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RESEARCH ARTICLE

A Point of No Return: A Comparative Analysis of Legal and Policy Responses to Irregularised Non-Removable Third-Country Nationals in Selected EU Member States

[version 1; peer review: 2 approved with reservations]

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Abstract

The situation of irregularised third-country nationals (TCNs), whose expulsion is not feasible or lawful presents a pressing challenge for the EU's approach to the common migration policy. While these individuals may be known to national authorities, practical, humanitarian, or legal considerations can render their removal (temporarily or permanently) impossible, leaving them individuals in a precarious state of administrative 'limbo'. This article examines the differing policy responses of selected Member States and scrutinises the accessibility of socio-economic rights of irregularised persons who are 'non-removable'.

This comparative analysis uses desk research, including review of primary and secondary sources, and national reports from seven EU Member States: Belgium, Germany, Greece, Italy, Slovenia, Spain, and Sweden. Beyond academic literature, national researchers consulted publicly available policy documents and conducted interviews with diverse stakeholders in migration management. The analysis considered key policy and legal developments up to July 2024.

This comparative exercise revealed a significant hyper-heterogeneity of approaches and regulatory fragmentation across Member States. Diverse grounds justify the non-issuing of return decisions or the suspension of removal orders, with considerable variations in granting documentation, registration, and access to residency. For those in limbo, accessing essential socio-economic rights – like healthcare, housing or social assistance – can be extremely difficult and widely restricted. Due to the inconsistent implementation and

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enforcement of the rules, these barriers can exacerbate the already precarious situation of individuals and their families. Simultaneously, the overarching aim of accelerating deportations means that legal obligations to safeguard basic human and procedural rights have been framed as 'obstacles' to return, despite existing, binding rules compelling authorities to suspend expulsions in compliance with applicable law. The examination finds that the prevailing policy notion of 'effectiveness', which necessitates a 'balancing act' and prioritises expulsions, is incompatible with international, regional, and EU human rights standards.

Policy responses focused on halting expulsions and facilitating transition to regularised residency status often constitute not only more humane but also more 'effective' alternatives in practice. Ultimately, the Article recommends a 'rights-first' approach unequivocally placing the human dignity of irregularised TCNs above migration management policy priorities.

Keywords
Non-removable; third-country nationals; regularisation; fundamental rights; policy; expulsion



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Introduction

The treatment of third-country nationals (TCNs) who find themselves in irregularised situations of stay and residence has consolidated as a critical issue in contemporary European Union (EU) migration policies. Among these TCNs, a specific subset has gained attention: those commonly referred to as 'non-removable' or 'non-deportable'. These individuals typically remain in EU Member States under unique and uncertain circumstances. While they are often 'known' to national authorities, their expulsion is either not practically feasible or has been postponed or suspended due to various grounds, including humanitarian, health-related or other practical considerations.

Recently, EU Member States have grappled with establishing policies aimed at dealing with this unique group of TCNs. These policies officially aim at 'balancing' an 'effective' enforcement of immigration laws (i.e. chiefly increasing the number of expulsions) with the need to uphold fundamental rights enshrined in the EU Charter of Fundamental Rights (EU Charter) and other international human rights obligations. However, a metaphorical balance between 'effectiveness' and 'human rights' works to the detriment of the latter. It wrongly assumes that the EU Charter can be jeopardised in the name of 'firm' migration policies. Derogations or exceptions, however, negate the absolute and essential nature of some of these rights and their intrinsic link to human dignity. These complexities are amplified by diverse and diffuse national policy approaches and administrative practices covering irregularised TCNs across EU Member States.

This Article focuses on the scope and implementation of policy practices and approaches in seven EU Member States – Belgium, Germany, Greece, Italy, Spain, Sweden and Slovenia. It seeks to provide a comparative snapshot of the situation of non-expellable TCNs considering current national policy practices and their implementation dynamics in these selected countries. The analysis unpacks the notion of 'effectiveness' in these policies. Furthermore, the Article examines key issues and barriers to effective access to socio-economic fundamental rights by non-expellable TCNs in these EU member states, in particular access to healthcare, social assistance, adequate housing, work and justice, which are crucial for fostering a dignified life for every person.

Following this introduction, Section 2 analysis the relevant EU policy framework covering TCNs expulsions, chiefly the so-called EU Returns Directive, with particular attention to the provisions covering TCNs who cannot be expelled. Section 3 examines existing policy and legal approaches to non-removable irregularised TCNs, and the grounds for the postponement or suspension. Section 4 examines selected socio-economic rights, and access to effective remedies when accessing essential services, and highlights the extent to which irregularised, non-removable TCNs can lead a life of dignity. It explores barriers to these fundamental rights, and some of the challenges faced by individuals that complicate their journeys and lived experiences.

Methods

The analysis is based on desk research grounded on an exhaustive evaluation of relevant primary and secondary sources, as well as national reports conducted by MORE partners. The national reports were based on the extensive analysis of academic literature and publicly available policy documents related to not only return and readmission policies but also on hegemonic alternatives to these policies. That is, public-led initiatives, at any level of the state, that are part of return procedures, or which represent an alternative to return, and their enforcement mechanisms or that extend rights to irregularised TCNs.

Each MORE national partner conducted interviews with relevant stakeholders who are active in the field of migration management, particularly, in returns enforcement processes or decision-making or working on alternative regulations and practices to return and its enforcing mechanisms. Interviewees included a diverse range of key stakeholders relevant to addressing this issue, comprising policymakers, policy implementing authorities, NGO and IGO workers, policy analysts, academics, lawyers, police forces, and human rights monitors (see Table 1). This diversity ensured a broad and multi-faceted discussion on the treatment of irregularised third-country nationals. The interviews took place between February and June 2024. To ensure coherence across all participating counties, the partners followed common guidelines corresponding to the five guiding themes of the MORE project. Interviews were recorded and subsequently transcribed. A grounded analysis approach was utilised to examine and interpret the data. This process involved an in-depth review of the transcripts to assign initial codes based on the projects guiding themes.

Ethics statement

Ethical approval for this research was sought and received by the Comisión de Bioética de la Universidad de Barcelona (CBUB - Institutional Review Board IRB00003099), on July 20, 2023.

Ethical guidelines and standard procedures were established for all interviews, including the use of standardised informed consent forms and anonymisation processes. Any identifying information was strictly excluded from the analysis. Written or oral consent was obtained from all participants. Although written consent was the preferred method, certain participants chose to give oral consent exclusively, preferring not to leave a written trace of their involvement. Consent included permission to record the interviews.

To protect the anonymity and confidentiality of the interview participants, and to facilitate data management, each participant was assigned a code, following the pattern <Task number-Country-Focus group number-Participant number>. As it is necessary to be able to re-trace a participant's identity to fully respect the right to withdraw from the study, in this context it is more relevant to talk about "pseudonymisation" than of full anonymisation. Additionally, any information that might identify a participant was strictly excluded from the analysis process.

The assessment presents a comprehensive review of administrative practices and prevailing policy approaches in the seven EU Member States: Belgium, Germany, Italy, Greece, Slovenia,

Table 1. Interview participants.

	Code	Country	Role	Date
1	WP2-BE-IV-PM1	Belgium	Academic	12/03/2024
2	WP2-BE-IV-PM2	Belgium	NGO social worker – social support	10/04/2024
3	WP2-BE-IV-PM3	Belgium	Lawyer and legal expert on migration law	15/04/2024
4	WP2-BE-IV-PM4	Belgium	NGO social worker – social support	17/04/2024
5	WP2-BE-IV-PM5	Belgium	NGO social worker – detention	14/05/2024
6	WP2-DE-IV-PM1	Germany	NGO social worker – social support	29/02/2024
7	WP2-DE-IV-PM2	Germany	Lawyer and legal expert on migration law	04/03/2024
8	WP2-DE-IV-PM3	Germany	Expert on Roma issues	23/04/2024
9	WP2-DE-IV-PM4	Germany	Expert on Roma issues	23/04/2024
10	WP2-DE-IV-PM5	Germany	Lawyer and legal expert on social law	03/05/2024
11	WP2-DE-IV-PM6	Germany	Head of a local immigration authority	30/05/2024
12	WP2-DE-IV-PM7	Germany	Local immigration authority	Multiple dates
13	WP2-DE-IV-PM8	Germany	Public officer – Ministry of the Interior	27/05/2024
14	WP2-DE-IV-PM9	Germany	Public officer – Ministry of the Interior	27/05/2024
15	WP2-DE-IV-PM10	Germany	Local immigration authority	07/05/2024
16	WP2-DE-IV-PM11	Germany	Local immigration authority	07/05/2024
17	WP2-DE-IV-PM12	Germany	NGO social worker – labour market	06/05/2024
18	WP2-DE-IV-PM13	Germany	NGO social worker – labour market	06/05/2024
19	WP2-ES-IV-PM1	Spain	NGO social worker – social support and academic	25/04/2024
20	WP2-ES-IV-PM2	Spain	Lawyer and legal expert on migration law	20/02/2024
21	WP2-ES-IV-PM3	Spain	Lawyer and legal expert on migration law	20/02/2024
22	WP2-ES-IV-PM4	Spain	Lawyer and legal expert on migration law	20/02/2024
23	WP2-ES-IV-PM5	Spain	Lawyer, legal expert and previously in government	11/04/2024
24	WP2-GR-IV-PM1	Greece	NGO social worker – social support	11/04/2024
25	WP2-GR-IV-PM2	Greece	IGO worker – returns	25/04/2024
26	WP2-GR-IV-PM3	Greece	Academic	15/04/2024
27	WP2-GR-IV-PM4	Greece	Lawyer and legal expert on human rights	18/04/2024
28	WP2-GR-IV-PM5	Greece	Public officer – Police	29/04/2024
29	WP2-GR-IV-PM6	Greece	IGO worker – returns	26/04/2024
30	WP2-IT-IV-PM1	Italy	Lawyer and legal expert on migration law	16/04/2024
31	WP2-IT-IV-PM2	Italy	Lawyer and legal expert on migration law	22/04/2024
32	WP2-IT-IV-PM3	Italy	Human rights monitor	23/04/2024
33	WP2-IT-IV-PM4	Italy	Public social worker – detention	29/04/2024
34	WP2-IT-IV-PM5	Italy	Lawyer and legal expert on migration law	07/05/2024
35	WP2-IT-IV-PM6	Italy	Project manager promising practices project	25/05/2025
36	WP2-SE-IV-PM1	Sweden	Academic and in government	23/05/2025
37	WP2-SE-IV-PM2	Sweden	Academic	28/05/2024

	Code	Country	Role	Date
38	WP2-SE-IV-PM3	Sweden	Public officer – Immigration Agency	29/05/2024
39	WP2-SE-IV-PM4	Sweden	Public officer – Immigration Agency	04/06/2024
40	WP2-SE-IV-PM5	Sweden	Public officer – Ministry of Justice	05/06/2024
41	WP2-SL-IV-PM1	Slovenia	IGO worker – Asylum	19/04/2024
42	WP2-SL-IV-PM2	Slovenia	Human rights monitor	23/04/2024
43	WP2-SL-IV-PM3	Slovenia	Public officer – Police	23/04/2024
44	WP2-SL-IV-PM4	Slovenia	Public officer – Detention	23/04/2024
45	WP2-SL-IV-PM5	Slovenia	Public officer – Immigration Agency	29/04/2024

Spain and Sweden. It considers key policy and legal developments up to July 2024. The Article uses the terms 'non-deportable', 'non-expellable' and 'non-removable' interchangeably. The administrative category of 'irregularised, non-removable' TCNs does not include people seeking asylum and refugees. The analysis, however, does not provide a country overview of de facto and de jure approaches to regularisation mechanisms and procedures.

The EU return directive and non-removable TCNs

The Return Directive 2008/115[1] aimed to provide horizontal rules to facilitate a cohesive approach to expulsions procedures and standards across the EU.[2] The Directive grants EU Member States *the option* – not the legal obligation – to grant a residence permit on 'compassionate, humanitarian, or other reasons' (Article 6) to non-removable TCNs. Article 9 of the Directive ('postponement of removal') foresees the obligation for EU Member States to formally suspend removal in cases where expulsions would violate the principle of *non-refoulement,* or when the competent national authority reviewing an appeal against an expulsion decides to temporarily suspend the enforcement of a removal order. Beyond these 'absolute bans',[3] Article 9.2 of the Directive does not require EU Member States to suspend removal even where it is simply unfeasible both in law and practice.

While the EU Return Directive fails to provide a harmonised approach covering and addressing the situation of legal limbo resulting from the protracted non-deportability of irregularised TCNs, some of its provisions (e.g. chiefly Article 14 which deals with 'Safeguards pending return') lay down clear legal obligations to EU Member States, which when read in combination with the EU Charter) and CJEU case-law, lay down a ceiling of administrative guarantees and rights which national policies cannot go below. However, as recognised by the EU Fundamental Rights Agency (FRA), while Article 9 expressly acknowledges that expulsion may be hindered by legal, practical, or humanitarian considerations, the Directive 'provides only limited guarantees to ensure treatment in accordance with fundamental rights standards'[4]. The resulting picture is one of hyper heterogeneity, and fragmentation across EU Member States. This is so as regards both the transposition and practical

[1] Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Recital (5). On the historical development of an EU policy on irregularised migration refer to Wagner, M., Desmond, A. & Kraler, A. (2024). *EU Policy Framework on Irregular Migrants,* MIrreM Working Paper 8/2024. Available at: https://www.icmpd.org/file/download/61067/file/MIRREM%2520Working%2520Paper_EU%2520Policy%2520Framework%2520on%2520irregular%2520migrants.pdf.

[2] Acosta, D. (2009). The good, the bad and the ugly in EU migration law: Is the European Parliament becoming bad and ugly? (The Adoption of Directive 2008/15: The Returns Directive). *European Journal of Migration and Law, 11*(1), Brill Nijhoff.; Baldaccini, A. (2009). The return and removal of irregular migrants under EU law: An analysis of the Returns Directive. *European Journal of Migration and Law, 11*(1), Brill Nijhoff.;, Lutz, F. & Mananashvili, S. (2016). 'Return Directive 2008/115/EC' in Hailbronner, K. and Thym, D. (eds.). 'EU Immigration and Asylum Law. A Commentary', 2nd edition, Munich/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos. and Peers, S., Guild, E., Acosta Arcarazo, D., Groenendijk, K. & Moreno Lax, V. (2012). *EU Immigration and Asylum Law* (Text and Commentary): Second Revised Edition, Martinus Nijhoff Publishers. (pp. 483–525).

[3] European Commission. (2017). Recommendation establishing a common 'Returns Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, 2017/2338, 16 November 2017, page 120, which states that 'The catalogue of possible reasons is open and allows Member States to react flexibly to any newly arising or newly discovered circumstances justifying postponement of removal. The concrete examples listed in the Return Directive (physical or mental state of the person concerned, technical reasons, such as lack of availability of appropriate transport facilities) are indicative examples. Member States may provide also for further cases in their national implementing legislation and/or administrative practice.'

[4] FRA. (2011). *Fundamental Rights of Migrants in an Irregular Situation in the European Union*. [FRA 2011] Vienna. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf.

implementation of the Return Directive's provisions, and most importantly those related to non-returnable irregularised TCNs.[5]

In its 2013 evaluation of the Return Directive, the European Commission laid down a strict understanding of the policy notion of 'effectiveness', interpreting it as a statistical exercise with the overarching aim of increasing return rates. The evaluation raised concerns around the Directive's lack of influence over the adoption of harmonised domestic procedural safeguards by EU Member States, including as regards policies on the application of safeguards in the return processes and subsequent stays or postponements of removals, accessing effective remedies and the provision of legal assistance to individuals impacted[6]. The evaluation also featured the Commission's own interpretation of the grounds on which EU Member States should be obliged to suspend or postpone expulsions versus those where they would have the option to do so[7]. According to the evaluation, Article 9 of the Returns Directive includes both 'shall' and 'may' provisions. According to the Commission's interpretation Member States are obliged to postpone removal of a TCN if it would violate the principle of *non-refoulement*, i.e. if the life or freedom of the TCN could be threatened. A Member State is also forced to postpone the return of a TCN if their enforcement is temporarily suspended by a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence (Article 13.2). However, '*it is not compulsory for Member States to postpone removal if the physical or mental capacity of an individual person is not sufficient. Furthermore, Member States do not necessarily have to postpone removal if there are any technical reasons* (such as lack of transport, failure of identification etc.)'. (Emphasis added).

That notwithstanding, the Directive and the Commission's evaluation problematically blur the grounds where postponement or freezing of removal is a duty - not an option - and nurtures legal grey zones in its practical application. As previously argued by Majcher (2020), some of the grounds classified as 'optional' – including those qualified as 'technical' - may in fact entail an obligation for national authorities not to issue a Return Decision, or not to expel the person concerned. This leads to uncertainty regarding the exact situations where postponement or prohibition of expulsion should be consistently applied by all EU Member States,[8] which has been identified as a key shortcoming of the Directive.[9]

Administrative and policy approaches to irregularised non-removable TCNs

Grounds for and process of suspending removals

What are the grounds for suspending the issuing of a return decision or the enforcement of a removal order? In terms of categorising the main existing *modes* of suspension, there is a fine line between those conceived of as legally binding 'humanitarian considerations' (i.e., narrower and requiring the suspension of expulsions), and those considered to denote 'practical/technical' and/or 'political' grounds (i.e. often portrayed as optional for states authorities). As highlighted above, the current EU policy imperative of 'effectiveness' is understood mainly through a statistical exercise focusing on the number of enforced removal orders and expulsions as the indicator of policy success. However, this perspective uncritically reframes some of these modes or grounds as 'obstacles' or 'barriers' to expulsions[10].

A 2011 report by the EU Fundamental Rights Agency (FRA) classified 'obstacles' to removal into three major categories: (1) 'humanitarian and legal obstacles', (2) 'technical obstacles', and (3) 'policy-related obstacles'[11]. The first group includes factors such as medical and health conditions; the protection of family and private life; humanitarian situations in the country of origin; as well as best interests' considerations, overall creating a category covering obstacles largely stemming from human rights law. 'Technical or practical circumstances' could include administrative issues in determining a person's nationality or legal identity, the absence of travel documents, or no means of safe modalities of travel or arrival[12]. A 'policy-related' consideration, meanwhile, may stem from values and commitments made in national constitutions, but it could also be based on discretionary measures taken by the national authorities to offer protection[13].

This Article argues that these divisions are useful but not always clear-cut. Some 'technical' or 'practical' grounds may raise important considerations affecting the rights of those to

[5] This was one of the key conclusions reached by a European Parliament. (2019). Substitute Impact Assessment, The Proposed Returns Directive (Recast), European Parliamentary Research Service (EPRS). Brussels.

[6] In the Return Directive's 2013 evaluation, page 9 stated that the Commission noticed some issues in relation to 'effective legal remedy, the period of time between adopting a forced return decision and the carrying out of the actual return as well as means tests applied before granting legal assistance free of charge'. See European Commission. (2013). *Evaluation on the application of the Return Directive (2008/115/EC)*. Publications Office of the EU & Directorate-General for Migration and Home Affairs. Available at: https://op.europa.eu/en/publication-detail/-/publication/2d7caada-14ed-448a-a3d2-4a0c54272043.

[7] Refer to pp. 111 and 114 of the Commission's evaluation (ibid.).

[8] Maes, M. (2011). The Implementation of the Return Directive in Belgium: Focus on Suspension of Removal. In K. M. Zwaan (Ed.), The Returns Directive. Central themes, problem issues, and implementation in selected member states (pp. 94, 107). Wolf Legal Publishers.

[9] Majcher, I. (2020). 'The European Union's Return Directive and its Compatibility with International Human Rights Law: Analysis of Return Decision, Entry Ban, Detention and Removal', Immigration and Asylum Law and Policy in Europe, Vol. 45, Brill Nijhoff. (pp. 683 and 684).

[10] This Article avoids using the labels 'obstacles' or 'barriers' to expulsions. These terms are only meaningful only when 'returns' is portrayed as the sole effective policy to address irregularity in Europe, and any policy measures preventing this are framed as an 'obstacle'. This context is controversial regarding both its legitimacy and effectiveness.

[11] FRA. (2011). supra footnote 4. (pp. 29 et seq.).

[12] FRA. (ibid.). (p. 32).

[13] ibid.

be expelled, leading to a legal obligation not to issue a return decision and, in the positive, enforce a removal order. Humanitarian grounds are anchored by the generally applicable and customary law principle of *non-refoulement*[14]. The principle consists of a prohibition by states to expel, return (*refoule*), or extradite any person where there are substantial grounds for believing that s/he would be at risk or in danger of serious harm. This human right, enshrined in Article 4 EU Charter, is absolute in nature and accepts no derogations or exceptions – even at times of politically declared urgencies or 'migration crisis' – as it is closely linked to the respect for human dignity under Article 1 EU Charter[15]. Moreover, Article 5 of the Returns Directive 2008/115[16], in combination with Articles 1, 4, and 19.2 of the EU Charter expressly forbid EU Member States from adopting a return decision or removing an irregularised TCN where this is the case[17].

Medical or health considerations

Medical or health-related reasons are widely accepted as grounds for suspending removals and tend to be classified under the category of 'humanitarian grounds'. The CJEU confirmed in Case C 69/21, *X v. Staatssecretaris van Justitie en Veiligheid*, that competent national authorities may adopt a return decision, or enforce a removal order, 'only if it has taken into account that person's state of health'. A return decision or enforcing a removal order should be precluded where it would expose a TCN to a 'real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain'.[18] According to the European Migration Network (EMN), Sweden indicates both physical and mental health as a justified reason to at least temporarily stay and postpone the enforcement of a return decision, which is listed under 'humanitarian grounds'.[19] 'Physical state or mental capacity' is also a recognised postponement ground in Greece.[20] Likewise, Belgium recognises mental and physical health as valid reasons to temporarily halt expulsion.[21] In Spain, the provision of emergency health care and basic treatment of illnesses count as grounds for postponing removals.[22]

According to the German Act on Residence (*AufenthG*), a 'life-threatening or serious illness which would significantly worsen' upon return may justify a deportation ban if there is a 'substantial concrete threat'.[23] Generally, the law assumes that deportation is not precluded on health grounds, unless a qualified medical certificate of an illness which might 'interfere with deportation' is provided, which could result in the temporary suspension of deportation and access to the so-called *Duldung* status, which is a toleration of stay that *acknowledges* non-deportability without extending a formal, more secure residence status.[24]

Slovenia recognises health reasons as grounds to extend the voluntary departure period.[25] Further, it recognises that removal is not permitted if the TCNs has a life threatening health condition or if the removal could lead to a 'serious and irreversible deterioration' of their health.[26] In Italy, should expulsion have a significant negative impact on the health of a returnee and appropriate medical documentation can be provided, expulsion will be postponed up to a year, granting a temporary residence permit for medical treatment.[27]

[14] The principle is enshrined in Article 33.1 of the Geneva Convention as well as Article 3 of the UN Convention against Torture. Refer also to General Comments 20 and 31 of the UN Human Rights Committee. See also the Convention on the Elimination of Enforced Disappearances (CED), and Article 3 of the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR). It is also foreseen in Article 78(1) of the Treaty on the Functioning of the European Union, and is inherent to Articles 4, 18 and 19(2) of the EU Charter. At the same time, the application of *non-refoulement* goes beyond the asylum acquis and other forms of protection (including humanitarian and subsidiary) – it is a fundamental principle precluding states from deporting individuals whenever there is a risk of breaching human rights. For further information see Gionco, M., & Levoy, M. (2022). *Barriers to return: Protection in international, EU and national frameworks*. PICUM. Available at: https://picum.org/wp-content/uploads/2022/02/Barriers-to-return_Protection-in-international-EU-and-national-frameworks.pdf.

[15] CJEU. (2016). *Aranyosi and Caldararu*, C 404/15 and C 659/15 PPU, judgment of 5 April 2016, EU:C:2016:198, paragraph 85.

[16] Article 5 of the Directive states that 'When implementing this Directive Member States shall… respect the principle of non-refoulement'.

[17] Refer to CJEU. (2023). *Bundesamt für Fremdenwesen und Asyl v AA* Case C 663/21. Judgment of 6 July 2023, where in paragraph 52 the Court concluded that 'Article 5 of Directive 2008/115 must be interpreted as precluding the adoption of a return decision in respect of a third-country national where it is established that removal of that third-country national to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.'

[18] CJEU. (2022). *X v. Staatssecretaris van Justitie en Veiligheid*. Case C-69/21. Judgment of 22 November 2022. para. 95. See also European Migration Network (2021).

[19] *Utlänningslag.* [SE Aliens Act]. Chapter 12, https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716/#K12 and EMN, Lund, M., Swedish Migration Agency (2021). 'National Report Sweden' [EMN Sweden]. in EMN, *Responses to long-term irregularly staying migrants: Practices and challenges in EU Member States and Norway* (pp. 10 and 11).

[20] Fouskas, T. *et. al*. (2020). 'National Report: Greece' [EMN Greece., in European Migration Network. (2021). *Responses to long-term irregularly staying migrants: practices and challenges in the EU and Norway* [EMN General Report]. Available at: https://home-affairs.ec.europa.eu/document/download/e4404716-36e2-42cc-9201-e748b1e7386d_en?filename=greece_ltism_study_2020_en.pdf.

[21] *Loi sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers.* [BE Residence Act]. Article 74/17 § 2, https://www.ejustice.just.fgov.be/eli/loi/1980/12/15/1980121550/justel#LNK0052.

[22] *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.* [ES Rights and Freedoms of Foreigners Act]. Article 64(2)(b), https://www.boe.es/buscar/act.php?id=BOE-A-2000-544.

[23] *Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet.* [DE Residence Act]. Section 60(7).

[24] ibid. Section 60a(2c). For an analysis refer to Schütze, T. (2023). The (Non-)Status of 'Duldung': Non-Deportability in Germany and the Politics of Limitless Temporariness, *Journal of Refugee Studies*, Vol. 36, No. 3, (pp. 409–429). See also Section 4.2. below. (pp. 29 and 30).

[25] *Zakon o tujcih.* [SI Aliens Act], Article 66(4), https://pisrs.si/pregledPredpisa?id=ZAKO5761.

[26] SI Aliens Act. Article 73(2).

[27] *Decreto Legislativo 25 luglio 1998 n. 286 – Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* [IT Immigration Code], Article 19(2)(d-bis), https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-07-25;286.

Pregnancies, which the EMN has categorised as 'impediments of foreseeable duration', may be grounds for temporarily suspending removals.[28] Belgium, Germany, Sweden and Slovenia either issue documentation confirming the postponement of return in such cases, or – alongside Spain – extend the period for voluntary return.[29] In Greece, the expulsion of pregnant women is prohibited during pregnancy up until six months post-partum.[30] The Italian Immigration Code similarly prohibits the deportation of a pregnant woman and suspends removals up to six months post-partum.[31]

Family and private life, and the best interest of the child

According to CJEU case law, EU Member States may have legally binding obligations to halt expulsions when considering both family and private life considerations of irregularised TCNs[32]. In Sweden, a decision expelling an unaccompanied minor may not be enforced, unless the authorities have ascertained that the child will be received by an appropriate carer upon return.[33] Swedish authorities must also consider whether the removal would result in a separation from their parent.[34] Similarly, Belgian legislation refers to considering the child's best interests before deciding to expel an unaccompanied minor.[35] This includes assessing risks of human trafficking, examining the family situation in the country of return and the existence of appropriate reception conditions. TCNs under the age of 18 who arrived in Belgium unaccompanied and remain without a carer, will be issued a provisional residence document, considering the child's best interests.[36]

The Germany also includes family unit considerations. The parents and family members living with an underage TCN holding a temporary residence permit may not be returned.[37] Generally, the fact that a minor living in the family unit is attending school can also lead to the suspension of the enforcement of a removal order.[38] Minors between 14 and 18, as well as young adults up to 21, if their deportation has been suspended, may be granted a temporary residence permit, which also applies to their parents.[39] In Greece the law states that when implementing return decisions, authorities must consider the family life of the returnee and the best interests of children.[40]

Slovenia foresees that unaccompanied TNC minors irregularly staying will be appointed a guardian.[41] The police may not issue a removal order unless the appointed guardian, based on consideration of all the relevant circumstances, has determined that return would be in the best interest of the child. Furthermore, removal can only take place if admission has been granted prior to return and it is ensured the child will be received by an appropriate carer.[42] Similarly, Spain prescribes that unaccompanied minors are placed in child protective services.[43] The maintenance of the family unit[44] and allowing minors to access basic education[45] are both grounds for suspending expulsion.

Generally, the legislation frames the situation of unaccompanied minors by the overarching aim of readmission cooperation with the third countries involved. For minors under the age of 16, the expulsion proceedings are suspended until a legal guardian is appointed, while those aged 16 to 18 can represent themselves.[46] Minors under such guardianship are considered to be regular residents and, by request of the guardian or if the impossibility of return has been established, the minor is to be granted residence authorisation *ex tunc*,[47] though that will not entirely prevent future repatriation if removal is found to be in the best interest of the child later on.[48] There are avenues for renewing this permit past the age of maturity and access more stable residence and work permits for minors under guardianship.[49] As in Italian legislation, a minor (up to 18) cannot be expelled unless they are following their expelled parent or guardian.[50]

Statelessness

Statelessness – as anchored by the 1954 United Nations Convention Relating to the Status of Stateless Persons – is envisaged

[28] European Migration Network. (2021). *Responses to long-term irregularly staying migrants: practices and challenges in the EU and Norway* [EMN General Report]. (p. 14). Available at: https://emn.ie/wp-content/uploads/2021/07/EMN-study_long-term-irregular-migrants_final_30072021.pdf.

[29] EMN General Report (2021). (ibid.).

[30] Act on the Entry, Residence and Social Integration of Third-Country Nationals on Greek Territory [EL Entry and Residence Act], Article 78(1), https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/EN%20-%20Law%203386%20%202005.pdf.

[31] IT Immigration Code, Article 19(2)(d).

[32] See: CJEU (2022). *X v. Staatssecretaris van Justitie en Veiligheid*, supra footnote 18, paragraphs 91 and 92, where the Court concluded that 'a return decision or a removal order cannot be adopted if it infringes the right to respect for private life of the third-country national concerned'; and CJEU (2018). *K.A. and Others (Family reunification in Belgium)*. Case C 82/16. Judgment of 8 May 2018, paragraph 104.

[33] SE Aliens Act, Chapter 12. § 3a.

[34] ibid. § 18.

[35] BE Residence Act. Article 74/16(1)(2).

[36] ibid. Article 61/2(2).

[37] DE Residence Act. Section 60a(2b).

[38] ibid. Section 60d(1) lit. 10.

[39] ibid. Section 25a(1)(2).

[40] Greek Act establishing an Asylum Service. Articles 20 and 25, https://www.refworld.org/legal/legislation/natlegbod/2011/en/78894. Age and family ties also play a role in the enforcement of returns. See: *Κώδικας* Μετανάστευσης [EL Migration Code] Article 95(3), Nomos No. 5038. Official Gazette of the Hellenic Republic, 1 April 2023. Issue 1, Sheet 81. (pp. 4103 et seq,). Available at: https://migration.gov.gr/wp-content/uploads/2023/04/%CE%9A%CF%8E%CE%B4%CE%B9%CE%BA%CE%B1%CF%82-%CE%9C%CE%B5%CF%84%CE%B1%CE%BD%CE%AC%CF%83%CF%84%CE%B5%CF%85%CF%83%CE%B7%CF%82.pdf

[41] SI Aliens Act. supra footnote 25, Article 82(1).

[42] ibid. Article 82(2).

[43] ES Rights and Freedoms of Foreigners Act. Article 35(4). https://www.boe.es/buscar/act.php?id=BOE-A-2000-544

[44] ibid. Article 64(2)(a).

[45] ibid. Article 64(2)(c).

[46] ibid. Article 35(6).

[47] ibid. Article 35(7). *Ex tunc* refers here to the point when the minor was placed in the care of child protection services.

[48] ibid. Article 35(8).

[49] ibid. Article 35(9).

[50] IT Immigration Code. Article 19(2)(a).

as a formal ground for suspension of removal in Belgium and Slovenia. Although the Convention provides a roadmap towards establishing criteria to determine statelessness, the standards used differ between countries. The existence of discrepancies shows that formal grounds may not guarantee that individuals fulfilling the relevant criteria will benefit from a stay of deportation. Some may end up expelled despite meeting all the requirements for halting an expulsion, signifying that returns could enjoy priority even in cases where – in line with binding human rights obligations – suspending the removal would be mandated.

The Statelessness Convention has served as the basis for civil society advocacy efforts in Slovenia to introduce an appropriate statelessness determination procedure that would allow for the regularisation migrants with no citizenship[51]. Yet, even if statelessness has been determined, individuals are not granted protection on that basis and authorities have no obligation to consider a statelessness claim[52] *ex officio*.

In Belgium, a new amendment has somewhat extended the rights of stateless persons.[53] Individuals will be able to apply for admission to stay on the grounds of statelessness, with applications to be submitted to the Immigration Office – should the decision be made in their favour, they will be permitted to stay for a limited period that can ultimately be converted to an unlimited stay after five years.[54] Spain includes exceptions for stateless individuals, if they meet the requirements of the Convention.[55] They may obtain documentation that attests their status of statelessness[56], and are eligible for a residence permit.[57]

Technical or practical grounds

In the countries observed, there are multiple examples of suspended removals on so-called 'technical' or 'practical' grounds, including reasons such as a lack of nationality or legal identification[58], the cooperation of third country authorities as well as a lack of government capacity to carry out the deportation. Slovenia specifies that the removal of TCNs without a valid travel document may suspended.[59] Likewise, the law stipulates that a lack of cooperation from the country of return or the unavailability of appropriate transportation are also grounds for suspensions.[60]

Similarly, Greece considers technical reasons for postponement including a lack of identification or appropriate transportation.[61] Germany recognises temporary suspensions for those with unverified identities, who[62] will receive a certificate confirming this suspension. Meanwhile, Belgium cites technical reasons for postponements including the 'absence of means of transport' or 'the failure to identify' the person subject to removal[63].

Judicial proceedings

In Italy, a first appeal against a rejection of international protection or a return decision delays but does not prevent deportations, as expulsion orders are immediately enforceable.[64] A similar framing is part of Slovenia's[65] and Sweden's Aliens Act.[66] The latter explicitly mentions that the suspensive effect of appeals can only be determined by the Migration Court, though prior to the Court's judgment, the order will not be enforced.

In Greece, TCNs can appeal a return decision[67], but its enforcement is not automatically suspended unless the Court decides or the TCN requests it.[68] Spain offers the possibility to appeal against the administrative decision of expulsion[69], but there is also no automatic suspensive effect.[70] However, the suspensive effect can be requested[71] or the authority hearing the appeal could suspend the enforcement if going forward with it would cause irreparable or severe damage, or if the decision is challenged on the grounds of being inconsistent with the legal order.[72] Likewise, the suspensive effect of the appeal filed is not automatic in Belgium and must be requested on the grounds that the immediate enforcement of the decision would cause the applicant serious harm.[73] There is also the possibility to invoke extreme urgency as a reason for suspending the order.[74] The German Residence Act states that an objection or legal action against an expulsion order has suspensive effect, but does not alter the 'operative effect' of the administrative act terminating irregular residence.[75]

[51] EMN General Report. (2021). supra footnote 28. (p. 34).

[52] ibid.

[53] EMN Belgium. https://emnbelgium.be/news/stateless-persons-belgium-can-now-apply-residence-permit-immigration-office.

[54] BE Residence Act, Article 57/45.

[55] ES Rights and Freedoms of Foreigners Act, Article 34(1).

[56] ibid. Article 34(2)

[57] Royal Decree implementing the Rights and Freedoms of Foreigners Act, Articles 148(3)(f) and 262(3)(b), https://www.boe.es/buscar/doc.php?id=BOE-A-2011-7703.

[58] From the Member States assessed here, this applies in Belgium, Germany, Greece, Spain, Slovenia and Sweden. See: EMN General Report. (2021). supra footnote 28. (pp. 10 and 12).

[59] SI Aliens Act. Article 73(2).

[60] SI Aliens Act. ibid.

[61] EMN Greece. (2020). supra footnote 20. (pp. 10 and 11).

[62] DE Residence Act. Section 60b(1).

[63] BE Residence Act. Article 74/17(2).

[64] See: IT Immigration Code. Articles 13(3) and 16, and the Code of Civil Procedure. Article 17(5).

[65] In line with the SI Aliens Act, this is true for a variety of different appeals. See, for example: Articles 10(2), 10b(3), 78(2), 100(4), 118(6)

[66] SE Aliens Act, Chapter 12, §8a(2).

[67] EL Migration Code, Article 96(1).

[68] *Κώδικας Διοικητικής Διαδικασίας* [EL Administrative Procedure Code], Article 26, https://www.refworld.org/legal/legislation/natlegbod/1999/en/96167.

[69] ES Rights and Freedoms of Aliens Act, Articles 21 and 65.

[70] *Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas* [ES Administrative Procedure Code], Article 117(1).

[71] ibid. Article 117(3).

[72] ibid. Article 117(2) and 47(1).

[73] *Arrêté royal fixant la procédure devant le Conseil du Contentieux des Etrangers* [BE Aliens Litigation Council Decree], Article 32. https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006122136&table_name=loi#LNK0020.

[74] ibid. Article 43.

[75] DE Residence Act, Section 84(2).

Victims of human trafficking

For victims of human trafficking, the 2024 EU Anti-Trafficking Directive includes a provision requiring Member State authorities not to prosecute or penalise such persons for their involvement in criminal or other unlawful activities.[76] Beyond that, Member States are obliged to provide comprehensive and timely assistance and support to victims, which includes safe accommodation, medical care, psychological support, legal representation and other protection measures, regardless of their willingness to cooperate with the authorities.[77] However, the Directive fails to ensure security of residence for victims beyond the framework of relevant legal proceedings and criminal investigations[78] and does not oblige Member States to issue a residence permit outside of the scope of such processes.[79] The national legislations sampled here reflect this 'conditionality' for supporting victims only as long as legal proceedings are underway.

Slovenia includes considerations for the treatment of irregularly residing victims of human trafficking, such as the extension of the period of 'voluntary departure'.[80] Additionally, the Aliens Act foresees the issuance of a temporary residence permit to victims of human trafficking, alongside victims of domestic violence and illegal employment.[81] In Greece, it is possible to grant victims of human trafficking a special residence permit[82], a practice that also exists in Germany.[83] The German legislation further specifies that the temporary residence is 'to be extended as a rule' should 'humanitarian or personal reasons or public interests' demand the person's presence on the territory. Belgium stipulates that foreign nationals without a residence permit are eligible to receive a temporary residence document of 45 days. Spain[84] foresees the suspension of deportation of irregularly staying women if they are victims of gender or sexual violence. Likewise, the expulsion order will not be executed against victims of human trafficking and temporary residence can be authorised for them.[85]

Under Belgian law, special provisions related to victims of trafficking – which explicitly include unaccompanied minors – are problematically framed by the requirement of 'cooperating' with the authorities[86] such as possibility of unlimited residence for those whose cooperation with the authorities have led to a conviction or whose contribution are considered crucial to the prevention of human smuggling or trafficking.[87]

Italy foresees special assistance and care for victims of violence, trafficking and serious exploitation. They may be issued a residence permit for up to six months, which can be renewed for one year (or more if necessary), allowing them to access care services, education and certain jobs.[88] For victims of domestic violence, a special resident permit can be issued for a year, which also allows access to education, care and work, with the possibility to upgrade to a more durable permit later.[89]

Overview of special, non-recognised 'statuses' for non-returnable TCNs and the authorities involved

Of the seven countries surveyed in this report, not all of them have formally established specific or 'special statuses' to describe the combination of irregularity and non-returnability (see Figure 1). While the word 'status' is used here, it is important to clarify that even if there is an administrative description provided for non-returnable irregularised TCNs, this does not constitute a 'regular' immigration status, nor does it 'regularise' their situation. These merely serve the purpose of recognising that an individual continues to stay 'irregularly' on the territory, but – despite a return decision – their removal cannot be enforced.

Of the countries that have established a separate regime, Germany uses the term '*Duldung*' (meaning 'toleration' of stay). Assigned by the 'supreme authority' in the given federal state, it is meant to recognise the individual's presence in the country and the fact of their *temporary* non-returnability.[90] It is not, however, a durable or regular status *per se* – nevertheless, the TCN will be issued a certificate confirming that the

[76] Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims [Amendment to the Anti-Trafficking Directive], Article 8. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024L1712.

[77] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [Anti-Trafficking Directive], Articles 11 and 12. Available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0036.

[78] Carrera, S., & Colombi, D. (2024). *Irregularising Human Mobility: EU Migration Policies and the European Commission's Role*. SpringerBriefs in Law. Available at: https://www.ceps.eu/ceps-publications/irregularising-human-mobility/.

[79] See, for instance, the wording of Recital (18) of Directive 2011/36 (ibid.), which makes it clear that Member States can generally cease support for victims once the proceedings have ended: 'In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period. If, after completion of the identification process or expiry of the reflection period, the victim is not considered eligible for a residence permit or does not otherwise have lawful residence in that Member State, or if the victim has left the territory of that Member State, the Member State concerned is not obliged to continue providing assistance and support to that person on the basis of this Directive.' A continuation of such support measures is only foreseen for select cases of medical treatment, safety and security, as well as in case of 'severe physical or psychological consequences of the crime'.

For more details, see: Carrera, S., & Guild, E. (Eds.). (2016). *Irregular Migration, Trafficking and Smuggling of Human Beings – Policy Dilemmas in the EU*. CEPS.

[80] Aliens Act, Article 66(4).

[81] Aliens Act, Article 35(2).

[82] EL Migration Code, Article 138.

[83] DE Residence Act, Section 25(4a).

[84] ES Rights and Freedoms of Foreigners Act, Article 31bis.

[85] ibid. Article 59bis(2).

[86] See: BE Residence Act, Chapter IV.

[87] ibid. Article 61/5.

[88] IT Immigration Code, Article 18(5).

[89] ibid. Article 18-bis(1-bis).

[90] DE Residence Act. Section 60a(1)(3)(4).

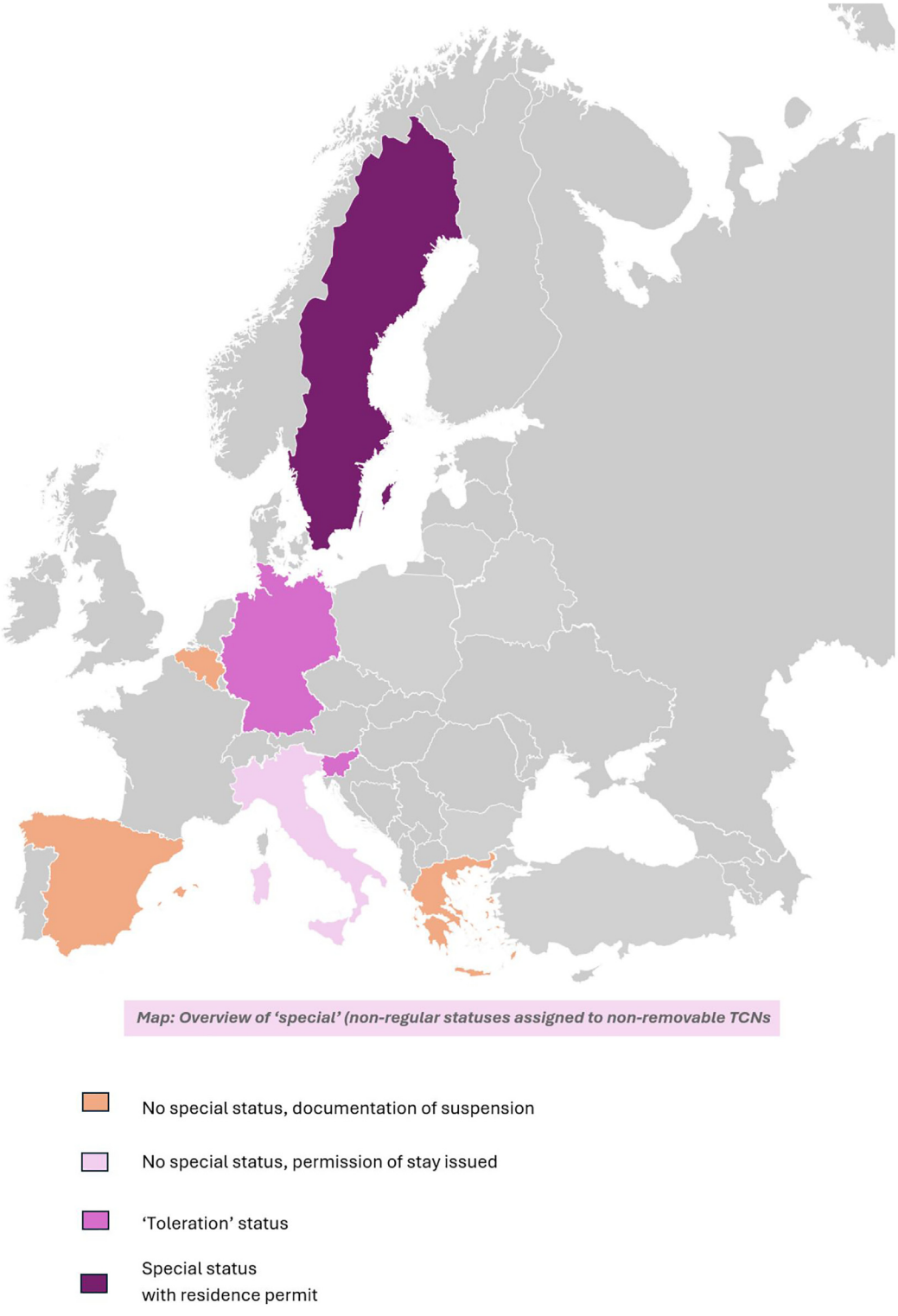

Figure 1. Overview of 'special' (non-regular) statuses assigned to non-removable TCNs.

deportation is suspended.[91] It may be obtained by individuals who cannot be deported due to *de facto* considerations.[92] Despite such a recognition, the return order is only suspended and remains valid, meaning that it could be carried out if the conditions preventing expulsion are lifted, even before the expiry of the *Duldung*[93]. Not everybody that cannot be expelled has access to this regime, leaving them in a further precarious situation.[94]

In Slovenia, there is a 'permission to remain' – issued by the police that is also tasked with carrying out expulsions – allowing TCNs with a postponed return decision to stay for six months or longer if the reasons for non-returnability persist.[95] The law specifies that the permission does not 'cancel' the individual's obligation to leave the country.[96] While not a 'regular' status, TCNs in this situation will receive a card authorising their stay on Slovenian territory.[97] Those who cannot be removed are ordered to move to the 'Centre for Aliens' or restricted in their movements for stricter surveillance.[98]

There is no special regime established to describe the intersection of irregularity and non-removability in Sweden, Belgium and Italy, but non-returnable TCNs can prove that their deportation order was suspended by a certificate or other written confirmation issued to them.[99] A temporary authorisation or permit to stay may also be issued in these three Member States.[100] In some Swedish cases, however, there is no documentation that the Migration Agency has suspended the execution of the order, with only a *de facto* suspension of return taking place.[101]

The Swedish Migration Agency is the primary actor involved in expelling irregularised TCNs[102] and even if they - even if the Agency not formally part of the process, whenever the enforcement of an expulsion seems to be hindered, the acting authority must keep the Agency informed.[103] It is also tasked with reviewing cases that could result in granting a TCN a temporary residence permit and effect the simultaneous cancellation of a deportation order made by the same Agency.[104] According to the Aliens Act, it is, however, possible that a permit is granted without the additional suspension of the return decision; nevertheless, the expulsion cannot take place until the permit expires.[105] In general, the law states that the Agency has discretion to grant residence permits – which are valid for three years[106] – in cases where there is an 'impediment' to the enforcement of a removal.[107]

Greece, where there is also no special title to describe irregularity, has established the police as the competent actor in enforcing and suspending return orders – in case of the latter, the police will also issue a written 'postponement certificate' to the individual.[108] Throughout the validity of this certificate, its holder has the right to temporarily reside on Greek territory, though they must remain at the disposal of the competent authorities and cooperate with them to enable their removal later on.[109] Spain has opted not to use a specific term either and there is no written confirmation of the postponement of returns.[110] Residence permits – temporary ones or for the longer term –, as mentioned above, may be granted to victims of violence, human trafficking or on humanitarian grounds.[111] There is also no specific term for irregularised status in Italy. Expulsion orders are executed by the police[112] and can be suspended, as mentioned above, by a court hearing the appeal lodged against the deportation decision (see Table 3 for a list of grounds that could lead to the temporary delay or suspension of a deportation order in the seven countries examined).[113]

Table 2 provides an overview of the main actors involved in the process of issuing, enforcing, and suspending return decisions in the selected EU Member States. It is notable that in several of the selected countries (including Greece, Spain, and Slovenia), the competent authorities for issuing a return decision and enforcing a removal order are primarily immigration enforcement or police actors. Those issuing residence ermits are under the discretion of relevant national Ministries or specialised asylum/migration national authorities[114]. On the other hand, when it comes to the suspension of removals,

[91] ibid. (4)

[92] See also: DE Residence Act. Section 60b.

[93] See Gionco and Levoy (2022). supra footnote 14. (p. 35).

[94] InfoMigrants, https://www.infomigrants.net/en/post/41820/explainer-what-germanys-asylum-reform-means-for-migrants-with-a-duldung.

[95] SI Aliens Act, supra footnote 25. Article 52(3).

[96] ibid. Article 52(5).

[97] ibid. Article 81.

[98] ibid. Articles 56 and 57.

[99] EMN General Report. (2021). supra footnote 28. (pp. 6, 13–14).

[100] ibid.

[101] ibid.

[102] SE Aliens Act. Chapter 12. § 14.

[103] ibid. § 17.

[104] ibid. § 15a.

[105] ibid. § 16(1)(2).

[106] ibid. § 18a(1).

[107] ibid. § 18.

[108] EMN Greece. (2020). supra footnote 20. (p. 11).

[109] ibid.

[110] EMN. (2021). *Responses to long-term irregularly staying migrants: practices and challenges in the EU and Norway – National Report: Spain* [EMN Spain]. European Migration Network Study. (p. 8). Available at: https://home-affairs.ec.europa.eu/document/download/0bfab884-bac5-4153-b15c-f6b427e9595e_en.

[111] ibid.

[112] EMN. (2020). *Responses to long-term irregularly staying migrants: practices and challenges in the EU and Norway – National contributions from Italy* [EMN Italy]. (p. 20). Available at: https://home-affairs.ec.europa.eu/document/download/0b208cc2-a367-4321-8e31-22dc9c6f31df_en?filename=italy_ltim_study_final_en.pdf.

[113] IT Decree implementing the Return Directive. Articles 35-1bis.(5) And 35-3bis(1), https://www.normattiva.it/esporta/attoCompleto?atto.dataPubblicazioneGazzetta=2008-02-16&atto.codiceRedazionale=008G0044.

[114] See, for instance, EL.

Table 2. Actors involved in the process of issuing, enforcing, and suspending return decisions. [Multiple actors might share competencies. Some authorities may not be principal actors but may – under certain circumstances – participate in the process, for instance, by providing information or assessment support to the authority issuing a decision. The information was provided by the MORE national research teams as a response to a written request by the Authors.]

	Actor issuing a return decision					Actor enforcing a return decision					Actor suspending a return decision				
	Police / Law Enforcement[115]	Ministry[116]	National authority[117]	Local authority	Judiciary	Police / Law Enforce-ment	Ministry	National authority	Local authority	Judiciary	Police / Law Enforce-ment	Ministry	National authority	Local authority	Judiciary
BE			■					■					■		
DE		■	■	■		■		■	■			■	■	■	
EL	■					■					■				
ES	■				■	■					■				■
IT		■			■	■									■
SI	■	■				■					■	■			
SE			■		■	■					■		■		

[115] This may include not only the police but also immigration enforcement agencies or border and security forces at both the national and local levels.

[116] 'Ministry' refers to government entities at the national level and in the case of countries with a federal structure, at the state level.

[117] 'National authority' is an administrative agency at the national or federal level which, though it may report to a ministry, is structurally independent.

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Table 3. List of grounds that could lead to the temporary delay or suspension of a deportation order. [This includes de facto grounds and practical obstacles indicated as such by the national research teams, despite not being laid down as 'formal' rules. For this reason, considering all possible de facto grounds, the list may not be complete.]

Grounds	BE	DE	EL	IT	SI	ES	SE
Non-refoulement	■	■	■	■	■	■	■
Medical or health reasons	■	■	■	■	■	■	■
Private and family life		■				■	
Best interests of the child			■	■		■	
Inadequate conditions for unaccompanied minors	■	■	■	■			
Victims of trafficking	■		■	■		■	
Lack of nationality, ID or adequate transportation	■	■	■		■	■	
Lack of cooperation by third country		■			■	■	■
Statelessness	■	■			■	■	
Other grounds	Children in compulsory education	Studying in the country	Elders' best interests	Subsequent asylum application; domestic violence	Ongoing studies		Environ-mental disaster

the competent actor may be a court (certain cases in Spain and Italy), a national or municipal administrative authority (Belgium, Germany and Sweden), or the police (Greece, Slovenia, and Spain). Additionally, ministries of the federal states in Germany may adopt deportation bans.

Consequently, the actors deciding on the suspension of removal could be the same authorities that also assess an application for international protection, which is the case in Sweden and partly in Germany. Furthermore, the competent authorities for issuing return decisions and for enforcing removal orders are not always the same in all the countries investigated. The current political push for competent national authorities to increase the % of expulsions at all costs may lead to a disproportionate issuing of return decisions as regards individuals where it shouldn't be the case, or where it should have been known or expected by the relevant actors that the removal order would be either unlawful and/or unfeasible in practice.[118]

National and local authorities know that expulsion is not always legal, so obligations may arise to suspend a return order and/or its enforcement, as otherwise they would become liable or legally responsible. Furthermore, the heterogeneity in the national authorities respectively involved in the issuing of return decisions, the enforcement of removal orders and the handling of decisions on the suspension/postponement of expulsion and appeals/effective remedies, might well lead to coordination issues,[119] as well as *blame and responsibility-shifting games* among these actors so as not to be the ones to be blamed for not meeting the overall EU priority to increase the numbers of enforced removal orders. This is the case for instance in Belgium, where the national actor responsible for adjudicating asylum, the CGRS, has emphasised that it lacks the competence to issue or regularise residence for non-removable TCNs. The resulting picture is one where there is a stark dissonance between EU policy priorities and practical realities, and what is qualified as 'success' and by whom, where 'alternatives to return' are proving to be a more effective and humane policy response.

Access to socio-economic rights and justice

The significance of upholding the human dignity of non-removable irregularised TCNs

All the core human rights instruments start from the premise that their core provisions, unless expressly indicated, apply to

[118] As argued by Carrera (2016), 'The goal of increasing return rates in comparison to the total number of removal orders does not address effectiveness from the perspective of the extent to which there are in fact too many removal orders being issued for people whom the competent national authorities know for a fact are not expellable. Expulsion orders may be taken perhaps too lightly by relevant authorities at domestic levels without carefully looking at the information available in individual cases and passing it to migration enforcement authorities while there are procedures or appeal processes still pending'. See: Carrera, S. (2016). *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights*. SpringerBriefs in Law. (pp. 58 and 59). Available at: https://link.springer.com/book/10.1007/978-3-319-42505-4.

[119] See Hendow, M., & Qaisrani, A. (2024). *Pathways and Policy Evolution: Comparing National Laws and Policies Addressing Irregular Migrants*. MIrreM Working Paper 6/2024. (pp. 77–80). Available at: https://zenodo.org/records/10782561. The contribution highlights how 'the various government entities involved in responses to irregular migration may have diverging policy priorities and may adopt varied interpretation of laws and policies related to migrant irregularity, and in some cases may also deliberately decide to implement policies in a different way'.

every person – without discrimination – irrespective of administrative status and without distinction of any kind, including 'other status'[120]. This is based on the foundational premise that some rights are inherently indivisible from, and inherent to, the human dignity of every person.

The UN International Covenant of Economic, Social and Cultural Rights (CESCR) has established a clear obligation to state parties to uphold a right to a minimum adequate standard of living, including states' obligation to secure the right to access to health facilities and essential medicines, as well as essential food, clothing, and basic shelter, including for undocumented TCNs.[121] These standards are understood as linked to the inherent dignity of the human person and indispensable to the fulfilment of other human rights[122]. They are not just 'aspirational' but constitute legally binding obligations that EU Member States have committed themselves to. A similar approach inspires international labour standards, including those developed in the context of the International Labour Organisation (ILO) and the ILO Conventions on the Rights at Work. The ILO framework pays particular attention to the extent to which the right to work qualifies as *decent* work when considering the completeness of the working conditions afforded to every worker regardless of the migratory status[123].

The European Social Charter (ESC) is of crucial importance here, too. The jurisprudence of the European Committee of Social Rights, which is mandated to interpret the ESC, has extended its personal scope of application and has found some states' parties in violation of their obligations under the ESC in cases directly related to TCNs in an irregularised situation (not only including children). In the 2013 case *Conference of European Churches (CEC) v. The Netherlands*, the ESC found that the Dutch authorities' policy negating access to emergency social assistance by undocumented migrants violated Articles 13 (right to social and medical assistance) and 31 (right to housing)[124]. The Committee confirmed its previous jurisprudence by stating that this restriction impairs their rights to life, physical integrity, and human dignity[125], and questioned the denial of shelter[126] and emergency healthcare to irregularised TCNs in Netherlands[127].

The standards laid down in the UN Global Compact on Migration (GCM)[128] are of special significance here too. While the GCM is not a legally binding instrument, it provides an authoritative interpretative tool when assessing the alignment of current national and regional laws and policies in Europe in light of internationally recognised practices and principles. The GCM, and its follow-up and monitoring mechanism[129], thus provides a framework for the better realisation of fundamental rights by EU Member States and European institutions within the scope of migration policy[130]. The GCM's Objective 7 calls for states to facilitate *transitions* from one status to another and 'to enable individual status assessments for migrants, including for those who have fallen out of regular status, without fear of arbitrary expulsion'. GCM Objective 15 underlines the commitment of signatory states 'to ensure that all migrants, *regardless of their migration status*, can exercise their human rights through safe access to basic services' (Emphasis added). It also makes express reference to what has been termed a 'firewall[131]' when calling to 'ensure that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregularised migrants by compromising their safe access to basic services'.

As the CJEU confirmed in its case law, the main objective of the Returns Directive 2008/115, as stated in Recitals 2 and 4, is the establishment of 'an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned'. Therefore, fundamental rights

[120] See for instance Article 2 of the Universal Declaration of Human Rights (UDHR).

[121] Refer to the Committee on Economic, Social and Cultural Rights (CESCR) Opinion 13, 14 and 20. In CESCR General Comment 4, the Committee additionally underlined how housing should be ensured to all persons and that every person should be provided with the right to live somewhere in security, peace and dignity, paragraphs 6 and 7.

[122] CESCR General Comment 12. Refer to CESCR Communication No. 134/2019 *Infante Díaz v. Spain*, 2 May 2023.

[123] Costello and O'Cinnéide (2020) who characterise the right to work as a 'composite right … to reflect its diverse and distinct aspects, and their interactions with a range of binding international legal sources. We term this composite right, with its concerns for both the freedom, accessibility and quality of work, as the 'right to decent work''. See Costello, C., & O'Cinnéide, C. (2020). *The Right to Work of Asylum Seekers and Refugees*. ASILE Report. (p. 5). Available at: https://www.asileproject.eu/wp-content/uploads/2021/07/CostelloOCinneide_RightToWorkASILE_10May2021.pdf.

[124] In paragraph 71 of this decision the Committee held that the Charter applies to migrants in an irregular situation when excluding them from its protections 'would have seriously detrimental consequences for their fundamental rights.

[125] The Committee held previously that in connection with children this was the case in relation to health and medical assistance (Refer to the previous cases *International Federation of Human Rights (IFHR) v. France*, Complaint No. 14/2003) and social, legal and economic protection (see *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 23 October 2012). The Committee has recalled that 'human dignity is the fundamental value and the core also of European human rights law. Refer to paragraph 31 of *FIDH v. France*.

[126] Ibid., paragraph 121.

[127] Ibid., paragraphs 125 and 128.

[128] United Nations Global Compact for safe, orderly and regular migration. (2018). A/RES/73/195.

[129] Chiefly the International Migration Review Forum (IMRF) which is, however, predominantly state-led, and the UN Migration Network.

[130] For a study of the GCM as a human rights document concluding that the Compact presents a complementary function to human rights law see: Bast, J., Wessels, J., & Farahat, A. (2022). The dynamic relationship between Global Compact for Human Rights Law. *PROTECT Project Research Paper*.

[131] Crepeau, F., & Hastie, B. (2016). The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights. *European Journal of Migration and Law, 2-3*, 157–183. These authors understand firewalls as 'a separation between immigration enforcement activities and public service provision'.

compliance is *by design* a core part of the equation and must go hand-to-hand in assessments of its 'effectiveness'[132]. Beyond provisions in EU secondary migration law, however, EU primary law laid down in the Treaties is hierarchically higher and takes precedence over any provision laid in the EU Returns Directive, which must be aligned and compatible with the latter. This includes the EU Charter of Fundamental Rights which benefits from the same legal constitutional value as the Treaties. Human dignity is the starting point of the EU Charter. Article 1 recognises that human dignity is inviolable and 'must be respected and protected'. Several of the above-mentioned rights are also categorized as 'fundamental' in the EU legal system and are therefore used as the foundations of our analysis in the following subsections of this Report.[133] Many of these EU Charter rights refer to 'everyone' or 'no one', and therefore their personal scope is not limited or dependent upon citizenship or migration status.

Healthcare

For those who are already in a precarious situation of irregularity, accessing healthcare under Article 35 EU Charter can indeed be a matter of life or death, bringing the human right to life, as well as that of physical integrity and the prohibition of inhuman and degrading treatment to the forefront. Across the seven EU Member States examined, the landscape of policy approaches is varied. Some countries – including Belgium, Greece, Slovenia, Spain, and Sweden allow 'medical reasons' as a justification for the issuance of a residence permit, despite varying criteria and procedures across countries. However, this needs to be read in a general context where, as recognised by the EMN, 'In practice, however, access can be challenging, especially given the fear of possible repercussions for migration status'.[134]

In Belgium, non-returnable TCNs are entitled to 'emergency medical assistance'[135]; however, practical access is increasingly difficult due to bureaucratic hurdles and varying application processes across different Public Centres for Social Welfare (PCSW)[136]. Beyond the complex and cumbersome administrative procedures – such as those for obtaining an 'urgent medical aid card' – access is limited by strict conditions (e.g. providing an effective residency address) and language barriers.[137]

Regional discrepancies are also present in Germany, where individuals may generally receive insurance for cases labelled as 'acute and painful illnesses'.[138] The discretionary practices of local authorities contribute to more restricted access for some TCNs and there is a lack of a 'standard canon' established by the statutory health insurance fund that could facilitate uniformity across the entire country.[139] Irregularised TCNs not having

[132] CJEU. (2018). *Gnandi*. Case C 181/16. Judgment 19 June 2018. paragraph 48; and CJEU. (2022). *X v. Staatssecretaris van Justitie en Veiligheid*. supra footnote 18. paragraph 88. In paragraph 89 of this same judgement the CJEU held that 'It follows that, when they implement Directive 2008/115, including when they envisage adopting a return decision or making a removal order in respect of an illegally staying third-country national, *Member States are required to respect the fundamental rights which the Charter grants to that national*' (Emphasis added).

[133] These include: Article 2 (right to life); Article 3 (right to the integrity of the person); Article 4, which envisages the prohibition of torture, and inhuman or degrading treatment; Article 6, which foresees the right to liberty and security which is understood as the right not to be arbitrarily detained; Article 7, which stipulates the right for private and family life; Article 14 (the right to education); Article 15 (Freedom to choose an occupation and right to engage in work), that in combination with Article 31 (fair and just working conditions) apply to 'every worker'; Article 19 (Protection in the event of removal, expulsion or extradition) which enshrines in its second paragraph the principle of *non-refoulement*; Article 20 (Equality before the law); Article 34 (social security and social assistance); Article 35 (Health care), which envisages the right of access 'to preventive health care and the right to benefit from medical treatment' under national law; and Article 47 (right to an effective remedy and a fair trial).

[134] EMN. (2021). (p. 19).

[135] Refer to *Arrêté royal relatif à aide médicale urgente octroyée par les centres publics d'aide sociale aux étrangers qui séjournent illégalement dans le Royaume* [Royal Decree on urgent medical assistance granted by public social welfare centres to foreign national residing illegally in the Kingdom], 12 December 1996. Art. 9ter of the BE Immigration Act states two conditions for third country nationals to apply for authorisation to stay for medical reasons: residing in Belgium when making the application, and suffering from a 'serious illness' defined as 'an illness occasioning either a real risk to the applicant's life or physical integrity or a real risk of inhuman or degrading treatment when there is no adequate treatment in the country of origin or habitual residence'. According to the Belgian Ministry of Social Integration (https://www.mi-is.be/fr/themes/aide-medicale/aide-medicale-urgente,): 'Emergency medical aid is not financial aid that is paid directly to the person, but only aims to ensure that people who are staying illegally in Belgium have access to medical care by paying the doctor, the hospital, the pharmacy, etc.' The name suggests that this is only for urgent help (e.g. in the event of an accident or illness), but this is not the case.

[136] See European Migration Network (2023). *Ad-Hoc Query on 2023.11 Procedure for the issuance of residence permits for medical reasons*. Available at: https://emnbelgium.be/sites/default/files/publications/20230511-202311_procedure_for_the_issuance_of_residence_permits_for_medical_reasons.pdf. and ECRE, & Vluchtelingenwerk Vlaanderen (2024). *AIDA Country Report Belgium – 2023 Update*. European Council on Refugees and Exiles, Brussels. Available at: https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-BE_2023-Update.pdf.

[137] ADDE *et al*. (2015). *Livre blanc sur l'autorisation de séjour pour raisons médicales: Pour une application de la loi respectueuse des droits humains des étrangers gravement malades*. Available at https://www.bvikm.org/media/docs/Livre%20blanc%20(9ter).pdf.

[138] Refer to § 4 and § 6 of the *Asylbewerberleistungsgesetz* [AsylbLG; DE Asylum Seekers' Benefits Act]. Additionally, those without employment have no access to the statutory insurance scheme that would provide them comprehensive access to healthcare.

[139] ECRE, Fachinger, T., Hoffmeyer-Zlotnik, P., & Stiller, M. (2024b). *AIDA Country Report Germany – 2023 Update*, European Council on Refugees and Exiles, Brussels. (p. 165). Available at: https://asylumineurope.org/wp-content/uploads/2024/06/AIDA-DE_2023-Update.pdf. This report states that 'A common problem in practice is caused by the need to obtain a health insurance voucher (*Krankenschein*). These vouchers or certificates are usually handed out by medical personnel in the initial reception centres, but once asylum seekers have been referred to other forms of accommodation, they usually have to apply for them at the social welfare office of their municipality'.

a 'Duldung' may visit a doctor to receive essential treatment, but need to cover the financial costs by themselves. According to the EMN (2021), a key challenge in accessing healthcare in countries like Belgium and Germany relates to irregularised migrants and healthcare officers' knowledge of rights and entitlements.[140]

Italy offers emergency healthcare that includes persons in 'irregular administrative situations'[141]. The so-called STP-card (*Straniero Temporaneamente Presente* or foreign person temporarily present) entitles irregularised TCNs to urgent emergency and essential health treatments, but not general check-ups or long-term care. Here, too, the scope and access to health benefits can vary regionally and those based in certain locations may have more difficulty getting the care they need.[142] Mistrust in public authorities has been also signalled as a key obstacle in practice.[143] In Slovenia, non-expellable TCNs are provided with 'emergency healthcare'[144]. This however encompasses only emergency medical services 'the omission of which would lead to irreversible and serious damage to the patient's health or death'. The costs of other non-urgent medical care are to be covered by the patient.[145] Those with temporary residence permits are entitled to obligatory insurance schemes on the condition of employment or being a family member of a person employed in Slovenia,[146] highlighting once more the existence of systemic practical hurdles faced by irregularised individuals.

Beyond emergency care, Greece also offers access to 'primary healthcare services[147]' in public hospitals to those whose removal has been suspended. Spain has seen some fluctuation when it comes to accessibility: until 2012, the same level of healthcare was provided for all individuals – even if unregistered in the municipal census – irrespective of legal status. This was restricted between 2012 and 2018 so that irregularised residents could only access emergency care for serious illnesses.[148] A 2018 Royal Decree law[149] mostly restored the pre-2012 *status quo*, reinstating healthcare access to all, with the caveat that individuals are now required to demonstrate residency in Spain for at least three months, linked to the issuing of an invoice with financial and legal implications if unpaid.[150] This rule has led to significant differences across the country, with some autonomous communities enforcing this while others do not.[151]

Sweden constitutes a more mixed approach, granting the 'children of asylum seekers the same healthcare' that minors with Swedish citizenship are entitled to. This inclusivity is not extended to adults, who may only receive care for 'issues that cannot be postponed', continuing with the trend of 'emergencies only' observed in the other countries in this Report. As acknowledged by the EMN (2021), 'it is at the discretion of the medical officer to assess the urgency of the medical treatment and decide whether it falls within the obligation of urgent health care.'[152]

Adequate standard of living and housing

Adequate housing is an intrinsic component of the right to a minimum standard of living,[153] and housing assistance is deemed

[140] EMN. (2021). (p. 19).

[141] Decree of the President of Ministry Council 12 January 2017 'Definition and updating of the essential levels of assistance, referred to in article 1, paragraph 7, of legislative decree 30 December 1992, n. 502, (17A02015)', (G.U. Serie Generale, n. 65, 18 March 2017), which states that '1. The National Health Service shall ensure, through the resources and in line with the principles and criteria indicated by Law no. 833 and by the decree Legislative Decree no. 502, as amended, and integrations, the following essential levels of assistance: a) Collective prevention and public health; b) District assistance; c) Hospital care'. See https://www.salute.gov.it/portale/esenzioni/dettaglioContenutiEsenzioni.jsp?id=4773&area=esenzioni&menu=vuoto

[142] Associazione NAGA. (2019). *Attuale Legislazione sanitaria italiana per gli immigrati irregolari et attuale fruibilita di tale legislazione a livello regionale*. Milano, 23-10-19 DEF MAILWord LEGIS. SANIT.

[143] See Ince-Bego, G., *et al*. (2024). *Inventory of Existing Alternatives to Returns Policies*. FAiR (Finding Agreement in Return) Horizon Project. (p. 52).

[144] SI Aliens Act. supra footnote 25. Article 75(1)., which states that 'Article 75 (Rights of an alien who is allowed to be detained) (1) An alien who is permitted to stay in the Republic of Slovenia shall have the right to emergency health care in accordance with the law governing health care and health insurance, basic care, and compulsory minor aliens shall also have the right to basic education. (2) Notwithstanding the preceding paragraph, a minor alien who is permitted to stay in the Republic of Slovenia shall be entitled to health care to the same extent as a child who is compulsorily insured as a family member. To the same extent, a school-age child after the age of 18 is entitled to health care, until the end of schooling, but not more than until the age of 26.' See also Government of the Republic of Slovenia, *Regulations on the emergency medical assistance service*, Official Gazette of Republic of Slovenia no. 81/15 in 93/15 – corr., 1 October 2015, Article 15.

[145] See Slovenian philanthropy, & Médecins du Monde. (2017). *Medical treatment of applicants for international protection*, (p. 19). Available at: https://www.filantropija.org/wp-content/uploads/2020/10/Zbornik_Migranti-in-zdravje_SLO-12-WEB.pdf. According to EMN (2021) 'municipalities and NGOs provide additional healthcare services to ensure more comprehensive access for undetected irregular migrants'. (p. 18).

[146] International Organization for Migration [IOM] *et al*. (2022). *Health care in Slovenia*. IncludeEU Project. (p. 19). Available at: https://includeu.eu/health-care-in-slovenia/.

[147] Articles 16 and 17 of Circular no. 42862/2019, available at Εγκύκλιος 42862/2019.

[148] Refer *to Real Decreto-ley 16/2012, de medidas urgentes para garantizar la sostenibilidad del Sistema Nacional de Salud y mejorar la calidad y seguridad de sus prestaciones* [Royal Decree-Law 16/2012 on urgent measures to guarantee the sustainability of the National Health System and improve the quality and safety of its services], 20 April 2012, No. RDL 16/2012). Available at: https://www.boe.es/buscar/act.php?id=BOE-A-2012-5403.

[149] *Real Decreto-ley 7/2018 sobre el acceso universal al Sistema Nacional de Salud.* [Royal Decree-Law 7/2018 on universal access to the National Health System]. 27 July 2018, No. RDL 7/2018, BOE-A-2018-10752. Available at: https://www.boe.es/buscar/doc.php?id=BOE-A-2018-10752.

[150] Hsia, R. Y., & Gil-González, D. (2021). Perspectives on Spain's legislative experience providing access to healthcare to irregular migrants: a qualitative interview study. *BMJ Open, 11*(8).

[151] Hsia and Gil-González. (2021). ibid..; Ince-Bego *et al*. (2024). supra footnote 140. (p. 109).

[152] EMN. (2021). (p. 20).

[153] Refer to Committee on Economic, Social and Cultural Rights (CESC) General Comments No. 4 (1991) on the right to adequate housing, and No. 7 (1997) on forced evictions. In paragraph 7 of the General Comment No. 4 the Committee underlined that 'the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This 'the inherent dignity of the human person' from which the rights in the Covenant are said to derive'.

essential to address social exclusion and poverty under Article 34 of the EU Charter. It must apply to *every person* irrespective of status and documentation, and without discrimination,[154] as well as irrespective of income or access to economic resources. In practice, having proof of address or residence is often the administrative gateway towards effectively accessing other fundamental socio-economic rights by irregularised persons. The availability of appropriate housing is crucial to guarantee the human dignity and physical and emotional well-being of every individual.[155]

However, in reality, access to adequate accommodation is an uphill battle for most TCNs, in particular those living an irregularised migration status, with many TCNs having no effective and sustainable access to shelter and living in insecure and overcrowed housing, or living in destitution and homelessness in the most appalling conditions. Furthermore, evidence shows that EU Member States continue making use of *de jure* or *de facto* detention for reasons related to migration enforcement and expulsions.[156]

The EMN (2022) found that several EU Member States have implemented in their national policies so-called 'alternatives to detention', which may range from residency requirements, release on bail, the surrender/confiscation of identity or travel documents and/or compulsory stay in designated places/reception facilities or regions.[157] Accommodation might take the form of collective or individual facilities. The FRA has underlined that there is a *duty* for states to provide adequate shelter to regularised and destituted TCNs who cannot be removed, in particular when they are not granted access to the labour market.[158] Most often, however, previous research has highlighted how irregularised TCNs by and large rely on family members, friends and other social network contacts in order to find accommodation in the private sector,[159] and the suspension of removal does not necessarily lead to granting housing.

In Greece and Germany, non-expellable TCNs have some entitlements to secure accommodation. Those holding a '*Duldung*' status in Germany have difficulties in finding private flats[160] and tend to be housed in central, shared accommodation – often in camps and reception centres –, with some federal states operating establishments specifically to house 'persons obligated to leave the country'[161]. However, impacted individuals in reception centres are mostly redistributed to the municipalities.[162] TCNs may be obligated to live in a reception centre if they do not comply with the 'obligation to cooperate' or have 'concealed their identity' to the competent national authorities.[163] Meanwhile, persons who cannot be deported from Greece, and whose removal has been postponed, may have access to temporary housing in public or community facilities that help them meet their immediate living needs, which should be up to the standards required for the reception conditions of applicants of international protection[164].

The options for low-cost housing are rather limited in Spain, and the situation is exacerbated by ever-increasing competition among those in need, leaving more people on the streets or in destitution[165]. Capacity constraints and other issues often result in newcomers being forcedly evicted from temporary accommodations, and accessing NGO-provided housing facilities

[154] See Committee on the Elimination of Racial Discrimination General Recommendation No. 30 (2004) on discrimination against non-citizens, in paragraph 32. CESCR Communication No. 134/2019 *Infante Díaz v. Spain*, 2 May 2023, para. 7.6, where the Committee concluded that undocumented TCNS must enjoy the same protection as nationals, including access to public housing services (para. 10).

[155] This Section covers access to accommodation by irregularised non-removable TCNs. It doesn't cover the growing phenomenon of 'detention facilities' in the scope of migration policies across the EU.

[156] See Mentzelopoulou, M., & Barlaoura, N. (2023). Detention of Migrants: A Measure of Last Resort. *European Parliamentary Research Service (EPRS), Briefing Brussels*. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/753926/EPRS_BRI(2023)753926_EN.pdf.; European Migration Network (2022). *Detention and Alternatives to Detention in International Protection and Return Procedures*. Study, May 2022 [EMN (2022)]. Available at: https://home-affairs.ec.europa.eu/system/files/2022-05/EMN_Study_on_detention_0.pdf.

[157] According to EMN (2022). id., 'The requirement to reside at a designated place is established by law in 20 Member States and used in practice in 17. This alternative requires third-country nationals to stay at a designated place, appointed by the authorities, which can range from their private residence to a shelter or reception centre'. (p. 8). Regarding the countries covered in this paper, Belgium, Germany, Greece, Italy and Slovenia are among those using it in practice. Furthermore, in Belgium accommodation in return and asylum facilities is used as an alternative to detention when TCNs don't have access to private residence or other form of accommodation. (pp. 18–22)

[158] FRA. (2011). supra footnote 4. (p. 59).

[159] Ibid. (p. 61).

[160] The literature however has highlighted how many of these persons do manage to find private accommodation and organize themselves to have access to housing. See Wilcke, H. (2018). *Illegal und unsichtbar? Papierlose Migrant innen als politische Subjekte*. transcript: Kultur und Soziale Praxis.

[161] Gottlieb, N., & Schülle, M. (2023). An overview of health policies for asylum seekers in Germany. *Health Policy, 125*(1). (pp. 115–121).

[162] As in healthcare, the discretionary powers granted to these municipalities tend to lead to significant regional differentiation in treatment.

[163] Haberstroh, F., Kreienbrink, A., & Lechner, C. (2022). *Unerlaubter Aufenthalt in Deutschland: Perspektiven, Maßnahmen und Herausforderungen*. Bundesamt für Migration und Flüchtlinge (BAMF) Forschungszentrum Migration, Integration und Asyl (FZ). Available at (in German): https://home-affairs.ec.europa.eu/document/download/b95489c0-5d26-46bc-8e74-608f44f62f93_en?filename=EMN-Germany-DE_Study-irregularly-staying-migrants.pdf.

[164] Refer to Article 37 in conjunction with Article 24 of Law 3907/2011. Greek Council Refugees (2020). Article by the President of the Board of Directors of the ESP, Vassilis Papadopoulos, regarding the residence permit for humanitarian reasons, Available at https://gcr.gr/el/news/item/1432-arthro-tou-proedrou-tou-esp-gia-tin-adeia-diamonis-gia-anthropistikoys-logous/.

[165] For a study the ways in which housing pathways are dependent upon the role of NGOs, support networks, and structural features of the asylum system and housing market refer to Ribera-Almandoz, O., Delclós, C., & Garcés-Mascareñas, B. (2022). '"Our home, your home?" The precarious housing pathways of asylum seekers in Catalonia', *Housing Studies*, 39(7). (pp. 1678–1701). and Garcés-Mascareñas, B. and Ribera-Almandoz, O. (2020). *Políticas de la indigencia. Solicitantes de asilo sin casa en Europa*, Barcelona: CIDOB. Available at (in Spanish): https://www.cidob.org/publicaciones/politicas-de-la-indigencia-solicitantes-de-asilo-sin-casa-en-europa.

usually entails long waiting times[166]. Furthermore, previous research has underlined how the Spanish authorities asked irregularised TCNs to surrender a valid identity/travel documents as an 'alternative to detention', which is also the case in Italy and Sweden.[167]

Local rules and administrative procedures play an important role in Italy too, where shelters can require proof of formal residency for admission. At the same time, council houses are largely inaccessible for non-returnable TCNs. Generally, access to public housing is tied to having legal residency and without it, particularly due to overwhelming differences in how local institutions apply the rules, many irregularised persons are denied access to assistance[168]. According to the EMN (2022) Study on 'Detention and Alternatives to Detention in International Protection and Return Procedures', alternatives to detention used in practice in Italy include reporting obligations, requirement to reside in a specific place and the obligation to surrender an identity or travel documents.[169]

In a similar vein to healthcare, Sweden has different rules for when children are involved: families with children are entitled to housing and basic support, while irregularised TCNs that have no children have no access to any housing assistance subject to the discretion of municipal authorities[170] Individuals in Slovenia may access private housing at their own expenses, which is an enormous hurdle to overcome. Consequently, many people end up living in overcrowded spaces, in poor conditions, and at risk of forced eviction[171].

In Belgium, irregularised TCNs, including those who are non-returnable, have no right to housing and no access to the property market, leaving them to destitution and homelessness. Many people use emergency accommodation centres which offer free and unconditional access to every person. However, when it comes to rejected asylum seekers, Belgian authorities have engaged in a serious 'rule of law and reception crisis'[172] consisting of their refusal to uphold EU reception conditions and comply with European and national court rulings compelling them to ensure equal access to these facilities, including by single men. The resulting picture has been an alarming increase in homelessness and inadequate and inhumane living conditions.[173]

The resulting picture is one where irregularised non-removable TCNs are not provided access to adequate housing conditions and are instead relegated to the margins of the private housing market, where high levels of structural discrimination exist and substandard housing conditions prevail,[174] leading to *housing precariousness*.[175] What EU member states often offer in terms of 'shelter' – when, and if at all - to irregularised TCNs does not therefore align with the human right to *adequate* standard of living under international human rights standards and Article 34.3 of the EU Charter,[176] which identifies the right to social and housing assistance as a condition to address poverty and social exclusion, and to ensuring a 'decent existence'.

[166] Ibid.

[167] Refer to EMN. (2022). supra footnote 153. (p. 19).

[168] Perocco, F. (2022). 'The System of Racial Discrimination in the Italian Welfare State', in Perocco, F. (ed.), Racism in and for the Welfare State, Palgrave-Macmillan. (pp. 261–298).

[169] EMN. (2022). supra footnote 153. (pp. 16–18). The Study explains how 'In Italy, non-compliance can be sanctioned with a fine from EUR 3 000 to EUR 18 000 and may lead to forced and immediate accompaniment to the border, with the possibility of ordering detention in the Repatriation Centre'. (p. 18).

[170] In 2016 a legislative amendment cut accommodation assistance to TCNs who are adults without children in cases returned didn't take place during the period of 'voluntary return' See: Ince-Bego, *et al*. (2024). supra footnote 140. (p. 24). Further, according to Lundberg and Kjellbom (2021) 'Municipalities 'may', however, according to the Supreme Administrative Court, aid in situations of undocumentedness under a so-called optional provision. It is noteworthy that assistance under the Social Services Act's optional assistance can never stipulate a right to assistance. Subsequently, decisions under the optional clause, cannot be appealed in the same way as assistance under the obligatory clause'. See Lundberg, A., & Kjellbom, P. (2021). Social work law in nexus with migration law. A legal cartographic analysis of inter-legal spaces of inclusion and exclusion in Swedish legislation. *Nordic Social Work Research. 11*(2), 142. (pp. 144 and 145).

[171] INCLUD-EU. (2021). *Housing in Slovenia*. Project Funded by the Asylum, Migration and Integration Fund of the European Union (DG HOME). Available at: https://includeu.eu/housing-in-slovenia/.

[172] European Commission. (2024). *Staff Working Document, 2024 Rule of Law Report Country Chapter on the rule of law situation in Belgium*. SWD(2024)801, 24.7.2024. (pp. 28 and 29). Available at https://www.justice-en-ligne.be/IMG/pdf/memorandumcommun2024fr.pdf. See also Joint memorandum of the three highest courts of Belgium of 19 July 2024 available at https://www.justice-en-ligne.be/IMG/pdf/me_morandum_commun_2024_fr.pdf.

[173] For a detailed overview see ECRE, & Vluchtelingenwerk Vlaanderen (2024). *AIDA Country Report Belgium – 2023 Update*. European Council on Refugees and Exiles, Brussels. (pp. 132–135). Available at: https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-BE_2023-Update.pdf. This report states that 'The reception crisis persisted throughout 2023, with a total of 8,816 persons with a reception need not being able to get a reception place. At the end of 2023, approximately 3,000 asylum seekers were registered on the waiting list, the average waiting time before getting access to a reception place being approximately 6 months', available at https://asylumineurope.org/wp-content/uploads/2024/05/AIDA-BE_2023-Update.pdf.

[174] PICUM. (2020). *Written Submission to the Consultation for the Action Plan for the implementation of the European Pillar of Social Rights*, Brussels.

[175] Clair, A., Reeves, A., McKee, M., & Stuckler, D. (2019). Constructing a housing precariousness measure for Europe. *Journal of European Social Policy, 29*. These authors consider the following factors as part of this notion: security, affordability, quality and access to services.

[176] Article 34.3 stipulates that 'In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a *decent existence* for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.'

Decent work

Employment can often be the first step towards leaving situations of administrative limbo. However, employment is also often conditional to having a recognised administrative status, which is not a given for irregularised TCNs who cannot be expelled. In a substantial majority of EU countries under examination irregularised TCNs are not allowed to have access to the labour market with severe restrictions applying both in law and practice. Even when access to the labour market occurs, conditions of employment do not align with the right of *decent* work,[177] and informality and precarity constitute the norm.

This is so even though all the core international labour standards apply to *all* workers, including those enshrined and develop in the scope of the International Labour Organisation (ILO). Further, Article 31.1 of the EU Charter of Fundamental Rights requires EU Member States to ensure fair and just working conditions for 'every worker'[178]. The Court of Justice in Luxembourg confirmed a broad interpretation of the term 'worker' covering also TCNs even when they are not authorized to work[179]. Furthermore, the 2009 EU Employers Sanctions Directive[180] provides a few rights to irregularised TCNs, such as have the right to back payments of any outstanding remuneration, taxes and social security contributions.[181]

While it is generally not allowed to work in Germany without a legal status, persons who have a '*Duldung'* toleration regime are granted access to the labour market after three months or, if they are obliged to live in a reception centre, after six months[182]. Even then, they may encounter significant barriers to securing a job (and a living wage) due to misconceptions among employers and precarious living conditions[183]. Greece allows non-returnable TCNs issued a formal suspension of removal to obtain a work permit and engage in specific labour market sectors – primarily agriculture, domestic work, animal husbandry, and clothing – and in specific geographical areas of the country. That notwithstanding, the effective implementation of this rule appears to be lacking in practice[184].

Asylum seekers in Sweden have the right to work *if* they cooperate with the authorities regarding their identification, while rejected asylum seekers with a return decision must rely on alternative means to seek employment without regular status[185]. According to the EMN, 'In Sweden, former asylum seekers who have been employed by the same employer for the last four months can apply for a work permit no later than two weeks after the return decision entered into legal force, provided that certain requirements are fulfilled'.[186] Slovenia

[177] Costello, C., & O'Cinnéide, C. (2021). The Right to Work. In C. Costello, M. Foster, & J. McAdam (Eds.), *The Oxford Handbook of International Refugee Law*. These authors argue that a right to decent work concerns both freedom, accessibility and quality of work.

[178] On the notion of 'fairness' in the scope of EU migration policy see Carrera, S., *et al*. (2019). *The Cost of Non-Europe in the Area of Legal Migration*. European Parliamentary Research Service (EPRS). Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631736/EPRS_STU(2019)631736_EN.pdf.; Carrera, S., Geddes, A., & Guild, E. (2017). Conclusions and Recommendations: Towards a Fair Agenda facilitating Legal Channels of for Labour Mobility. In S. Carrera, A. Geddes, E. Guild, & M. Stefan (Eds.), *Pathways towards Legal Migration into the EU: Reappraising Concepts, Trajectories and Policies* (pp. 183–209). CEPS Paperback.

[179] CJEU (2014). *Tümer,* Case C-311/13. Judgment of 5 November 2014 (ECLI:EU:C:2014:2337). According to de Schutter (2016), the Luxembourg Court 'seemed to be convinced by an argument raised in the case by Advocate General Bot, who noted that excluding workers who are third-country nationals from protective measures applicable to employees who are nationals of a Member State of the European Union would 'sit ill with the purposes of the European Union's social policy as set out in the first paragraph of Article 151 TFEU, not least because such exclusion could encourage the practice of recruiting foreign labour in order to reduce wage costs'. See de Schuter, O. (2016). *Links between migration and discrimination: A legal analysis of the situation in EU Member States*. European Commission: DG Justice and Consumers. (p. 52). On this point see also Opinion of AG Bot of 12 June 2014, para. 52; Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, 20 October 1980; and Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, 12 June 1989.

[180] Directive 2009/52/EEC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, 18 June 2009 [EU Employers Sanctions Directive].

[181] Article 6 of the Directive. For a detailed qualitative study of its implementation and data on selected EU Member States refer to FRA. (2021).

[182] According to 47 and § 61 Asylgesetz [AsylG; DE Asylum Act] it is prohibited to work during the first six months of the stay in a reception centre. The work permit is issued by local authorities subject to the validation of the Federal Employment Agency. Furthermore, access to work is not permitted to non-removable TCNs who are considered responsible for the non-removability or who don't cooperate with the authorities.

[183] See, for instance, Ataç, I., *et al*. (2024). *Teilhabe trotz Duldung. Kommunale Gestaltungsräume für geduldete Jugendliche und junge Erwachsene*. Available at https://www.stiftung-mercator.de/content/uploads/2024/04/HandlungsempfehlungenTeilhabetrotz_Duldung.pdf.

[184] Article 24, Law 3907/2011, Government Gazette A' 7, and Article 3 of Decree No. 53619/735/2015. According to the Greek Council Refugees (2020), Article by the President of the Board of Directors of the ESP, Vassilis Papadopoulos, 'Article 13A of Law 4251/2014, regarding the granting of a special regime of postponement of removal with the right to work, linked to employment in agricultural work, has found greater application, but which has nothing to do with the provisions for granting a residence permit for humanitarian reasons or with the exceptions of the return directive'. Available (in Greek): Available at (in Greek): https://gcr.gr/el/news/item/1432-arthro-tou-proedrou-tou-esp-gia-tin-adeia-diamonis-gia-anthropistikoys-logous/.

[185] In Sweden, the possibility of obtaining a labour market work permit after a rejected asylum application is known as a 'change of track' or 'work track'. According to ECRE (2024c). 'In 2022, 637 asylum seekers were granted work permits after a legally binding deportation order. This number decreased to 495 in 2023'. (p. 94). See ECRE, & Swedish Refugee Law Center (2024c). *AIDA Country Report Sweden*, European Council on Refugees and Exiles, Brussels. Available at: https://asylumineurope.org/wp-content/uploads/2024/04/AIDA-SE_2023-Update.pdf. The rejection rate remains highly substantial. See Ince-Bego, *et al*. (2024). supra footnote 140. (p. 25). For a governmental and bureaucratic view on this policy and the views from national authorities on its implementation refer to Lindberg, H. M. (2023). The Tricky Thing of Implementing Migration Policies: Insights from Return Policies in Sweden. In L. Lerpold *et al*. (Eds.), *Migration and Integration in a Post-Pandemic World Socioeconomic Opportunities and Challenges* (pp. 151–175). Palgrave Macmillan.

[186] i.e. minimum salary of €1.288 and an offer of employment for the same employer for at least a further 12 months (EMN 2021). (p. 21).

limits access to the labour market to TCNs who hold temporary residence permits or who meet the specific conditions outlined in the Aliens Act as well as the Employment, Self-employment, and Work of Foreigners Act[187]. Temporary residence permits can be granted to those who were allowed to stay in the country for at least 24 months due to the suspension of their removal.[188]

Belgian law prescribes that TCN workers must obtain a work permit, otherwise, they engage in 'illegal employment' under the EU Employers Sanctions Directive[189], which could result in penalties for both the employer and the employee. Irregularised non-removable TCNs have therefore no access to the labour market. Irregularity tends to bar access to work permits, leading many to seek 'informal' or 'undeclared' work.[190] Furthermore, the overriding policy focus on 'effectiveness of expulsions' nurtures fear of being penalised and forcedly expelled, acting as barrier to irregularised TCNs reporting of unscrupulous employers to employment authorities.[191] Such is the case in Spain as well, where those without a regular status cannot lawfully access the labour market but can engage informally, where they tend to contribute to structurally precarious sectors where labour exploitation has been well documented, such as in domestic and seasonal work sectors[192].

Moreover, there is a noticeable inconsistency by relevant national authorities when it comes to undeclared work by irregularised TCNs. There is a double official discourse: on the one hand, emphasis is put on 'effective' enforcement of migration policies and the increasing of expulsions; and on the other, relevant authorities turn a blind eye to the use and exploitative conditions of undocumented labour by irregularised TCNs and fail to enforce corresponding labour standards legislation.[193]

Social assistance

Article 34 of the EU Charter underlines that 'In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources'. These benefits may include pension, unemployment contributions, assistance in cash, care services, or vocational training[194]. When it comes to social assistance entitlement, national practices vary greatly across the EU countries examined. Greece's Immigration Code[195] extends rights and benefits under the national social protection system to TCNs with a regular residence and offers social protection to those who 'transit' in a regular manner or have received a residence permit for humanitarian reasons.[196] Irregularised TCNs cannot access neither humanitarian system of assistance for benefits in cash and accommodation[197] nor social welfare programs such as the Social Solidarity Income Program (KEA)[198]. To help those in need, including rejected asylum seekers and irregularised TCNs, civil society organisations have stepped up, offering aid through programs such as 'Food for All' to help individuals in precarious conditions meet their most essential needs.[199]

Human dignity, in conformity with the standards set out by the European Committee of Social Rights, was meant to

[187] Those who are 'regular' residents of the country can freely access the labour market. The term 'regular' refers here to both permanent and temporary residents. Temporary residents, who have, for instance, family reunion permits and other specific categories of residents with temporary permits, have equal access to employment as nationals. See the information provided in https://www.gov.si/en/topics/employment-and-work-of-foreign-nationals.

[188] Refer to SI Aliens Act. Article 51/2, and Article 6 of the Employment, Self-Employment and Work of Foreigners Act.

[189] Supra footnote 177.

[190] Van den Durpel and Derluyn (2023) argue that 'Crimes such as (sexual) abuse, exploitation, extortion and harassment are often endured because the fear of the unknown and unpredictable -by going to the police- takes precedence'. See: Van den Durpel, A., & Derluyn, I. (2023). Victims with Irregular Migration Status' Safe Reporting of Crimes in Belgium. *Centre for the Social Study of Migration and Refugees (CESSMIR), Ghent University*. pp. 40 et seq. See also Dauvrin, M. (2023). Irregular migrants and work in Belgium: a case study. *European Journal of Public Health, 33*(Supplement_2).

[191] In addition: 'The lack of knowledge largely explains the massive underreporting of crimes and the under-representation of irregular migrant victims, regardless of the availability of legal options for safe reporting and effective access to legal assistance and care'. See Van den Durpel, A., & Derluyn, I. (2023). Victims with Irregular Migration Status' Safe Reporting of Crimes in Belgium. *Centre for the Social Study of Migration and Refugees (CESSMIR), Ghent University*. (p. 42).

[192] Fanjul, G., & Gálvez-Iniesta, I. (2020). *Foreign, essential and undocumented: A snapshot of irregular immigration in Spain*. Investigación por Causa.

[193] See van Nierop, P., Schänenberg, L., & Terziev, P. (2021). *Counteracting undeclared work and labour exploitation of third-country national workers.* European Labour Authority (ELA), European Platform tackling undeclared work. Available at: https://www.ela.europa.eu/sites/default/files/2023-12/counteracting-undeclared-work-labour-exploitation-third-country-national-workers.pdf.; Pajnik, M., & Bajt, V. (2011). Third Country Migrant Workers as Third Class Non-Citizens in Slovenia. In M. Pajnik & G. Campani (Eds.), *Precarious Migrant Labour Across Europe*. Morivni Institut. (p. 97). https://www.researchgate.net/profile/Mojca-Pajnik/publication/264242780PrecariousMigrantLabourAcross_Europe/links/53d5f69b0cf2a7fbb2ea65f4/Precarious-Migrant-Labour-Across-Europe.pdf#page=97.; FRA. (2021). *Protecting Migrants in an Irregular Situation from Labour Exploitation: Role of the Employers Sanctions Directive*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf. and FRA. (2019). *Protecting migrant workers from exploitation in the EU: workers' perspectives*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-severe-labour-exploitation-workers-perspectives_en.pdf.

[194] ibid.

[195] EL Migration Code. (pp. 4103 et seq.)

[196] Article 18(1)-(3) of the EL Migration Code. Gazette (p. 4125).

[197] Tramountanis, A., *et al*. (2022). *Humanitarian assistance and social protection responses to the forcibly displaced in Greece*. ODI. Available at: https://media.odi.org/documents/HumanitarianassistanceandsocialprotectioninGreece.pdf.

[198] Marini, F. (2020). Migrants' Access to Social Protection in Greece. In J. M. Lafleur & D. Vintila (Eds.), *Migration and Social Protection in Europe and Beyond (Volume 1)* (p. 205). IMISCOE Research Series. Springer. https://doi.org/10.1007/978-3-030-51241-5_13.

[199] INTERSOS (2024). *Food insecurity: how 'Food for All' addresses the needs of refugees in Greece.* Available at: https://www.intersos.org/en/food-insecurity-how-food-for-all-addresses-the-needs-of-refugees-in-greece/.

headline the Belgian approach. According to Article 1 of the 1976 Act on the Public Social Welfare Centres (*centres publics d'action sociale – CPAS*)[200], 'Everyone is entitled to social assistance'. However, subsequent amendments – including, prominently, a reform in 2012 that encompassed Article 57[201] – narrowed the scope concerning the reception of assistance for third-country nationals. In a 2022 judgment, the CJEU decided on a referral from the Belgian Court of Cassation that concerned a rejected asylum seekers with a return order and whether she was entitled to social assistance.[202] The Court held that Article 6(4) of the Return Directive allows Member States to withdraw a return order and grant social assistance to irregularised TCNs following an application to remain on humanitarian and compassionate grounds. While the ruling allows for broader accessibility of social assistance in cases of possible non-returnability, the applicable Belgian law remains narrow on allowing irregularised, non-returnable TCNs to benefit from assistance. In a step forward, the Belgian Reception Conditions Act[203] material assistance is available to minors staying irregularly on the territory with their parents, provided that the CPAS has established that the parents are unable to fulfil their maintenance obligation towards their child.[204] Likewise, material assistance is extended to those third-country nationals 'unable' to leave a 'reception structure' for reasons including (1) finishing a school year, (2) pregnancy up until two months post-partum, or (3) medical inability.[205]

In Italy[206], those TCNs holding residence permits of at least one year, as well as those having work and study permit receive the same treatment as Italian nationals and may benefit from social services, including economic and social assistance. This language clearly excludes irregularised, non-returnable TCNs, who have to turn to charitable organisations and civil society for material aid and other social assistance services.[207]

However, the 2020 EMN Country Report on Italy states that social assistance may be available in case of 'extraordinary conditions' and for those in 'particular need or poverty'.[208] Simultaneously, the EMN Country Report details that those TCNs who are detained in the so-called 'Repatriation centres' are guaranteed to receive minimum services free of charge, which include psychological and social assistance – the latter may be delivered by social workers.[209]

In Germany, the law[210] clarifies that Duldung holders as well as individuals with an enforceable return order, even when that deportation order is not anymore or not yet enforceable, may claim the benefits during their stay on federal territory.[211] Such assistance includes healthcare, though in exceptional circumstances – upon individual assessment – a person may be entitled to receive further benefits. More recently, limiting and reducing social assistance for asylum seekers have been subject to extensive debate in Germany.[212] In this respect, a 2012 judgment of the Federal Constitutional Court has been referenced, where the First Senate held that the basic cash assistance paid under § 3 of the AsylbLG was insufficient and that the German Basic Law ensures a guarantee of a dignified minimum existence as a human right, to which both German and foreign nationals residing on the territory are entitled to.[213] Crucially for the purposes of this Report, the court stated that '[h]uman dignity, guaranteed on Article 1.1 of the Basic Law, may not be modified in light of migration-policy considerations'.[214] This judgment has established a strong constitutional basis for social assistance for all individuals, regardless of immigration status.

The Spanish Rights and Freedoms of Foreigners Act establishes the entitlement of *all* TCNs in Spain to basic social services and benefits irrespective of administrative status.[215] By contrast, Article 14(1)(2) foresees that 'resident foreigners' may receive social security benefits and services under the same conditions as Spanish nationals, including both general and specific services. Consequently, there is a mandatory framework allowing irregularised TCNs to benefit from social services, albeit not to the same degree as regularly residing TCNs and citizens.[216] However, diminishing access and limited amounts

[200] *Loi organique des centres publics d'action sociale (CPAS)* [Act on the CPAS], 8 July 1976. Published in the Offical Journal [Moniteur Belge, M.B.] on 5 August 1976. (p. 9876). Available at: https://wallex.wallonie.be/eli/loi-decret/1976/07/08/197670810/1997/01/01.

[201] *Loi modifiant la législation concernant l'accueil des demandeurs d'asile (1)* [BE Act Amending the Reception Conditions Act], 19 January 2021, published in the Official Journal on 17 February 2021, M.B. Ed. 2, (pp. 11422 et seq.). Available at: http://www.ejustice.just.fgov.be/mopdf/2012/02/17_2.pdf#page=46.

[202] CJEU (2022). *UP v Centre public d'action sociale de Liège,* Case C-825/2, Judgment of the Fifth Chamber of 20 October 2022, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=ecli:ECLI%3AEU%3AC%3A2022%3A810.

[203] *Loi sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers,* [BE Reception Conditions Act], 12 January 2007, published in the Official Journal on 7 June 2007, M.B. (pp. 30893 et seq.). Available at: https://www.ejustice.just.fgov.be/cgi_wet/article.pl?language=fr&sum_date=&pd_search=2007-05-07&numac_search=2007002066&page=1&lg_txt=F&caller=list&2007002066=0&trier=promulgation&fr=f&nm_ecran=2007002066&choix1=et&choix2=et.

[204] BE Reception Conditions Act. Article 60.

[205] ibid. Article 7 §§ 1, 2.

[206] IT Immigration Code. Article 41.

[207] EMN Italy. (2020). supra footnote 112. (p. 20).

[208] EMN Italy. (2020). ibid.

[209] EMN Italy. (2020). (pp. 25–27).

[210] DE Asylum-Seekers' Benefit Act. § 1.

[211] ibid. § 1(1) Nr. 4, 5.

[212] PRO ASYL. (2023). *Leistungskürzungen für Geflüchtete: Ein Angriff auf die Menschenwürde.* Available at: https://www.proasyl.de/news/leistungskuerzungen-fuer-gefluechtete-ein-angriff-auf-die-menschenwuerde/.

[213] German Federal Constitutional Court. [BVerfG]. (2012). Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10 -, paras. 1-113. ECLI:DE:BVerfG:2012:ls20120718.1bvl001010. https://www.bverfg.de/e/ls20120718_1bvl001010en.html.

[214] BVerfG (ibid.). paragraph 95.

[215] ES Rights and Freedoms of Foreigners Act. Article 14(3).

[216] See also: EMN Spain. (2021). supra footnote 110. (pp. 40 and 41).

of support may depend on different municipalities and autonomous communities – discrepancies also arise from the fact that access to regularisation and regular residence status can vary across the country, which would aid TCNs in receiving broader and better social welfare benefits.[217]

Securing the special, yet still irregular status of 'tolerated stay' following the suspension or postponement of a return decision allows TCNs in Slovenia to exercise their rights to social assistance. This is based on the Aliens Act[218], which grants TCNs who are 'permitted to stay' access to basic care in the form of cash social assistance in case they do not have their own means of subsistence.[219] Article 75(4), however, includes a limitation to this right, making basic conditional upon compliance with Article 90(1)(2) of the Aliens Act. In brief, the two paragraphs foresee that the TCN cooperates with the competent authorities, mainly to voluntarily provide access to and submit all the relevant documents to establish their identity. Likewise, Article 75(5) stipulates that 'basic care' is not available to those admitted to a hospital, penitentiary or other state institution for the duration of their stay there. At the same time, 'basic care' is only available to those irregularised TCNs who remain 'known to authorities' and therefore also have been issued a return decision.[220] Benefits beyond basic care, such as tax-funded and means-tested social assistance schemes aimed at preventing poverty and social exclusion[221], are not available for irregularised TCNs.[222]

In Sweden, while irregularised TCNs are generally not entitled to support other than 'emergency assistance'[223] or lose access either upon receiving a deportation order or when the period for 'voluntary departure' expires[224], social benefits may be provided by the Swedish Migration Agency or the Social Public Services under certain circumstances.[225] The Agency is responsible for the provision of social benefits services to adults with minor children or unaccompanied minors until the day they depart from the country, as foreseen by the Act on the Reception of Asylum Seekers and Others.[226] Meanwhile, each individual may apply for social benefits from the Public Services in the municipality they reside in.[227] As stated by the EMN, granting such services depends on the discretion of the local authority, so it is possible that irregularised TCNs are granted support in line with the applicable Social Services Act.[228]

Effective remedies

For most irregularised TCNs, regularising their status remains a primary goal, which is only possible if they have access to effective remedies, including access to legal assistance. In cases related to expulsions of TCNs, this right in EU law, as enshrined in Article 47 EU Charter, requires effective access to an independent judicial authority and the automatic suspensive effect in cases raising *non-refoulement*, right to liberty or humanitarian issues, including cases where other fundamental rights might be put at risk. The accessibility of an effective remedy is also anchored by Article 13(1) of the Return Directive as the option of seeking either an appeal or a review procedure, which has also been confirmed by the CJEU.[229]

According to the Commission's 2017 Return Handbook[230], it must be laid down in domestic law that the appeal body can suspend the enforcement of a deportation order in individual cases. If there is a risk of *refoulement*, the reviewing authority

[217] See, for example: Schweitzer, R. (2022). 'Migrant Irregularity in Britain and Spain, London and Barcelona', in: Schweitzer (ed.), *Micro-Management of Irregular Migration,* IMISCOE Research Series, Springer, Cham. (pp. 57 and 86). Available at: https://doi.org/10.1007/978-3-030-91731-9_4#DOI.

[218] SI Aliens Act. supra footnote 25.

[219] European Migration Network (2020). *Responses to long-term irregularly staying migrants: practices and challenges in the EU and Norway – National Contributions from Slovenia.* [EMN Slovenia] (pp. 12 and 13). Available at: https://home-affairs.ec.europa.eu/document/download/249b7fca-4b42-4bef-9fd1-51ca81f5467a_en?filename=slovenia_ltim_study_final_en.pdf. See also: Article 75 of the SI Aliens Act, supra footnote 141.

[220] EMN Slovenia. (2020). (pp. 15 and 16).

[221] Strban, G., & Mišic, L. (2020). Migrants' Access to Social Protection in Slovenia. *In: Lafleur, JM., Vintila, D. (eds) Migration and Social Protection in Europe and Beyond (Volume 1).* IMISCOE Research Series. Springer, Cham. (p. 401). Available at: https://doi.org/10.1007/978-3-030-51241-5_26.

[222] See the exclusionary wording of Article 3 of the Social Security Benefits Act, which lays down that only citizens, permanent residents, those with residence permits based on family reunification and those granted international protection may receive social security benefits. *Zakon o socialno varstvenih prejemkih* [SI Social Security Benefits Act] (2010), Consolidated text 196/21. Officially published on 26 July 2010. Official Gazette of the Republic of Slovenia, No 61/10. Available at: https://pisrs.si/pregledPredpisa?id=ZAKO5609

[223] According to the EMN Sweden (supra footnote 19), (p.19)., there is no regulation what the Emergency Assistance should compromise, only that it is a temporary, 'last-resort' assistance that serves the purpose of 'avoiding distress'. This may include temporary shelter or food.

[224] Sveriges Kommuner och Regioner. *Frequently Asked Questions.* Available at: https://skr.se/integrationsocialomsorg/asylochflyktingmottagandeintegration/ansvarsfordelningregelverk/densomfaravslag/fragorochsvarekonomisktbistandtilldensomskautvisas.13071.html.

[225] EMN Sweden. (2021). supra footnote 19. (p. 19).

[226] *Lag om mottagande av asylsökande m.fl.* [SE of Asylum Seekers Act] (1994) No. 1994 :137, Officially published on 30 March 1994, Last amended by Act 2022:1006. §§ 1, 1a, 8, 17-19. Available at: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/lag-1994137-om-mottagande-av-asylsokande-m.fl_sfs-1994-137/.

[227] EMN Sweden. (2021). (ibid.)

[228] SE Social Services Act. (2001:453).

[229] See, for instance: CJEU. (2014) *Boudjlida v Préfet des Pyrénées-Atlantiques*, Case C-249/13, Judgment of 11 December 2014, ECLI:EU:C:2014:2431. Available at: https://curia.europa.eu/juris/liste.jsf?num=C-249/13 and CJEU. (2014). *Mukarubega v Préfet de police and Préfet de la Seine-Saint-Denis,* Case C 166/13, Judgement of 5 November 2014, ECLI:EU:C:2014:2336. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0166.

[230] European Commission. (2017). Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks. *Official Journal of the European Union, L 339/135*, Section 12.4. (p. 53). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338.

should grant an automatic suspensive effect *ipso jure*. As per the Commission's recommendation – to 'strike the right balance between the right to an effective remedy and the need to ensure the effectiveness of return procedures' –, an automatic suspensive effect is limited to cases such as *non-refoulement* and grave risks to life, limb and health.[231]

This notion of 'balancing' is profoundly problematic. It presupposes that the protection of fundamental rights – which includes the right to an effective remedy – and the principle of *non-refoulement* can be 'weighed' or 'balanced' against the overall aim of increasing 'effectiveness' by enforcing more return decisions. This implies that the policy goal of 'effectiveness' could override the obligation to protect the rights of individuals. In this context, the rights of TCNs are wrongly reframed as secondary, if not subordinated, to administrative effectiveness and overarching migration management policy aims. Such an approach can unavoidably undermine the very essence of the rights and principles which are absolute in nature while possibly leading to wrongful and illegal expulsions. The right to asylum and the liberties associated with it cannot be contingent on ever-changing political interests and their respect should not depend on the outcome of a 'balancing' of colliding interests or conflicting 'policy dilemmas'.

According to a 2017 EMN Report[232], appeals have automatic suspensive effect – albeit with notable exceptions – in three of the EU Member States examined here: Sweden, Slovenia and to some extent, Germany. Sweden does not seem to be granting any kind of access to legal services for irregularised TCNs.[233] Persons may seek out NGOs and volunteering legal professionals for assistance.[234] Initiatives, like the City Mission's *Migrationsträdet* – a map displaying available service providers and helping users navigate the routes out of irregularity –, seek to provide information on the services available to irregularised individuals, thereby bridging the information gap that often prevents TCNs from benefitting from legal recourse. At the same time, avenues to appeal unfavourable decisions remain open.[235] Removal order (Chapter 14, § 2) made by the Swedish Migration Agency alongside the rejection of an application for international protection (Chapter 14, § 14) can be appealed to a Migration Court.

Greece's Immigration and Social Integration Code[236] establishes a comprehensive right to appeal in Article 96. Article 96(1) specifically mentions return decisions and prescribes that such order be justified and communicated in writing to the TCN, alongside sufficient information about potential remedies. An automatic right of appeal is granted by Article 96(2), with Paragraph (3) specifying that appeals are to be filed to the competent administrative court. Crucially, Article 96(4) grants legal aid to those TCNs who are long-term residents and are looking to appeal a return decision without having sufficient resources to fund the judicial process. Additionally, Article 25 lays down related procedural safeguards, mentioning the possibility to appeal decisions rejecting residence permit applications as well as withdrawing existing permits – situations that could result in irregularisation.

The Belgian Residence Act[237] establishes the 'Aliens Litigation Council' (also referred to as 'Council for Alien Law Litigation' or 'CALL'), an administrative court with sole jurisdiction to hear appeals against administrative decisions related to access to and expulsions from the territory, as well as residence. Notably, as Article 39/2 spells out and the Immigration Office also stresses[238], the Council's jurisdiction is limited to examining the legality of the decision – meaning whether the Immigration Office made a procedural error or applied the law incorrectly – but cannot decide on the merits of the decision and its assessment of the applicant's administrative situation. Should the Council decide to annul a return order, it will no longer be enforceable.

The issuance of return orders to irregularised TCNs are based on Article 110. Title III of the Act then goes on to detail the available remedies and recourse to the Belgian Council for Alien Law Litigation (established by Article 39/1), which can hear appeals in cases related to a refusal to grant international or another type of protection.[239] Appeals may be submitted within 30 days following the reception of a negative decision. Crucially, the Immigration Office specifies that 'requests' to have a return decision annulled – via a submission to the Council – have, in principle, no suspensive effect.[240] In general, a special appeal must be lodged in an order for the appeal to have a suspensive effect, and only if the appellant can demonstrate that the normal procedure would take too long.[241] Persons detained for the purpose of preparing for removal may appeal to the Council Chamber of the Court of First Instance, which can order an individual's release due to unjustified deprivation of liberty.[242] However, it is possible that the return is enforced before the Council can even issue a judgment, signalling that such an appeal also does not have an automatic suspensive effect. In terms of aid, the Belgian Federal Agency

[231] ibid., (p. 135). Section 12.4/2.

[232] European Migration Network. (2017) *The effectiveness of return in EU Member States – Synthesis Report for the EMN Focused Study*. (p. 55). Available at: https://www.emn.at/wp-content/uploads/2017/12/EMN-Synthesis-Report-2017-The-effectiveness-of-return-in-EU-Member-States.pdf. [EMN Synthesis Report. (2017)]

[233] EMN General Report. (2021). supra footnote 28. (p. 40.)

[234] EMN Sweden. (2021). supra footnote 19. (p. 24).

[235] SE Aliens Act. Chapter 14.

[236] Officially published in the Government Gazette of the Hellenic Republic on 1 April 20214. Issue No. 80. (pp. 1303 et seq.) Available at: https://www.mfa.gr/images/docs/ethnikes_theoriseis/2015/metanast.pdf.

[237] BE Residence Act, Article 39/1.

[238] https://dofi.ibz.be/en/themas/onwettig-verblijf/meer-weten/possibilities-appeal.

[239] https://www.cgrs.be/en/asylum/appeals-procedures/the-council-for-alien-law-litigation.

[240] https://dofi.ibz.be/en/themas/onwettig-verblijf/meer-weten/possibilities-appeal.

[241] EMN, (2017), Section 6.3. (p. 55).

[242] Immigration Office, ibid.

responsible for the reception of asylum seekers is obliged to ensure the availability of legal assistance to the 'beneficiaries of reception'.[243]

Spain's Act on the rights and freedoms of foreigners states[244] that foreigners have the right to effective judicial protection, while Article 21(1) further specifies that all administrative acts adopted in relation to TCNs may be appealed, including return orders. Furthermore, Article 22(1) affords them legal aid to the same extent as what is available to Spanish citizens, which, should the TCN not have the financial means, is provided free of charge alongside any necessary interpretation. As the EMN notes, Spain is among the few EU Member States that has mandatorily established access to legal assistance for irregularised TCNs to the same extent as those with a regular status.[245]

The Italian Immigration Code lays down different legal bases for appeals. Individuals may appeal an expulsion order[246], and the order of a judge that 'validates' the enforcement of an expulsion by the police in line with Articles 13(5-bis) and Article 14(6), though the latter two do not suspend the enforcement of the removal order. As the EMN Synthesis Report of 2017 notes, an appeal against the return decision does not have suspensive effect in Italy, though it can be specifically requested by the appellant and the judicial authority will decide on it within 5 days.[247]

Slovenia's Free Legal Aid Act[248] includes general provisions for free legal aid. According to the EMN, the Slovenian Ministry of the Interior supports a free legal aid program aimed at TCNs in the return process to help them understand their status, any available possibilities and the consequences of potential non-compliance with the return decision.[249] Otherwise, an individual looking for counselling may rely on civil society organisation who provide legal assistance for irregularised TCNs.[250] Meanwhile, Article 87 of the Aliens Act lays down several provisions that allow individuals in irregular situations to seek legal remedy against unfavourable administrative decisions. Crucially, the right to appeal a return decision and right to free legal advice has its legal basis in Article 64(7). Furthermore, paragraph 6 notes that appeals against a return order or a decision refusing to extend the deadline for voluntary departure (Article 66), the right to free legal aid is available to TCNs under the conditions of the Free Legal Aid Act.

In Germany, individuals who are not granted international protection are given 30 days to leave the country, or, in case of appeal, the date of the return is 30 days after the 'incontestable conclusion of the asylum procedure' (DE Asylum Act Article 38(1)).[251] Court action taken in such cases has suspensive effect[252]. However, only appeals against rejected asylum claims have a suspensive effects – generally, this is not the case in action brought against return decisions, though there may be some exceptions.[253] Similarly to Belgium, persons can request an order for a suspensive effect.[254] The action needs to be filed within one week of notification and if that deadline is met, then the enforcement of the removal is suspended until the competent court decides. An appeal to the second instance is possible if the first instance decision is not favourable to the appellant. Individuals who have been detained and are awaiting deportation are permitted to contact legal representatives alongside aid and support organisations. The Federal States are required, as a rule, to provide support and counselling at departure facilities[255]. Detainees may also apply to receive legal aid from organisations providing them and the staff of such organisations are allowed to visit individuals in detention centres[256].

The EMN notes that legal aid is available to persons with a low income in Germany, irrespective of their citizenship, for a fee EUR 15, which can be waived.[257] This can even encompass legal representation in civil and administrative matters. Yet, as the report concedes, just like in the rest of the Member States studied, access can be difficult. For one, unauthorised residents who are not in contact with the authorities are not able to apply for legal aid through the local authorities. They may instead rely on civil society organisations who provide free legal advice even to individuals who do not have a regular residence status. Particularly the organisations who specialise in asylum and migration law – including Refugee Law Clinics –, tend to be 'heavily overloaded' and cannot help all the TCNs who need support. On the other hand, language barriers and a lack of knowledge of the German legal system can prevent persons from benefitting from existing options.

Conclusions: Humanising EU Migration Policy

This article highlights significant disparities between the selected EU countries when it comes to their legal and policy responses to irregularised, non-returnable, TCNs. This fragmentation carries the acute reality of leaving individuals in a precarious state of 'administrative limbo', where their rights are inconsistently recognised and effective access to socio-economic support and justice is either absent or severely curtailed, pushing them towards destitution and precarity.

[243] BE Reception Conditions Act, Article 33.

[244] ES Rights and Freedoms of Foreigners Act, Article 20(1).

[245] EMN. (2021). (p. 40.)

[246] IT Immigration Code, Article 13(3).

[247] EMN Synthesis Report 2017, supra footnote 229, Section 6.3. (p. 56).

[248] *Zakon o brezplačni pravni pomoči* [ZBPP; SI Free Legal Aid Act] (2004), Official Gazette of the Republic of Slovenia, No. 96/04, 23/08, 15/14, 19/15, https://pisrs.si/pregledPredpisa?id=ZAKO1265.

[249] EMN Slovenia. (2020). supra footnote 216, (p. 23).

[250] EMN Slovenia. (2020). supra footnote 216. (p. 18).

[251] DE Asylum Act. Article 38(1). supra footnote 179.

[252] Section 75(1). (ibid).

[253] EMN. (2017). (p. 55)

[254] ibid. (p. 56).

[255] Sections 62a(2) and 61(2)

[256] Articles 62a(4)

[257] Haberstroh *et al*. (2022). supra footnote 160.

The analysis reveals critical commonalities, including the challenging pathways to freezing expulsions, as well as the systemic obstacles and structural discrimination faced by irregularised TCNs in accessing fundamental rights such as healthcare, housing, employment, and justice. Moreover, these findings indicate that access to legal support and effective remedies remains inadequate or inexistent in many of the countries under investigation. TCNs excluded from enjoying these fundamental rights are forced to rely on civil society organisations, which are often policed and underfunded in their work, rather than receiving the required assistance and support from competent national authorities.

The research underscores the need for the European Commission to ensure a more effective and timely enforcement of the protective elements of the EU Returns Directive in line with the EU Charter of Fundamental rights, as interpreted through CJEU standards and international/regional human rights obligations. Ultimately, the focus should be the reduction of inconsistencies and highly diverging national discretions to protect these already marginalised groups and ensure their successful social inclusion and dignity.

This analysis highlights that non-removable TCNs' 'hyper-heterogeneity' also stems from the disproportionate political emphasis on 'effectiveness' as a numerical exercise on increasing enforced returns at all costs. This had led the European Commission and EU Member States' governments to frame various modes or grounds legitimately justifying the freezing and suspension of expulsions as 'obstacles' and 'barriers', or as a voluntary or facultative options in their hands. The analysis provided in this article challenges this prevailing framing and shows that many of these grounds relate to absolute human rights. These rights, and the effective legal recourse to them, do not accept derogations in the name of 'policy priorities', even at times of politically declared 'crisis' (or otherwise). A policy focus on 'effectiveness' thus conceived, prevails over humane treatment and compliance with fundamental rights standards as required by the EU Treaties.

The currently predominant tendency of national actors to prioritise expulsions over dignified treatment creates tremendous legal uncertainties for TCNs, inhibiting their ability to seek out opportunities to extend their stay, either through the suspension of their expulsion or via regularisation or transition of status. Without comprehensive and accessible information on their rights and transitioning of status options,[258] lack of clarity and an understandable fear of forcible deportation, prevents them from finding a way out of limbo. Therefore, the national policies examined in this article do not always comply with existing norms under EU law and CJEU case-law, international and regional human rights standards, and the commitments under the UN Global Compact on Migration, which calls for states to facilitate status transitions, individual status assessments, and safe access to basic services.

While some of the countries studied provide access to certain socio-economic rights, the effectiveness of such access remains troublingly limited by bureaucratic administrative barriers, registration obstacles, systemic discrimination faced by communities that are already rendered vulnerable by the circumstances of irregularity resulting from current policies and a prominent *penalisation* approach focused on their 'willingness to cooperate' with national authorities on their identification (nationality and/or legal identify) and expulsion procedures.

The research also reveals a highly heterogeneous and diverse landscape of national and regional authorities responsible for adopting return decisions and removal orders, handling the appeals and effective remedies against these decisions, assessing/issuing a suspension of expulsion and dealing with the transitioning of administrative statuses. In a political context where enforcing expulsions constitutes the overriding policy priority, there is a tremendous risk in 'responsibility-shifting', placing the blame of non-enforceability or the weight of support and legal navigation upon other competent national authorities, including local and civil society actors.

This article concludes that it is imperative to reaffirm an unyielding commitment to human dignity in EU policy. This is the indispensable foundation upon which all policies must lie, including the area of 'migration'. Human dignity cannot be 'balanced' against migration management policy agendas but rather underscores the inherent human rights of each person and constitutes a key foundation and legitimation factor of European integration and its founding Treaty principles.

Ethics statement

Ethical approval for this research was sought and received by the Comisión de Bioética de la Universidad de Barcelona (CBUB - Institutional Review Board IRB00003099), on July 20, 2023.

Ethical guidelines and standard procedures were established for all interviews, including the use of standardised informed consent forms and anonymisation processes. Any identifying information was strictly excluded from the analysis. Written or oral consent was obtained from all participants. Although written consent was the preferred method, certain participants chose to give oral consent exclusively, preferring not to leave a written trace of their involvement. Consent included permission to record the interviews.

To protect the anonymity and confidentiality of the interview participants, and to facilitate data management, each participant was assigned a code, following the pattern <Task number-Country-Focus group number-Participant number>. As it is necessary to be able to re-trace a participant's identity to fully respect the right to withdraw from the study, in this context it is more relevant to talk about "pseudonymisation" than of full anonymisation. Additionally, any information that might identify a participant was strictly excluded from the analysis process.

Data and software availability

Underlying data

Zenodo repository_WP2 - Documents of analysis

[258] Carrera, S., & Shabbir, A. (2024). *Humanising EU Migration Policy: The transitioning of statuses in the EU regular and labour migration law*. CEPS Report. Available at: https://cdn.ceps.eu/wp-content/uploads/2024/05/EU-LEVEL-REPORT-ASPIRE-FINAL-3.pdf.

https://zenodo.org/uploads/15188032, 10.5281/zenodo.15188031

This data set consists of the documents consulted for the analysis, including legislation and soft law tools.

Zenodo repository_WP2 - Interview data

https://zenodo.org/records/14755977, 10.5281/zenodo.14755976.

This dataset consists of semi-structured interview data generated in WP2 of the MORE project in seven countries: Belgium, Italy, Germany, Greece, Slovenia, Spain and Sweden. The aim was to analyse policymakers' and other relevant stakeholders' perceptions of policy responses given irregularised third country nationals and existing hegemonic alternatives to return and readmission. The dataset contains factsheets from 36 semi-structured interviews.

In accordance with the MORE project's ethical guidelines and data management plan, to protect personal data and pseudonymised identities, access to this dataset is restricted. The interviews data has been qualified as sensitive by the Universitat de Barcelona's Data Protection Officer for which it can only be shared after approval. Data access may be obtained by submitting a request to the coordinator, Universitat de Barcelona via email to olga.jubany@ub.edu and protecciodedades@ub.edu, providing written plans and justification for what is proposed with the data. Requests will be reviewed by coordinator, Universitat de Barcelona, and the work package leader, Centre for European Policy Studies, in consultation with the project's Ethical Standards Committee.

Data are available under the terms of Creative Commons Attribution 4.0 International.

Extended data

Zenodo Repository – WP2 – Documents of analysis

http://10.5281/zenodo.15188032

This dataset contains following underlying data:

- MORE_WP2_ORE Publication_Documents included in the analysis.xlsx

Zenodo Repository – WP2- Extended Data

http://doi.org/10.5281/zenodo.14894333.

This dataset contains following extended data:

- MORE_WP2_Interviews_Extended data_Guiding questions.txt

Data are available under the terms of Creative Commons Attribution 4.0 International.

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Some observations - A Point of No Return: A Comparative Analysis of Legal and Policy Responses to Irregularised Non-Removable Third-Country Nationals in Selected EU Member States

Jan Cremers/Tilburg Law school

In general
The authors use the term 'common migration policy' in the abstract. This can be misleading as migration law is first and for-all the competence of the EU Member States. The fact that there is no common policy largely explains the patchy and fragmented regulatory findings.
Secondly, it is recommended to stick to the starting point (mentioned on page 5) that TCNs in this article do not include people seeking asylum and refugees. It is sometimes confusing to read about asylum acts/procedures although it is explicitly said that the administrative category of TCNs envisaged does not include people seeking asylum and refugees. The same counts for the arbitrary use of the term 'undocumented migrants' or 'undocumented TCNs'.

This brings me to a central question. How is the administrative category of 'irregularised, non-removable' TCNs defined in this analysis? Who are we talking about? Are we talking about illegal border crossers, victims of human trafficking or TCNs with deliberately expired visas? Is the focus on TCNs having entered as labour migrants and becoming unemployed (and with lacking employment losing their work and residence permit)? Or is it the definition as mentioned in several Directives and Regulations of a third-country national not or no longer fulfilling the conditions of entry and stay?[1] And, moreover, what **led them to become irregularised**? Or is that irrelevant and does it only matter that they are 'non-removable' and/or 'non-deportable'?

Specific comments
The analysis could have been elaborated in more detail from the perspective of labour legislation and social policy and the rights that can be derived from having (had) a labour relation.[2] One of the key socio-economic rights in the EU is the right to stay in a Member State for the purpose of

employment and to remain in the territory of a Member State after having been employed in that State (TFEU, Article 45). In the Treaty, this right is basically preserved for EU-citizens. However, the Treaty also speaks (in art. 153) about protection of (all) workers where their employment contract is terminated. The pathway of entering as (temporary) labour migrant is only partially treated in the paragraph *Decent work* and should figure also in other parts of the article. Moreover, that paragraph regards refugees and irregular workers in the same breath, whilst their entrance channel is or can be quite different.

In several Member States an increase of TCNs entering as labour migrants is signalled, with or without work visa, whilst at the same time labour inspectors are confronted with TCNs working illegally.[3] In the meantime, some countries speak about the new 'homeless', labour migrants who were recruited, sometimes through dubious pathways, became unemployed, losing their work and residence permits. Fair treatment of third-country nationals once residing legally in Member State because they were employed can thus be an issue.

This right, seriously hampered due to the dependency relationship of an almost exclusive sponsor or employer, is somewhat neglected. Finding an alternative employer, for instance, can represent an alternative to return for third-country nationals who have become irregularised due to a loss of their employment status.[4]

Irregular workers can be the victim of unfair recruitment, labour trafficking, and other informal ways to enter, situations attracted with promises of work, income and other tempting prospects, finally ending up in irregular or illegal situations and in complete dependency (and debt that is not signaled in the article).[5] In cases where the labour inspectorate finds out that their status is illegal, this irregularity will bar access to work (as prescribed on page 21). The handling of such a case goes beyond the labour law derived competences of the inspection services, with migration legislation entering that can lead to expulsion. The risk is that policing becomes more important than protection. At that moment, labour-related safeguards and policy considerations (as defined by FRA) should continue to apply. I have the impression that this is not analysed in-depth as a consideration that matters. For instance, the issue of safe reporting is only touched upon in the Belgium case.

The article rightly refers to the EU Employers Sanction Directive. Another relevant Directive from the social perspective is not mentioned, i.e. Directive 2014/36/EU on the conditions of entry and stay of third-country nationals the purpose of employment as seasonal workers.[6] Several parts of this Directive are relevant (admission should not present a risk of illegal immigration; leave at the latest at the date of expiry), although the Directive is unclear about the consequences of a withdrawal of the authorisation. Nevertheless, it is possible for Member States to extend a labour contract with a different employer. Even more important are the possibility to examine the genuine record of the employer involved (art. 8), the handling of fraud and the possible withdrawal of authorisation (art. 9) and the liability of employers to pay compensation (art.17). All these issues could have been treated in the paragraph on remedies (page 23 and further). Most relevant articles are about procedural safeguards, including the right to stay on the territory (art.18) and the facilitation of complaints (art. 25). Unfortunately, the implementation of and practical experiences with these aspects were not analysed.

[1] Some scholars rightly call this a rather 'abstract frame of reference':

https://www.icmpd.org/file/download/61067/file/MIRREM%20Working%20Paper_EU%20Policy%20Framework%

[2] See for instance: https://picum.org/wp-content/uploads/2022/04/Guide-to-undocumented-workers-rights-EN.pdf

[3] https://www.ela.europa.eu/sites/default/files/2025-06/Third_country_nationals_report.pdf

[4] See, for instance, the Borealis case: https://www.justiceatlast.eu/uncategorized/exploited-migrant-workers-still-await-backpay-in-borealis-case/ and https://www.business-humanrights.org/en/latest-news/belgium-filipino-workers-subject-to-rights-abuse-at-borealis-factory-incl-low-wages-denial-of-work-permits-incl-cos-comments/

[5] German research revealed that TCN-truck drivers recruited by sham intermediates often had to go into debt or sell their possessions, taking on debts of several thousand euros to get the job in Europe. https://www.faire-mobilitaet.de/dgb-fm-fileadmin/dateien/Dokumente/Internationaler-Stra%C3%9Fentransport/Fachinformationen/Dossier_Arbeitsbedingungen_Entsendung_06_25_barrierefrei.pdf

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0036

Is the work clearly and accurately presented and does it engage with the current literature?
Yes

Is the study design appropriate and is the work technically sound?
Yes

Are sufficient details of methods and analysis provided to allow replication by others?
Partly

Are all the source data and materials underlying the results available?
Yes

If applicable, is the statistical analysis and its interpretation appropriate?
Not applicable

Are the conclusions drawn adequately supported by the results?
Partly

Competing Interests: No competing interests were disclosed.

Reviewer Expertise: European Social Security Law; Migration Studies; Transnational Posting Of WorkersLabour Market Issues; European Social Law;Mobility Of Labour

I confirm that I have read this submission and believe that I have an appropriate level of expertise to confirm that it is of an acceptable scientific standard, however I have significant reservations, as outlined above.

Reviewer Report 17 October 2025

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The paper offers a comprehensive and informative overview of the subject matter. It provides a well-structured description of relevant legal documents, which is corroborated by interviews. The contribution demonstrates solid knowledge of the legal framework and succeeds in mapping the current state of play in the field. However, the paper appears to be conceived more as a background or foundational document for a larger research project than as an academic article. Both in terms of content and style, it prioritizes descriptive and documentary work over analytical engagement and theoretical reflection.
To enhance the scholarly value and overall coherence of the paper, some minor improvements are recommended.
-Critical analysis: The authors are encouraged to integrate more analytical and interpretative insights throughout the paper, particularly in the concluding section.
-Contextual framing: The introduction should include a brief presentation of the MORE project - its aims, scope, and relevance to the paper - to situate the work within its broader research context. Alternatively, a hyperlink to the project's webpage could be added for readers seeking further information.
-Empirical details: Additional information about the interviews would be valuable, as the current details appear only in a table that is accessible in full online but not in the printed version. Further elaborating the methodological section would improve the transparency and reproducibility of the research.
-Ethics statement: The ethics section is currently repeated and overly lengthy. It could be streamlined to avoid redundancy while maintaining essential information on ethical compliance.
-Acronyms: The authors should ensure that all acronyms are spelled out in full at their first appearance (e.g., *CGRS*), to improve readability and accessibility for a broader audience.
-Title: The current title of the section "Decent Work" may be too generic and potentially misleading. A more specific and descriptive title would better capture the reader's attention and clarify the content.
Overall, the paper provides a valuable groundwork for further academic inquiry and policy-oriented research. With a stronger analytical component and minor editorial adjustments, it could develop into a more robust academic contribution.

Is the work clearly and accurately presented and does it engage with the current literature?
Yes

Is the study design appropriate and is the work technically sound?
Yes

Are sufficient details of methods and analysis provided to allow replication by others?
Partly

Are all the source data and materials underlying the results available?
Partly

If applicable, is the statistical analysis and its interpretation appropriate?
Not applicable

Are the conclusions drawn adequately supported by the results?
Yes

Competing Interests: No competing interests were disclosed.

Reviewer Expertise: International law; human rights; minority rights; non-discrimination

I confirm that I have read this submission and believe that I have an appropriate level of expertise to confirm that it is of an acceptable scientific standard, however I have significant reservations, as outlined above.