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Summary: In several EU Member States migrant children without a residence permit may have a right to attend school but it is compromised by other regulations or policies. This is violating states' obligation under international as well as European law.

Education – A Human Right Also For Migrant Children!

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The importance of education for the development of the individual person as well as for societies is nowhere seriously disputed. The discussion about PISA and other evaluation programs and tests clearly shows that. It is also rather commonplace that access to education is a fundamental human right.

Nevertheless, in many countries around the world children are still excluded by state policies from access to schools. As a survey currently conducted by the Jesuit Refugee Service Europe² shows, this is especially true in a number of Member States of the European Union with regard to children of asylum seekers, of migrants with “toleration” or undocumented migrant families. In most of these countries there is a gap between provisions in law on one hand and the reality on the other.

Take for instance Sweden, a country quite well-known for good schools and education facilities. Migrant children without a residence permit have a right to go to school in Sweden, but not an obligation. Hence it depends on the parents whether they send their children to school or not. Also, it is not always clear whether the school has a duty to accept a certain child. There is no positive law regulating this issue. Another hindrance might be that schools do not receive state money for undocumented children. Hence in quotidian reality the possibility for a child to attend school heavily depends on the regional government's and individual school's policy as well as on the parents' willingness.

What can make the situation even more complicated is that an old section in the Swedish Aliens Ordinance³ stipulates a duty of the local education committee to inform the police about every migrant child enrolled for the first time in a school. Neither the regulation's wording nor its application are very clear and there are doubts that reporting a child to the police would not constitute a breach of the school staff's professional secrecy. Nevertheless, it is an uncertainty which might have weight when an undocumented migrant family decides whether to send their child to school or not. Anyway, police can come into a school and ask for the whereabouts of a named person.

The situation in Germany is quite similar. Here as well a migrant child without a residence permit might have a right to attend school⁴ but it is not mandatory. The main obstacle is that Section 87 of the Residence Act stipulates a duty of every “public authority” to report the stay of an undocumented migrant to the Aliens Department. A public school is, no doubt, a “public authority”. There is some discussion about whether a school has to ask for the residence permit of a child as this is not part of the professional duties but nevertheless there is a danger for an undocumented family to be reported and subsequently expelled.

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² Which is generously funded by the Network of European Foundation (NEF) in their European Program for Integration and Migration (EPIM).

³ Chapter 7 section 1 second paragraph number 4 of the Aliens Ordinance.

⁴ It depends on the regulations in the different *Länder* as education mainly lays within their competence.

These findings are in sharp contrast to the states' obligations under international law. In the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ State Parties have agreed to take steps "with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means" (Art. 2 para 1). Even if, therefore, the ICESCR does not contain individual, enforceable obligations, Art. 2 para 2 of the covenant expressively commits State Parties to ensure that exercise of the rights enunciated in the covenant will be without discrimination "of any kind" such as, inter alia, colour, national origin "or other status." This non-discrimination rule allows limitations of the enjoyment of social rights only in so far as they might be compatible with the nature of these rights (Art. 4). Even if a distinction could be justified with objective reasons it must not touch the core of the respective right.⁶

This must be respected in the interpretation and implementation of the relevant national law, especially with regard to the right of education including primary education, which, in accordance to Art. 13 (2) (a), "shall be compulsory and available free to all".

Even if the litigability of the ICESCR in detail is highly disputed, the UN Committee for Economic, Social and Cultural Rights (CESCR) has nevertheless repeatedly highlighted the states' obligation to completely transpose the covenant into domestic law and, in this context, especially to pay attention to the situation of non-citizens.⁷ Also, pursuant to Art. 27 of the Vienna Convention on the Law of Treaties, a State Party must not invoke domestic law as justification for failure to perform a treaty.

To discriminate a person in granting rights deriving from the ICESCR does also constitute a violation of the International Convention on the Elimination of All Forms of Racial Discrimination.⁸ As the UN Committee for the Elimination of All Forms of Racial Discrimination has stated in their General Comment No. 30, the ICESCR sets forth human rights states must grant to everybody being subjected to their jurisdiction.⁹

The International Convention on the Rights of the Child¹⁰ establishes in Art. 3 para 1 the duty of every state to give priority to the best interest of a child in the context of any action a child – being a person under the age of 18 years – is subjected to. This is expressively true for the right of the child to education (Art. 28-29).

As we are discussing the situation in EU Member States, regional European law should be taken into consideration as well. Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹¹ enshrines the right to freedom of discrimination on the grounds of, inter alia, national origin or "other status". This can result in a ban on differentiation on these grounds in the context of social security. As the European Court of Human Rights (ECtHR) has ruled in *Gaygusuz*,¹² a different treatment of national citizens and foreigners violates the non-discrimination rule of Art. 14 if it is not grounded on objective and reasonable justification. This is the case if not a legitimate aim is pursued or there is no reasonable relation between the interests of the persons affected on one hand

⁵ 993 UNTS 3.

⁶ See Joan Fitzpatrick, The Human Rights of Migrants. In: T. Alexander Aleinikoff/Vincent Chatal (ed.), Migration and International Legal Norms. The Hague et al. 2003, pp. 169-184 <175>.

⁷ See CESCR General Comment 9 (The domestic application of the Covenant), U.N. Doc. E/C.12/1998/24, 3.12.1998; David Weissbrodt, Progress report on the rights of non-citizens – U.N. activities, U.N. Doc. E/CN.4/Sub.2/2002/25/Add.1 (2002), paras 41–46; *idem*, Prevention of Discrimination – The rights of non-citizens. Final Report. U.N. Doc. E/CN.4/Sub.2/2003/23.

⁸ 660 U.N.T.S. 195.

⁹ General Recommendation 30: Discrimination against non-citizens. U.N. Doc. CERD/C/64/Misc 11/rev.3, 12 March 2004

¹⁰ 1577 U.N.T.S. 3.

¹¹ ETS No. 5.

¹² ECtHR, Decision of 16/09/1996 – No. 39/1995/545/631 (*Gaygusuz vs. Austria*).

and the aim of the measure on the other. The states enjoy a certain margin of discretion in deciding if and how far differences justify a different treatment. But they must show good cause if a difference in treatment based solely on the nationality shall be compatible with the ECHR.

This approach was developed further in *Poirrez*,¹³ where the Court held that a differentiation in the treatment with respect to social benefits between nationals of State Parties to the ECHR on one hand and nationals of other states on the other is not justifiable. This argumentation can, *mutatis mutandis*, be applied to schooling as well.

The Twelfth Protocol to the ECHR¹⁴ came into force as of 1 April 2005. This brought an expansion of the ban on discrimination because Art. 1 para 1 of the Protocol calls for every right guaranteed by law to be granted without discrimination on any of the grounds enumerated in Art. 14 ECHR. Hence, if a state stipulates school attendance to be compulsory for children being his nationals he must also recognize the right of migrants children to education.

Art. 10 – 20 of the EU Reception Conditions Directive¹⁵ lay down minimum standards for the treatment of *asylum seekers*, i.e. of third country nationals or stateless persons who have made applications for international protection in respect of which a final decision has not yet been taken. (Though the directive directly addresses only the treatment of asylum seekers Member States are free to apply the directive on other cases as well.) In accordance to the Directive, asylum seekers have at least the right to, inter alia, schooling and education for minors.

Relevant for the treatment of “*tolerated*” migrants are the provisions of Art. 9 in conjunction with Art. 14 of the EU Return Directive.¹⁶ If a Member State decides, for whatever reason, to postpone a removal it shall be ensured that, inter alia, minors are granted access to the basic education system subject to the length of their stay.

Hence, under international as well as regional European law a state violates obligations if non-citizens who are asylum-seekers, “*tolerated*” migrants or irregular migrants, are completely excluded from schooling and education for minors. EU Member States should, therefore, revise their respective policies and make sure that every migrant child whatever the status under immigration law is can in fact attend school.

Jesuit Refugee Service Europe will continue advocating this and other causes of migrants in destitution. We would be more than happy if other organisations working on the field of education would join us.

¹³ ECtHR, Decision of 30/09/2003 – No. 40892/98 (*Poirrez vs. France*). See also later decisions of 25/10/2005 (No. 58453/00 - *Niedzwiecki vs. Germany* – and No. 59140/00 – *Okpisz vs. Germany* -).

¹⁴ ETS No. 177.

¹⁵ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; OJ L 31 (2003), 18.

¹⁶ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.