

Fundamental Rights Conference 2011 'Dignity and rights of irregular migrants'

Summary conclusions by the FRA

The European Union Agency for Fundamental Rights (FRA) held its annual Fundamental Rights Conference (FRC) '**Dignity and rights of irregular migrants**' in Warsaw on 21-22 November 2011. The conference was organised in cooperation with the Polish Presidency of the Council of the European Union (EU) and discussed how to improve access to fundamental rights for migrants in an irregular situation, namely of those persons without authorisation to stay in the EU. The discussions were drawing on FRA's EU-wide research on the situation of migrants in an irregular situation, which was published in the run-up to the conference.

Some 300 representatives of EU institutions and bodies, national governments, international organisations, national human rights institutions and equality bodies, labour inspectorates, social partners and civil society organisations from across the European Union took part in the conference. European Commissioner Cecilia Malmström, UN Deputy High Commissioner for Human Rights Kyung-wha Kang, European Commission Director for Migration and Borders Belinda Pyke, Under-secretary of State Grażyna Bernatowicz from the Polish Presidency of the EU and a number of other high-level speakers addressed the conference participants. The FRA hosted the conference, with the support of the European Commission, the Council of Europe, UNICEF and the International Labour Organisation, which chaired the four expert workshops on solutions for protracted irregularity, detention of irregular migrants, labour exploitation and the rights of accompanied children in an irregular situation.

While recognising the sovereign right of every EU Member State to manage its borders and combat irregular migration, the FRC highlighted that once a person is within a state's jurisdiction, this state has to guarantee his or her human rights. As highlighted by the FRA research, further efforts are needed to eliminate existing legal and practical barriers that prevent migrants in an irregular situation from accessing their most basic rights. The conference discussions underlined the importance of applying a fundamental rights approach to migration management and offered a number of practical suggestions to:

- facilitate access to justice;
- respect the right to education and health;
- preserve the best interests of the child;
- combat labour exploitation;
- reduce the use of immigration detention;
- end situations of legal limbo for persons who are not removed.

Preserving the best interests of the child

Conference participants recognised that children in an irregular situation are particularly vulnerable – as children, as migrants and as individuals without papers – and therefore require special protection. The discussions identified four main areas of concern:

- the United Nations (UN) Convention on the Rights of the Child (CRC) requires that the best interests of the child be given primary consideration in all actions concerning children. This also concerns return decisions. Experience with current practices, however, indicates that little attention is given to the best interests principle in cases where children are removed to their countries of origin together with their families;

- basic services, such as healthcare and compulsory education must be accessible to all children irrespective of their parents' migration status. Legal as well as practical obstacles limit, nevertheless, access in practice. Apprehensions near schools and hospitals, reporting duties by service providers to the police as well as data exchange between service providers and immigration law enforcement bodies discourage migrants from approaching healthcare or educational facilities, thereby disproportionately hindering their access to fundamental rights;
- all children should have access to adequate housing with due respect to the right to family unity. Evictions of families with children from reception centres affect not only the right to housing of children but also their right to life, social protection, respect for the child's human dignity and best interests;
- birth registration is a guarantee of a child's right to identity and nationality. It facilitates access to other rights, including in case of return. Creating awareness of the importance of birth registration and the adoption of simple procedures to allow parents to register a child's birth without revealing his or her migration status could contribute to reducing the number of unregistered children.

Upholding labour standards and access to justice in cases of breaches

Evidence by the FRA shows that migrants in an irregular situation are at heightened risk of becoming victims of labour exploitation and abuse. Among them, domestic workers face particular risks. Recognising that international labour standards apply to all workers irrespective of their nationality or migration status unless otherwise stated, participants considered that:

- fear of detection and deportation (also due to reporting practices by labour courts or labour inspectors) as well as limited rights awareness discourage migrants from reporting cases of abuse and exploitation to the authorities. More awareness is thus needed, both among employers as well as those employed. Greater visibility for successful court cases involving migrant workers in an irregular situation would encourage other migrant workers to seek justice against abusive or exploitative employers;
- labour inspectorates, trade unions, civil society organisations, national human rights institutions and equality bodies play a vital role in ensuring respect for wages and working conditions and in making justice mechanisms more accessible, provided they extend their work to all workers, regardless of legal status;
- migrants in an irregular situation employed in the domestic work sector face particular challenges.

Better regulation of the domestic work sector as well as simple and effective procedures to obtain legal employment for domestic workers were identified as important steps to reduce the risk of abuse;

- participants stressed the need to make more systematic use of existing protection tools, such as, for example, the mechanism to claim withheld wages in Article 6 of the Employer Sanctions' Directive and to ensure effective implementation of this Article by EU Member states.

Detention conditions and alternatives

Many participants noted with concern the growing use of pre-removal detention, often carried out in inadequate facilities. An irregular situation in and of itself should never be considered a sufficient ground for detention. Discussions highlighted the following areas of concern:

- participants underscored the importance of a number of basic conditions to ensure that detention is lawful and non-arbitrary, such as the need for clear and exhaustive grounds for detention, the need to respect procedural safeguards and a case-by-case assessment of individual circumstances;
- alternatives to detention were seen as a practical tool to reduce the need for custodial measures, provided such alternatives do not disproportionately affect other fundamental rights. Innovative examples have been emerging in a number of EU Member States, among them Belgium, Sweden and the United Kingdom, which could serve as an inspiration for other EU Member States;
- children can be deprived of their liberty only as a measure of last resort and for the shortest appropriate period of time. In those exceptional cases when children are detained, the need to respect family unity and the child's best interests requires that facilities are adapted to the specific needs of the child and that the staff is adequately trained.

Ending situations of legal limbo

Removal may be suspended, postponed or not enforced for a variety of reasons, for example due to legal, humanitarian or technical obstacles. Persons in return procedures who are not removed can end up in a situation of legal limbo, which can last for a protracted period of time. While authorities acknowledge their presence de facto or formally, persons who are not removed are usually not provided with an explicit right to stay. Discussions highlighted the following areas of concern:

- persons, who cannot be removed and who are not provided with a residence permit, are often deprived of basic rights. As access to rights is generally connected

to legal status, the option of providing individuals who are not removed with lawful stay until the removal is implemented was raised. It was proposed that after a certain period, the status and rights of non-removed persons could be aligned to those of legal migrants;

- when the removal is not enforced, affected persons should not risk destitution. Many participants

saw access to the labour market as an essential pre-condition to providing for one's own living;

- a possible harmonising role for the European Union, given the great divergence of existing national practices.

Follow-up

As a follow-up to the Fundamental Rights Conference 2011, the FRA will:

- discuss with key partners at the national, European and international levels the feasibility of providing guidance to immigration law enforcement bodies on how to avoid enforcement actions which disproportionately affect access to fundamental rights;
- undertake a comparative analysis of alternatives to detention applied in the 27 EU Member States, with a view to identifying promising practices;
- initiate a research project in 2013 on extreme forms of labour exploitation, which will also explore access to justice in cases of abuse or exploitation and look into the application of Art.6 of the Employer Sanctions' Directive;
- discuss with healthcare professionals how to address some of the practical obstacles which limit access to health-care, such as reporting and information-exchange practices with immigration authorities, complex reimbursement procedures for health providers and cost issues;
- discuss with key partners at the EU and Member State level policy and legal options for providing persons who could not be removed with access to basic rights and authorisations to stay.

Further information:

An overview of all the speakers at the FRC, and much more, can be found on the conference website at:

<http://fra.europa.eu/fraWebsite/frc2011/>

All FRA publications, including language versions, are available online at:

http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm