State. From this general duty of care the following can be derived:

(11) Continued support equal to asylum support received upon filing an asylum claim should be provided to asylum seekers in appeal and rejected asylum seekers until the moment that they have left the country of stay. In addition, they should be granted the right to access the formal labour market to allow them to generate their own income.

(12) Irregular migrants should be provided at least with basic support during the removal process.⁴⁶⁵ The minimum basic support should include housing as well as financial support of a sufficient level to cover all needs regarding food, clothing, health care, hygiene products and other material essentials. In addition, irregular migrants should be granted with the right to access the formal labour market to allow them to generate their own income.

2.3 Social inclusion policies

(13) Destitution of illegally staying third-country nationals should be addressed within social inclusion policies at the

⁴⁶⁵ The time period concerns the period between the issuance of the removal order and the actual removal.

European and national level. JRS Europe concludes that as a result of the limitations of return policies, significant numbers of destitute rejected asylum seekers and destitute third-country nationals without a residence status are likely to remain for long periods of time on the territory of European States. The existence of these destitute migrants should not be ignored by the State authorities at the national, regional and local level, nor by European policy makers.⁴⁶⁶ Integration policies should address, at least, minimum rights and access to services for illegally staying third-country nationals. Migration and asylum policies which cause destitution are a harmonised area of policy making in the European Union. Therefore the effects of such policies such as the social exclusion of persons living for long periods of time on the territory of EU member states also need to be addressed at the causal level: i.e. the European level, among others.

(14) JRS Europe is deeply concerned that **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 governments not profit from their expertise and miss out on taxes and social security contributions: Third-country nationals who for long periods of time are not allowed to work become de-skilled, making integration into society more difficult. Given the fact that destitute migrants who have so far not returned to their countries of origin are even less likely to return, the disadvantages created by such policies are to be dealt with in the EU member states. Therefore such policies are detrimental to the interest of EU member states. Excluding migrants from society by way of destitution is harmful to European societies.

(15) **Destitution leads to the alienation from society of a large group of migrants who are living in abject poverty and are excluded from accessing public goods and services.** The creation of a group of third-class citizens should be avoided.

⁴⁶⁶ The Common Basic Principles on Integration (CBP) do not consider the inclusion of illegally staying third-country nationals to be an issue to be addressed within integration policies. The EU should widen their focus. Common Basic Principles on Integration (CBP), adopted by the EU Council in November 2004.

Annex I France

For technical reasons a complete research could not be conducted in France to the same extent as it has been done in other countries. But given the fact that destitution among migrants is of great concern to JRS France, the office had independently conducted interviews with various NGOs active in Paris and Lyon that work directly with destitute migrant groups. Furthermore, an interview was conducted with one destitute rejected asylum seeker from Mauritania. This annex is a reflection of the findings of JRS France.

1. Dimensions of Destitution

1.1 Health

In accordance with law⁴⁶⁷, asylum seekers have access to health care on an equal footing to French nationals. The Aide Médicale d'Etat (AME) is responsible for providing free medical care to third-country nationals. Pursuant to Article L 251-1 of the Family and Social Action Code all third-country nationals who have been continuously residing in France for more than three months, including those with an illegal stay on the territory, are also entitled to medical care in public hospitals. However, access to health care for third-country nationals without residence rights proves to be very difficult in practice. According to Groupe d'Information et de Soutien des Immigrés (hereinafter referred to as "GISTI")⁴⁶⁸, even where entitlements to health care exist access is often denied because the legal status of the third-country national is contested by the administrative authorities. Furthermore, the medical staff are often unaware of the entitlements for third-country nationals as regards health care. Emergency health care is normally provided for. Medical staff are not under a legal obligation to report irregular migrants who received medical treatment to the immigration authorities.

As a response to the limited health care for irregular migrants and rejected asylum seekers under the regular public health system, NGOs, such as Comité Medical pour les Exilés (hereinafter referred to as "COMEDE")⁴⁶⁹, provide medical services to these migrant groups. COMEDE also makes referrals to the regular public health system. COMEDE's beneficiaries are third-country nationals with a precarious stay on the territory, including rejected asylum seekers and irregular migrants. Based upon the information provided by COMEDE, the principal three diseases that destitute migrants with a precarious stay suffer from are: psycho-traumatic diseases, infectious diseases such as HIV and hepatitis B, and chronic diseases, such as diabetes and asthma. COMEDE noted that a rejected asylum seeker or irregular migrant who is ill will very often only ask for their assistance when the symptoms of the disease have already become very serious. COMEDE considered the poor social situation and insecurity of stay to have a negative impact on the physical and mental health of irregular migrants and rejected asylum seekers. What is often missing in the regular health system is an adequate follow-up or continuous care. In its work COMEDE ensures that their clients do receive this follow-up or continuous care if necessary.

According to COMEDE the generally weak physical and mental health condition of third-country nationals with a precarious stay on the territory has two main causes: the traumatic experiences which they had in the country of origin,⁴⁷⁰ and the poor social situation coupled with the insecurity of stay. COMEDE added that many of their beneficiaries find it hard to cope with the fact that they are separated from their families or that they were forced to leave their children behind. GISTI confirmed that poor living conditions, the lack of work and social support negatively affects the health condition of rejected asylum seekers and irregular migrants.

As stated by COMEDE, although health care is offered by specialised NGOs, this is not

⁴⁶⁷ Code de l'action sociale et des familles. Version consolidée au 9 avril 2009. Quoted as shown on www.legifrance.gouv.fr (last visit on 14 April 2009). For general information see also Claire Escoffier et al., "Economic and Social Rights of Migrants and Refugees in the Euro-Med Region. Access to health care and the labour market. Case studies: France, Jordan and Morocco." Published by the Euro-Mediterranean Human Rights Network. Copenhagen 2008, p. 49-51.

⁴⁶⁸ The Groupe d'Information et de Soutien des Immigrés is a non-profit human rights organisation established in 1972 to protect the legal and political rights of third-country nationals and to advocate freedom of movement across borders. The Group provides information and support to third-country nationals through its knowledge of immigration law—French, European, and in some respects international—and its experience of immigration practices. It defends the rights of third-country nationals, offers training and publications and participates in the debate on migration policies.

⁴⁶⁹ Comité Medical pour les Exilés was established in 1979 by Amnesty International, the CIMADE and Groupe Accueil Solidarité. Comede has two main activities:

- A medical centre that provides free medical and psychological care to asylum seekers, refugees, rejected asylum seekers or other irregular migrants. General practitioners are working at the centre. Also interpretation services are provided.
- A resource centre for all relevant actors who are active in the field of health care to third-country nationals, such as NGOs and medical staff.

⁴⁷⁰ 50% of the persons consulted reported having been a victim of violence.

sufficient to reach out and offer treatment to all irregular migrants and rejected asylum seekers who are in medical need.

1.2 Housing/Shelter

During the asylum procedure asylum applicants are in principle housed in reception centres or hostels. According to Forum-Réfugiés,⁴⁷¹ after an asylum claim has been rejected, the former asylum seeker must leave the reception centre within one month. A failed asylum seeker loses his entitlements to housing under the asylum system.

In accordance with the Family and Social Action Code, emergency housing can be provided to irregular migrants and rejected asylum seekers. However, in practice access is often denied because of limited availability. GISTI explained that due to limited places, priority is given to the elderly and sick, with the result that access is often denied to others. Furthermore, emergency shelter only offers short-term accommodation, while most homeless irregular migrants and rejected asylum seekers are in need of a permanent solution that cannot be found. Forum-Réfugiés systematically contacts the Social Emergency Service on the emergency line 115 to secure housing for extremely vulnerable rejected asylum seekers. Vulnerable cases include families or seriously ill or disabled persons. According to Forum-Réfugiés, families are normally offered a place in the emergency shelters. The organisation communicated that the conditions of the shelter facilities in Lyon are very harsh. An interviewed rejected asylum seeker who is residing in a shelter facility describes the living conditions in the shelter as rough, but he is at least happy to have a place to stay and to be able to make friends with other residents.

GISTI stated that in cases of homelessness in Paris there are a number of NGOs where irregular migrants and rejected asylum seekers

can go to for services. However, the demand is high and for some services waiting lists exist.

Generally, the housing situation of irregular migrants and rejected asylum seekers is extremely precarious. Many do end up on the streets. Some rejected asylum seekers or irregular migrants manage to stay for some nights at a friend's place, or they squat in an abandoned building. Caritas France gave an example of a female migrant with a child who managed from time to time to stay temporarily in emergency housing, but when she was unsuccessful she and her child stayed during the night at a bus shelter. The International Movement ATD Quart Monde⁴⁷² highlighted the fact that the housing projects of the Ministry for Social Affairs often have effects contrary to what is intended: the demolition of many old buildings and houses, for example, in which many rejected asylum seekers stayed, led to an increase in the number of homeless rejected asylum seekers.

Both GISTI and Forum-Réfugiés indicated that there is a gap between the provisions in law and the current reality faced by many irregular migrants and rejected asylum seekers who live on the streets or in precarious housing situations. Both organisations believed that the loss of housing enhances the destitute situation and makes it more difficult to overcome this situation and face the future.

It should also be taken into account that in accordance with the French law⁴⁷³ any person who directly or indirectly facilitates the irregular stay of a foreigner in France is

⁴⁷¹ Forum-Réfugiés is a non-governmental organisation established in 1982 in Lyon (France) which is specialised in the reception of asylum seekers and refugees and in the promotion of a fair and humane asylum policy. Its members are both individuals and organisations who entrust it with a specific role in that field. Forum-Réfugiés is today acknowledged as a recognised spokesperson by many public authorities (Ministries, European Commission, Council of Europe, Prefecture, UNHCR, local authorities...) and other associations and individuals. Forum-Réfugiés provides legal advice and administrative assistance to thousands of asylum seekers who do not benefit from housing in a reception centre and enables them to have a postal address which is necessary for the asylum procedure. The prefecture has entrusted Forum-Réfugiés with the coordination and organisation of a commission made up of several partners which meets every week to decide upon priority entries in the reception system of asylum seekers. Furthermore Forum-Réfugiés is involved in litigation and research projects in order to promote the right of asylum.

⁴⁷² The prototype of the International Movement ATD Quart Monde was founded in 1957, in a camp for homeless families outside Paris, by the late Father Joseph Wresinski, a Catholic priest, who himself had grown up in poverty. "Aide à Toute Détresse" – Help for All in Distress – was the first name of the association. The name Quart Monde came later and was coined by the founder after the Fourth Estate of the French Revolution, which comprised the very poorest people struggling to be represented in the political changes of the time. Today ATD Quart Monde operates in eight European countries, Northern and Central America, and several countries in Africa and Asia. The Movement has three major lines of action: (i) grass-roots presence and involvement among very poor families and communities, in housing estates, slums and isolated shanty towns; (ii) research into poverty undertaken with the people concerned; (iii) campaigning and mobilising public opinion at local, national and international levels. The International Movement ATD Quart Monde is committed to representing people living in extreme poverty at an international level. It has general consultative status with the United Nations Economic and Social Council (ECOSOC), UNICEF, UNESCO, ILO and the Council of Europe and has a permanent delegation at the European Union Commission and the European Parliament. It aims to unite the experience and knowledge gained from people living in extreme poverty through its numerous grass-roots projects with the academic-based knowledge of the various international institutions.

⁴⁷³ Currently Article L.622-1 of CESEDA.

punished by imprisonment of 5 years and a fine of 30,000 Euros. The law does not apply to benevolent persons who provide assistance to persons in distress, and it also specifies that there is immunity from prosecution when the act in question was, in the face of present or immediate danger, necessary for safeguarding the life or physical integrity of the foreigner. On the other hand, this immunity is not applicable if "there is disproportion between the means employed and gravity of the threat or if it gave rise to something in return, direct or indirect." With such ambiguity in the law, according to information from GISTI there have been some convictions of persons doing humanitarian work⁴⁷⁴ and the law may have the effect of dissuading many people of good will from going to the assistance of irregular migrants out of purely humanitarian concerns.⁴⁷⁵

1.3 Food

Asylum seekers who stay at reception centres are supplied with food from the State. Irregular migrants are not entitled to food support from the State. However, according to GISTI there are several NGOs in Paris that run soup kitchens funded by the state.

1.4 Work/Social Welfare

Generally, under French law the right to access the formal labour market is connected to the possession of a residence permit.⁴⁷⁶ As a consequence, rejected asylum seekers and irregular migrants cannot find employment in the formal labour market and are forced to take up jobs in the informal market to generate income. Asylum seekers are entitled to receive financial support from the State.

An interviewed rejected asylum seeker reported having different jobs in the informal market. Most of his engagements related to work on a construction site, but he had also worked in the cleaning sector. He found these jobs through other residents at the emergency shelter where he is staying. The interviewee described his wages as extremely low: on average 35% under the official minimum wage.

According to the NGOs spoken to, irregular migrants and rejected asylum seekers often become victims of exploitation: work is underpaid, working conditions are unsafe and

they are exposed to degrading treatment. In the view of GISTI, as the right to access the formal labour market is withheld, irregular migrants and rejected asylum seekers have extreme difficulties in finding paid (irregular) employment and in generating their own income. This is concerning since they are left without any form of financial support from the State. Caritas France also recognised that, besides residence rights, the right to access the formal labour market is of high priority for rejected asylum seekers and irregular migrants.

2. Relevant Status under Asylum Law

The most relevant law on asylum in France is the "Code de l'entrée et du séjour des étrangers et du droit d'asile" (CESEDA). Under this law the two most important forms of protection are:

2.1 Refugee Status

In France, refugee status can be granted on three occasions:

- To a person who has been persecuted because of her or his activities for freedom,⁴⁷⁷
- To persons who have been recognised as refugees by the United Nations High Commissioner for Refugees on the basis of articles 6 and 7 of the Statute,⁴⁷⁸
- If a third-country national qualifies as a refugee according to Article 1 of the 1951 Refugee Convention.⁴⁷⁹

2.2 Subsidiary protection

Subsidiary protection is granted to any person who does not qualify as a refugee under French law, but in whose case it is established that s/he is exposed to one of the following serious threats in the country of origin:⁴⁸⁰

- Death penalty,
- Torture or inhuman or degrading sentence or treatment,
- In case of a civilian a serious, direct and individual threat against life or physical integrity because of general violence resulting from a local or international armed conflict situation.

⁴⁷⁴ See <http://www.gisti.org/spip.php?article1399>.

⁴⁷⁵ See also Migration News Sheet, May 2009, p. 7: "France – Immigration Minister claims that the crime of helping others is a 'myth'".

⁴⁷⁶ For general information see also Claire Escoffier et al., "Economic and Social Rights of Migrants and Refugees in the Euro-Med Region. Access to health care and the labour market. Case studies: France, Jordan and Morocco." Published by the Euro-Mediterranean Human Rights Network. Copenhagen 2008, p. 44-48.

⁴⁷⁷ Article 711-1 first alternative of CESEDA, see also No 4 of the Preamble to the French Constitution of 1946 to which the Preamble to the 1958 Constitution refers.

⁴⁷⁸ Article 711-1 second alternative of CESEDA.

⁴⁷⁹ Article 711-1 third alternative of CESEDA.

⁴⁸⁰ Article 712-1 of CESEDA.

3. Removal of Illegally Staying Third-Country Nationals: Obstacles and Solutions

This section briefly discusses the obstacles to removal recognised in French law and the possible legal solutions in such cases.

3.1 Grounds for Non-Removal

In its Fifth Book,⁴⁸¹ CESEDA regulates the removal of third-country nationals from French territory.

The most important obstacles to removal listed in Article L 511-4 of CESEDA are:

- Being of minor age (younger than 18 years),
- Permanent stay in France before having turned 13.
- Regular stay in France for more than ten years (except for the stay with a student visa)
- Regular stay on the French territory for more than 20 years
- Being the parent (except for the case of polygamy) of a minor French child residing in France, with the additional requirement that contributions have been made to the care and education of the child under the relevant provision of the Civil Code since the date of the child's birth or for at least two years
- Having lived for at least three years in matrimony with a French national, provided that the matrimonial harmony did not cease since the date of marriage and the spouse has kept the French nationality
- Regular stay on the French territory for more than ten years and for at least three years marriage to a third-country national who has been habitually residing on the territory for more than 10 years, provided that the matrimonial harmony did not cease since the date of marriage
- In cases where the person is, due to industrial accident or occupational disease, entitled to a disability pension from a French institution if the person's disability rates at 20 percent or more
- Medical condition for which no adequate treatment can be received in the country of origin and return would lead to extreme hardship.

⁴⁸¹ Livre V : Les mesures d'éloignement.

3.2 Legal Solutions in case of Obstacles to Removal

If the obstacle to removal, as mentioned in L511-4 of CESEDA, relates to private and family life and if additional conditions are met,⁴⁸² the third-country national may obtain a corresponding temporary residence permit.⁴⁸³ In other cases an exceptional temporary residence permit on humanitarian grounds may be issued.⁴⁸⁴ Nevertheless, this is left to the discretion of the prefect.⁴⁸⁵

⁴⁸² As listed in Article L313-11 of CESEDA.

⁴⁸³ In French: La carte de séjour temporaire portant la mention "vie privée et familiale".

⁴⁸⁴ Cf. Article L313-14 of CESEDA: "L'admission exceptionnelle au séjour".

⁴⁸⁵ See for general information also GISTI, L'admission exceptionnelle au séjour par le travail dite « régularisation par le travail ». Collection Les notes pratiques. Paris 2009.

Annex II Slovenia

1. Slovenia: A country in transition

At the time when this study was conducted, destitution among third-country nationals with a precarious stay on the territory was not a pressing problem in Slovenia when compared with the countries discussed in separate chapters.⁴⁸⁶ An explanation given by the NGOs spoken to was that Slovenia is still mainly a transit country through which irregular migrants and persons in need of protection travel to other EU countries to apply for asylum. According to the Institute for Contemporary Social and Political Studies⁴⁸⁷ (hereinafter referred to as the Peace Institute), most irregular migrants and those seeking protection do not have Slovenia as a final destination: "they all want to go to Italy or Austria." Furthermore, those rejected asylum seekers and irregular migrants who are on Slovenian territory generally only stay for short periods of time, after which they are either removed by the Slovenian authorities or they themselves cross the borders illegally into Slovenia's neighbouring countries hoping to find better prospects. In view of PIC⁴⁸⁸ and the

Slovene Philanthropy,⁴⁸⁹ most rejected asylum seekers and irregular migrants leave the territory of Slovenia by themselves.

The Refugees and Foreigners Integration Section, part of the Slovenian Ministry of Interior, provided us with statistics showing that the number of asylum applicants is gradually growing.⁴⁹⁰ However, according to JRS Slovenia there was a huge drop in 2006 and the trend of decreasing numbers of asylum seekers was also noticed in the first months of 2007. Nevertheless, JRS Slovenia expects that Slovenia is transforming from a transit country to a destination country. A possible explanation for this might be Slovenia's accession to the EU. However, Slovenian law does not offer any rights apart from permission to remain on Slovenian territory for third-country nationals who cannot be removed.

Seen from this perspective, destitution among third-country nationals might become a pressing issue in Slovenia in the near future.

⁴⁸⁶ The cases of the so-called "erased" falls outside the scope of the study and therefore are not discussed in this Annex. The "erased" concern individuals, mainly people from other former the Yugoslav republics, whose records were removed from Slovenian registry of permanent residents to the foreigners' registry in 1992. The result of this "erasure" was that they became *de facto* third-country nationals or stateless persons illegally staying in Slovenia. See for more information on the fate of the "erased" Amnesty International's Briefing to the UN Committee on Economic, Social and Cultural Rights, 35th Session, November 2005.

⁴⁸⁷ The Peace Institute (Mirovni Inštitut), Institute for Contemporary Social and Political Studies, was founded in 1991 by a group of independent intellectuals and focused on peace studies and the issues of violence, war and security. Over the years the Peace Institute extended their fields of interest to embrace a wider range of contemporary social and political studies, such as racism and political conflicts, gender studies, cultural studies, political and social practice, political extremism, democratisation and equal opportunity politics in Central and Eastern Europe, independent women's and feminist movements in Slovenia, sexual abuse, refugees, civil service in place of military service, cultural industry and the like. This has led to a number of action research studies and projects. In the end of 2000 the Institute's area of work was further extended to the fields of human rights, media studies and topics related to the EU and Stability Pact.

⁴⁸⁸ PIC (Pravno-informacijski center nevladnih organizacij) is a nongovernmental organisation that was established in 1997 and is active in three main areas: nongovernmental organisations, human rights, and alternative dispute resolution. As regards nongovernmental organisations, their activities are aimed at contributing to improving the situation of nongovernmental organisations in Slovenia. In the area of human rights, PIC offers legal counselling to socially underprivileged individuals, including foreigners, refugees and asylum seekers, and nongovernmental organisations regarding human rights and other fields of

law including family law, housing law, labour and social welfare legislation. Further, they raise public awareness of human rights issues and conduct projects in this field. As regards alternative dispute resolution, PIC offers mediation on the following fields: family mediation, small claim disputes, mediation in the working place, and mediation for organisations.

⁴⁸⁹ The Slovene Philanthropy (Slovenska Filantropija) is a non-governmental, non-profit, and non-political organisation established in 1992 with the aim of developing and promoting different forms of humanitarian activities in Slovenia. The objective of the Slovene Philanthropy is to encourage and spread volunteering and other charity work in the social field by developing programmes of voluntary work, especially the voluntary work of youth and of the elderly, by promoting volunteering through training and educating volunteers, organisers and mentors of voluntary work, raising the public awareness of the importance of volunteers and developing the network of volunteer organisations throughout Slovenia. Their activities are not limited to Slovenia: their work also takes place in countries affected by armed conflicts, in countries originating from former Yugoslavia and other countries in South East Europe. With its activities the Slovene Philanthropy has been contributing to peace and stability. The activities of Slovene Philanthropy can be defined as: promotion of ideas of solidarity and encouraging public solidarity; co-operation with governmental organisations in target areas (poverty, refugees and asylum seekers, helping the elderly and including the elderly in voluntary work, promotion of volunteering and other forms of solidarity); co-operation with services and institutions (medical service, educational system, social security) in developing voluntary work in the social field; development of new models of voluntary work; training of experts and volunteers; publishing materials; and spreading the Slovene experience and know-how to areas affected by war.

⁴⁹⁰ The official figures of the Ministry of Interior are: 1066 applications in 2003, 1173 applications in 2004, 1597 applications in 2005 and 579 in 2006.

2. Potential cases of destitution

On the basis of the interviews with the relevant actors in the field, rejected asylum seekers with an illegal stay on the territory are particularly prone to fall victim to destitution if they remain in Slovenia. Another group concerns rejected asylum seekers who have received a “permission to remain” on the territory because the authorities are unable to remove them.

2.1 Access to health care

Rejected asylum seekers only have a right to urgent medical care: they are excluded from other forms of medical treatment provided within primary or secondary care. Holders of permission to remain on the territory are also only entitled to urgent medical care in accordance with the Law on Health Care and Health Insurance 1992.⁴⁹¹

On the basis of information provided by PIC, urgent medical care includes:

- a) emergency medical care, emergency ambulance transport, emergency dental care;
- b) essential treatment based on the decision by the physician in charge of treatment, which shall consist of:
 - the preservation of vital function, stopping serious bleeding or preventing fatal bleeding;
 - the prevention of a sudden deterioration of health that could cause permanent damage to individual organs of vital function;
 - treatment of shock;
 - services relating to chronic diseases and states of illness, the abandonment of which could directly and imminently result in disability and other permanent health defects or death;
 - treatment of states of fever and the prevention of the spread of an infection that could lead to a septic state;
 - treatment and prevention of poisoning;
 - treatment of bone fractures, sprains and other injuries requiring emergency medical assistance.

In Ljubljana, a clinic has been set up which offers free medical assistance to persons without basic health insurance, including asylum seekers, rejected asylum seekers and irregular migrants, because they do not have full access to the regular health system. The clinic provides medical treatment and medicine and the doctors and nurses work on a voluntary basis at the clinic. One of the nurses at the clinic only knew of one case where a person without residence rights sought medical assistance at their clinic.

2.2 Housing/Shelter

Rejected asylum seekers are not legally entitled to access public housing. However, they

are subject to detention.⁴⁹² As regards holders of a permission to remain, the state authorities determine at which specific address the person in question will have his place of residence.⁴⁹³ According to PIC, those who have been granted with a permission to remain usually reside in the Centre for Foreigners under an open regime, but leave the Centre after a short period in order to move on to other countries.

The Peace Institute states that Ljubljana has one shelter facility for homeless people that has a maximum of 20 beds. It could not be established in the course of this study whether rejected asylum seekers made use of these facilities. The Peace Institute continued by stating that in Ljubljana there is also a church that provides shelter during the day. In its working activities, PIC has not yet come across homeless third-country nationals.

2.3 Food/clothing

Rejected asylum seekers and irregular migrants are not entitled to receive food support from the State. They can only benefit from food supplied by the State when they stay at the Foreigners Centre. Pursuant to Article 55 of the Foreigners Act,⁴⁹⁴ holders of a permission to remain have the right to the basic requirements for survival. The law does not provide what these “basic requirements” are. According to PIC, it includes food, but this is only provided if they reside in the Foreigners Centre.

The Peace Institute reported that the existing NGOs in Ljubljana do not provide food support in the forms of meals or food packages to third-country nationals. The Institute considered that there is no need to provide these services at the moment.

⁴⁹² On the basis of the Foreigners Act, they shall be detained if the conditions articulated in Article 56 apply. Article 56 reads:

1. “Until the time they are deported but for no longer than six months, foreigners who do not leave the country by the specified deadline and whom it is not possible to deport immediately for any reason shall be ordered by the police to move to the Centre for the Deportation of Foreigners at the Ministry of the Interior (hereinafter: Centre), until their removal from the country, where special rules regarding accommodation and movement shall apply.
2. The provision of the preceding paragraph shall also be applied in cases where the identity of the foreigner is not known.
3. Any foreigner specified in the first paragraph of this Article whom it is not possible to accommodate at the Centre due to special reasons or needs may, in agreement with the social security office and with the costs borne by the Centre, be accommodated at a social security facility or provided with other appropriate institutional care.”

⁴⁹³ Article 52(4) of the Foreigners Act.

⁴⁹⁴ Foreigners Act of 8 July 1999, as most recently amended by Act of 14 July 2006. In original language: Zakon o Tujcih.

⁴⁹¹ Article 55 of the Foreigners Act.

2.4 Work/Social Welfare

Rejected asylum seekers, irregular migrants and holders of a permission to remain are prohibited from accessing the formal labour market. Furthermore, they also do not receive financial support for their subsistence.

3. Relevant Status under Asylum Law

The most relevant law on asylum in Slovenia is the Asylum Act of 1999 (hereinafter referred to as "Asylum Act").⁴⁹⁵ Under this asylum law, the two most important asylum statuses are:

3.1 Convention refugee

Under the Asylum Act Slovenia shall grant asylum to third-country nationals who request protection on the grounds stipulated in the 1951 Refugee Convention Relating and its Protocol. Under Article 1 of the Refugee Convention, a third-country national is eligible for refugee status who, as the result of a well founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership to a particular social group, is outside of the country of origin and is unable or, owing to such fear, unwilling to avail himself of the protection of that country, as well as the stateless person who, being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In cases where a right to asylum upon these grounds is recognised third-country nationals are issued with a residence permit.

3.2 Subsidiary protection

In accordance with the Asylum Act, Slovenia shall also grant subsidiary protection to third-country nationals who do not meet the condition for convention refugee status. There must be a well-founded fear that such a third-country national will upon removal to his country of origin or to the country of former habitual residence, if he is a stateless person, face a real risk of suffering serious harm.

4. Removal of Illegally Staying Third-Country Nationals: Obstacles, Practice and Solutions

This section briefly discusses the recognised obstacles to removal in Slovenian law, and the possible legal solutions in such cases.

⁴⁹⁵ The Asylum Act was adopted on 14 August 1999, and last amended in 2006. In original language: *Zakon o Azilu*. The Act came into force on 4 March 2006, however the opposition political parties made a constitutional complaint against the law. The Constitutional Court has, at the moment of writing the study, still not ruled upon the complaint.

4.1 Grounds for Non-Removal

The most relevant laws which regulate the return of third-country nationals in Slovenia are the Asylum Act and the Foreigners Act.

According to Article 6 of the Asylum Act, removal of third-country nationals during the asylum procedure is prohibited to a country where their life or freedom would be threatened on the grounds of race, religion, nationality, membership of a particular group or political opinion or to a country where they could be exposed to torture or inhuman and degrading treatment or punishment.⁴⁹⁶

A similar provision can be found in the Foreigners Act, which prohibits the removal of a third-country national to a country in which his life or freedom would be endangered on the basis of race, religion, nationality, membership of a special social group or political conviction, or to a country in which the third-country national would be exposed to torture or to inhumane and degrading treatment or punishment.⁴⁹⁷ Furthermore, the Foreigners Act recognises the impossibility of removal, without providing examples.⁴⁹⁸

4.2 Legal Solutions in case of Obstacles to Removal

Permission to remain

The Slovenian authorities shall issue a "permission to remain" to a third-country national where the grounds for non-removal, as identified in the Foreigners Act, exist.⁴⁹⁹ The permission to remain is issued upon the request of the third-country national or *ex officio* for a period of 6 months. Extension of the permission may take place as long as the grounds for non-removal continue to exist. With the issuance of a permission to remain the third-country national is still under the obligation to leave Slovenia. A permission to remain is terminated immediately when the reasons preventing removal have ceased.⁵⁰⁰

Long term legal solutions

Slovenia's laws do not provide for regularisation of illegally staying third-country nationals after a certain period of stay on the territory.⁵⁰¹

⁴⁹⁶ Pursuant to Article 6(2) of the Asylum Act exceptions are made for reasons of public security.

⁴⁹⁷ Article 52 of the Foreigners Act.

⁴⁹⁸ Article 52(2) of the Foreigners Act.

⁴⁹⁹ Article 52 of the Foreigners Act.

⁵⁰⁰ Article 53 of the Foreigners Act.

⁵⁰¹ However, attempts have been made in the past to regularise the "erased" persons.

Annex III Ukraine

1. Ukraine: a transit country for migration into the European Union

In Ukraine a field trip was conducted to L'viv and interviews took place with the State Border Guard Service of the Western Border⁵⁰² (hereinafter referred to as the "Border Guard Service") and the Local Immigration Service of the L'viv region.⁵⁰³ (Hereinafter referred to as "Local Immigration Service"). One interview was conducted with an asylum seeker whose second claim for asylum was recently accepted and who had been staying illegally in Ukraine for several years.

In the L'viv area of Ukraine it proved to be difficult to access destitute migrants for the following reasons.

Firstly, few irregular migrants and (rejected) asylum seekers actually remain on the Ukrainian territory for long periods of time. Ukraine is a transit country bordering four European Union Member States⁵⁰⁴ and the overall majority of migrants attempt to enter the European Union by crossing the western border of Ukraine. The Border Guard Service confirmed that "all of the migrants who travel through Ukraine want to go to the EU." According to the Border Guard Service there has been a major increase in the number of irregular migrants who try to cross the Ukrainian western border. Migrants either come through Russia or through the Balkans and Turkey.⁵⁰⁵ In the view of the Border Guard Service, the border with Russia is not well guarded; many can just pass the border without being checked. Irregular migrants caught by the border guards in the western region are put in detention centres that are overcrowded due to the large flow of irregular migrants trying to find their way into the European Union.⁵⁰⁶ According to the Border

Police, around 25% of the migrants that are caught at the western border of Ukraine and consequently detained request asylum, because requesting asylum is grounds for release from detention. The Local Immigration Service indicated that around 90% of the asylum seekers in the L'viv region disappear trying once again to cross the border with the EU. The Border Guard Service reported that the maximum duration of detention is six months. In cases where removal is unsuccessful within this time period, the third-country national is released again and tries to reach the European Union once more.

Secondly, while civil society in Ukraine is slowly emerging, there is no network of civil society organisations that would be comparable to the networks existing in Western Europe. In this respect, JRS Ukraine states: "Irregular migrants are very hard to access, since they do not have "gather points" in town; they are not that visible in street life. Civil society has not been well developed, meaning that at this point in time there are no NGOs (or even state authorities) providing direct material support to them, save for those who are kept in detention."

2. A Case Study

– Bulat, a male rejected asylum seeker who filed a second asylum claim, from Chechnya, around 30 years old –

Bulat fled from Chechnya because of the war. He travelled to Ukraine in March 2001, crossing the eastern Ukrainian border without any difficulties. Bulat did not have a wish to travel further to the European Union, because he could speak the language of Ukraine and knew about the culture of the country.

In 2001 Bulat directly travelled to L'viv and applied for asylum, but his claim was rejected by the immigration authorities after a short period of time. After his asylum claim was rejected, Bulat stayed illegally for more than five and a half years in the L'viv area. In 2006, with the assistance of an NGO providing free legal support, he filed a second asylum claim which was declared inadmissible by the administrative authorities. He appealed against this decision to the court which decided in his favour in late 2006. At the time of the

⁵⁰² The western border is alongside the following Ukrainian regions: Odessa, Vinnytsya, Chernivtsi, Ivano-Frankivsk, Zakarpattia, L'viv, and Volyn.

⁵⁰³ The Local Immigration Service is responsible for the processing of asylum claims.

⁵⁰⁴ Poland, Slovakia, Hungary and Romania.

⁵⁰⁵ Through Russia irregular migrants come from Iraq, Chechnya, Armenia, Georgia, North and South Korea, Vietnam and China; through Turkey and the Balkans they come from India, Bangladesh, and African countries.

⁵⁰⁶ Although not officially mandated to do so, the Border Guard Service has set up detention facilities in the regions of the western border that have been financed by their annual budget: no additional funding is received by the government. The Border Guard Service explained that they do not have sufficient resources or expertise to run these detention centres and to provide adequate care for the detainees. Even the Border Guard Service themselves consider that the living conditions in the detention centres are deplorable.

See for more information on the treatment of irregular migrants and asylum seekers at the western border of Ukraine: Human Rights Watch, Ukraine: "On the Margins – Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union", 2005, <http://detention-in-europe.org/images/stories/ukraine%20human%20rights%20watch.pdf>

interview, his asylum case was being referred to the immigration services to be decided upon. His stay on the Ukrainian territory has become legal, since he is within the asylum procedure again.

Bulat has moved from one place to another in L'viv many times during his illegal stay on the territory. For subsequent short periods he stayed at housing of either local people or fellow Chechens. Bulat contributed to the rent, but every time he had to move again when he ran out of money due to loss of employment. One summer, when Bulat was without work and hence without sufficient money, he did not have accommodation in L'viv for two months. About this period, Bulat says: "I found a place to stay for low rent in a city 100 kilometres away from L'viv. I was only allowed to stay there between 10 in the evening and 5 in the morning. Every day I travelled back and forth with public transport to L'viv to look for work." When Bulat found work again he moved back to L'viv. This had not been the only period when he was without housing. For some periods of time he was so desperately in need of a place to stay that he knocked on doors of houses in small villages to ask to stay overnight. A bed was often offered.

During his illegal stay on the territory, Bulat had not been caught by the police while he was walking the streets. Bulat considers: "I look like a Ukrainian and speak the language; I think that is why the police did not detain me that often." He said that if the police were to stop him on the streets he told them that he had left his passport at home and they believed him.

During his stay in Ukraine, Bulat was always struggling to meet his basic needs, such as housing, food and clothing. Bulat did not receive any form of state support during his illegal stay in the country. His family sometimes sent him money. "I had difficulties with getting food, but I managed somehow." Fortunately, he never had health problems during his stay on the territory.

Bulat worked from time to time, but he said it was not easy to find work. However, he managed to find occasional work at construction sites by asking friends and contacts he had.

The situation has not improved for Bulat now he is in the asylum procedure. He does not receive any material support from the State. He still has no fixed address, and although he is legally entitled to work, he is prevented from doing so in practice. He needs to obtain an ID code to work from the local authorities, but because he has no fixed address the local authorities refused to issue him this code.

"I live from day to day. I cannot relax", confided Bulat. "My future is in the hands of the immigration authorities. At least my life is not at threat here in Ukraine. It is not safe for me to return to Chechnya. I would like to become a citizen of the Ukraine."

3. Dimensions of Destitution

3.1 Health

Pursuant to Article 18 of the Law of Ukraine concerning Refugees of 2003 (hereinafter referred to as "Refugee Act")⁵⁰⁷ third-country nationals who are within the determination phase of their asylum claim are entitled to medical care.⁵⁰⁸ However, the Refugee Act does not state what is understood by this medical care.

According to the legal expert attached to JRS Ukraine, irregular migrants have no right to access health care, not even in emergency situations, although in practice they might receive emergency health care.⁵⁰⁹ The Border Guard Service revealed that in cases of serious illness the border guards bring sick detainees to the local hospitals for medical care. Women in the late stages of pregnancy are brought to the nearest hospital. Furthermore, according to the Border Guard Service, psychologists visit the detention centre to provide counselling. This has been arranged by an NGO.

As regards the health condition, the Border Guard Service stated that many of the irregular migrants caught at the border suffer from exhaustion since they have been walking long distances through the forests.

In the view of the Local Immigration Service the general physical condition of asylum seekers is weak.

3.2 Housing/Shelter

"The living conditions of the detainees are not human."

– State Border Guard Service of the Western Border –

Irregular migrants caught crossing the western border in Ukraine are placed in detention. The Border Guard Service themselves consider the detention centres to be deplorable and that the living conditions for the detainees are inhuman.

⁵⁰⁷ Law of Ukraine concerning Refugees with changes and amendments adopted through the respective Laws of Ukraine on 3 April 2003 and 31 May 2005. The Refugee Act replaces the Refugee Act of 2001, which was the first refugee law in Ukraine. Registered Asylum Act was adopted on 14 August 1999, and last amended in 2006. In original language: Закон України про Біженців із змінами і доповненнями.

⁵⁰⁸ Asylum seekers in the admissibility phase of the asylum procedure do not have this entitlement.

⁵⁰⁹ Ukrainian laws on health care only regulate that national citizens have access to medical care.

All of the detention centres in the Western region are overcrowded.⁵¹⁰ The Border Guard Service reported that some detention centres have mould on the walls and lack showers. All of the centres are closed: the migrants cannot move freely and take fresh air. The Border Guard Service reported that irregular migrants are kept for a period of six months in detention, and if after this period removal proved unsuccessful they are released again. If the police catch them on the streets, they are again put into detention. In case a detainee asks for asylum, the Border Guard Service stated that they bring him to the local immigration office.

Although a right to housing is provided for under Article 18 of the Refugee Act, only recently were two reception centres for asylum seekers in the determination phase of the asylum procedure⁵¹¹ opened in the L'viv and Kiev regions. They are refurbished army barracks with slightly better living conditions than in the detention centres. More centres where asylum seekers as well as irregular migrants shall be accommodated are planned to be built, with a large percentage of the costs to be paid by the European Union.

According to the Local Immigration Service some asylum seekers receive assistance from persons of the same nationality who already obtained refugee status, and some manage to stay in summer houses for a short period of time. In view of the Local Immigration Service, the provision of housing is the most important issue that should be improved for asylum seekers. Generally, they stated that the situation for asylum seekers is problematic since the Ukrainian authorities do not provide for the basic needs of asylum seekers. Given the pressing housing need, JRS Ukraine is intending to set up a reception centre for asylum seekers in the near future.

3.3 Food

"We only give asylum seekers legal rights: we do not provide them with material support to meet their needs. Our department does not have money for that."

– Local Immigration Service of L'viv region –

Irregular migrants in detention are provided with food in the detention centres. The Border Guard Service described that in the past only dry food products could be given to the detainees, but that now with the assistance of a NGO weekly fresh products are also provided.

⁵¹⁰ Figures by the Border Guard Service show, for example, that the Mukachevo detention facility has a capacity of 220 persons while in the end of 2006 460 persons were hosted.

⁵¹¹ Asylum seekers in the admissibility phase of the asylum procedure do not have this entitlement under law.

Asylum seekers do not receive any form of material assistance from the State. They are left to their own devices. The Local Immigration Service stated that no food or clothing is provided and L'viv has no public food kitchens where asylum seekers could prepare food.

3.4 Work/Social Welfare

Irregular migrants have no possibility to take up employment in the formal labour market. Asylum seekers in the determination phase of the asylum procedure are granted the right to take up temporary employment.⁵¹² The interviewed asylum seeker indicated that he had practical difficulties accessing the formal labour market because he lacked a permanent address.

4. Relevant Status under Asylum Law

The most relevant law on asylum in the Ukraine is the Refugee Act. Additionally, Article 26 of the 1996 Ukrainian Constitution recognises the right to seek asylum.⁵¹³ Only refugee protection is provided under the Refugee Act: no complementary forms of protection are recognised.

4.1 Refugee status

Article 1(2) of the Refugee Act follows the 1951 Refugee Convention by defining a refugee as "a person who is not a citizen of Ukraine and who, on account of a well-founded fear of becoming a victim of persecution for reason of race, religion, ethnicity, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or is unwilling to avail himself of the protection of this country owing to the said fear; or, having no nationality and being outside the country of his previous habitual residence, is unable or is unwilling to return to such country on account of the said fear." In such situations, refugee status is granted.⁵¹⁴ Family members of a person who

⁵¹² Article 18 of the Refugee Act.

⁵¹³ Article 2 of the Refugee Act also refers to the Constitution as regards refugee matters.

⁵¹⁴ Pursuant to Article 10 of the Refugee Act, Refugee status shall not be granted to a person: who committed a crime against peace, war crime or crime against humankind and humanity as defined in international legal instruments; who committed a serious crime of non-political nature outside Ukraine prior to arrival in Ukraine with the intention of acquiring refugee status, if the deed committed by such person is classified by the Criminal Code of Ukraine as a serious crime; who was found guilty of committing deeds that conflict with the goals and principles of the United Nations; who does not meet the conditions stipulated in paragraph 2 of article 1 hereof; who was granted refugee status or asylum in other country prior to arrival in Ukraine; who, prior to arrival in Ukraine with the intention of acquiring refugee status, stayed in a safe third-country. This does not apply to children separated from their families or to persons born or habitually residing in Ukraine and to their descendants (children, grandchildren).

has been granted refugee status also have the right to acquire refugee status for the purpose of family reunification.⁵¹⁵

5. Removal of Illegally Staying Third-Country Nationals: Obstacles, Practice and Solutions

5.1 Grounds for Non-Removal

The principle of non-refoulement is recognised in Article 3 of the Refugee Act, according to which “no refugee may be expelled or forcibly returned to the countries where his or her life or freedom is threatened for reasons of race, religion, ethnicity, nationality, membership of a particular social group, or political opinion.” In addition, the second paragraph of Article 3 provides: “No refugee may be expelled or forcibly returned to countries where he/she may suffer torture and other severe, inhuman or degrading treatment or punishment.” According to the legal expert attached to JRS Ukraine, no other grounds for non-removal are recognised under Ukrainian law.

The Border Guard Service stated that pregnant women are in practice not removed from the Ukrainian territory if they are in the late stages of their pregnancy. They are instead brought to the nearest hospital to receive the necessary care. Practical obstacles to remove an illegally staying third-country national are, as mentioned by the Border Guard Service, the lack of identity papers and the unwillingness of the respective embassies to cooperate. The Border Guard Service stated that many illegally staying third-country nationals in detention do not reveal their countries of origin. Embassies that are reluctant to issue the necessary documents are Iraq, Bangladesh, India and Pakistan. Another obstacle to removal is the lack of state funding to pay for the ticket of the third-country national back to his country of origin.

5.2 Legal Solutions in case of Obstacles to Removal

Short and medium term legal solutions

No solutions are offered under Ukrainian law in cases where an illegally staying third-country national cannot be removed. The only way to obtain a legal stay in Ukraine is an application for asylum and the subsequent recognition as a refugee.

Long term legal solutions

No provisions are made in Ukrainian law to regularise illegally staying third-country nationals who have stayed on the territory for a certain period of time.

⁵¹⁵ Article 4 of the Refugee Act.

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