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# RIGHTS OF CHILDREN IN AN IRREGULAR SITUATION

A REPORT MAPPING THE RIGHTS OF IRREGULAR CHILDREN IN SWEDEN AND THE UK

**ABSTRACT:** Even if human rights should apply to everyone regardless of their legal status in a country, they are often not accessible to undocumented migrants. This paper maps the rights undocumented children are entitled to according to the international law and in the UK and Sweden. With focus on healthcare, education, social services and housing, we find developments in somewhat different directions in Swedish and British legislation: while Sweden has granted more human rights for children in irregularity, the UK is enhancing reporting obligations, thus tightening the connection between human rights and immigration control.

**KEYWORDS:** Human rights, irregularity, Sweden, the UK, child migrants.

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**LIST OF ABBREVIATIONS**

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<b>UDHR</b>	The United Declaration of Human Rights
<b>CRC</b>	The Convention on the Rights of the Child
<b>ICESCR</b>	The International Covenant on Economic, Social and Cultural Rights
<b>ICCPR</b>	The International Covenant on Civil and Political Rights
<b>ICERD</b>	The International Convention on the Elimination of all forms of Racial Discrimination
<b>CEDAW</b>	The Convention on the Elimination of all forms of Discrimination Against Women
<b>ECHR</b>	The European Convention on Human Rights
<b>ESC</b>	The European Social Charter
<b>CFREU</b>	The European Charter of Fundamental Rights of the European Union
<b>ICRMW</b>	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
<b>ECtHR</b>	The European Court of Human Rights
<b>ECSR</b>	The European Committee of Social Rights
<b>ECSCR</b>	Committee on the Economic, Social and Cultural Rights
<b>UN</b>	United Nations
<b>WHO</b>	World Health Organization
<b>EU</b>	European Union
<b>FRA</b>	European Union Agency for Fundamental Rights

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## INTRODUCTION

According to international human rights standards,<sup>1</sup> human rights apply to everyone, without distinction, no matter their legal status in a country. This is reflected in the Universal Declaration of Human Rights Article 2 on non-discrimination. However, previous research shows that these rights are often not accessible to people in an undocumented situation. In part, this is because national legal frameworks do not secure the rights of undocumented migrants to the same extent as international instruments, nor the same rights in comparison with citizens. In addition there are many practical barriers.<sup>2</sup> Another obstacle is that the rights of undocumented migrants are in conflict with immigration control measures. When these measures conflict with undocumented migrants' room for access to rights, governments often prioritize immigration control.<sup>3</sup> Undocumented children's rights are compromised as they fall in-between immigration control measures and claiming their human rights.

This paper aims to highlight what rights undocumented children are entitled to according to international and national law, taking the UK and Sweden as two examples. We also look at policy at the local level of one city in each country – Malmö in Sweden and Birmingham in the UK.

This report is written as a part of the project *Undocumented Children's Rights Claims*, conducted at Malmö University, a project exploring undocumented children's everyday experiences and actions, access to human rights and their strategies to claim them.

Even though international legal regimes grant human rights to undocumented children, these are in a variety of ways limited at the national level. There are several recent changes to legislation in both countries, and our material shows that while Sweden is in general extending rights explicitly to undocumented children, the United Kingdom (UK) has been making life for people in an irregular situation more difficult. At the local level, the city of

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<sup>1</sup> Universal Declaration of Human Rights (UDHR); UN Convention on the Rights of the Child (CRC); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Elimination of All Forms of Racial Discrimination (ICERD); European Convention on Human Rights (ECHR); European Social Charter (ESC) and Charter of Fundamental Rights of the European Union (CFREU)

<sup>2</sup> Tengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation* (Brussels: PICUM, 2013)

<sup>3</sup> Sigona, Nando and, Hughes, Vanessa, *Being Children and Undocumented in the UK: A Background Paper* (Oxford: COMPAS Working Paper No. 78, 2010)

Malmö has in recent years been somewhat ahead of the Swedish national legislation in granting rights for undocumented children, for example by using the ‘Best interests of the child-principle’ in their interpretations of the national legislation.<sup>4</sup> Birmingham, on the other hand, as our research indicates, seems to mirror the general tendencies in the UK.

In this report we depart from how human rights are formulated in international and regional conventions and do not engage in the discussion of whether these rights are ‘inborn and inalienable’ or based on some conception of morality and the like. Therefore we proceed from juridical formulations of human rights to describe different levels of rights-contexts. Further we discuss the degree to which the international human rights are implemented in the states’ legislations, highlighting some of the problems, barriers and obstacles in regard to the realization of human rights for undocumented migrants. While some of these barriers are generally obstacles for the realization of human rights for any set of individuals, there are also specific obstacles for undocumented children, notably their deportability. Our emphasis is on the written law, and not on praxis, which may divert significantly in terms of what rights undocumented children can actually access. The latter will be discussed briefly based on previous research through a presentation of the main barriers that commonly hinder undocumented children in accessing the rights to which they are entitled. This helps us to express some of the differences between the letter of international law and everyday practices because looking at the entitlements in the law alone does not reflect the true situation of undocumented children.

Healthcare, education, social services and housing are four issues previous studies have highlighted as being of special importance to undocumented children<sup>5</sup>, among them a Pilot Study conducted in Malmö in 2012 by Lundberg and Söderman, where undocumented migrant youth were interviewed about their experiences of claiming human rights in their everyday lives.<sup>6</sup> Being very concrete and practical areas of life, these issues are important because lacking them tends to exclude persons affected from the rest of the society. As a

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<sup>4</sup> *Riktlinjer för handläggning av försörjningsstöd och ekonomiskt bistånd för livsföring i övrigt* (Malmö: Stadskontoret Malmö Stad)

<[http://malmo.se/download/18.1d68919c1431f1e2a9636e7/1389365268757/Riktlinjer+f%C3%B6r+handl%C3%A4ggning+av+f%C3%B6rs%C3%B6rjningsst%C3%B6d+och+ekonomiskt+bist%C3%A5nd\\_Malm%C3%B6+stad.pdf](http://malmo.se/download/18.1d68919c1431f1e2a9636e7/1389365268757/Riktlinjer+f%C3%B6r+handl%C3%A4ggning+av+f%C3%B6rs%C3%B6rjningsst%C3%B6d+och+ekonomiskt+bist%C3%A5nd_Malm%C3%B6+stad.pdf)>, Accessed 4 Nov. 2014

<sup>5</sup> These include, among others, research reports from PICUM, FRA and COMPAS.

<sup>6</sup> Lundberg, Anna and Söderman, Emma, "Emergence of and negotiations concerning undocumented children’s human rights on city level of governance. Reflections from a bottom-up perspective" (forthcoming)

significant part of people's everyday life, lacking entitlement and access to these areas of rights most often results in marginalization. Furthermore, this kind of exclusion can lead to other problems in the future, an uneducated and unhealthy population being one example among many others, that shows the importance of highlighting the rights of children in an irregular situation. Currently, undocumented migrants' access to certain fundamental services within EU states remains highly political and subject to change, as policies shift towards securitization and away from protecting their human rights.<sup>7</sup>

The focus within EU law on irregular migration as something to combat through stricter immigration control has a significant impact on vulnerable migrants' lives. Immigration control measures limit access to fundamental rights, directly as well as indirectly. It is argued by the scholars in the field that irregularity is a consequence of immigration policies, for example through strict family reunification policies and the limited paths to regularization after first being undocumented.<sup>8</sup> As children often inherit the migration status of their parents, they automatically become undocumented because of their parents' legal status.<sup>9</sup>

This report will present the human rights undocumented children are entitled to according to the four issues mentioned above. As a starting point, the international legal provisions relevant to each right are presented, as well as common barriers for access to the rights highlighted in previous research. Then we go on to describe the laws in each country. Prior to presenting the rights, an overview of the used theory and terminology is described, as well as the method used for this report and our theoretical framework. The report ends with a general discussion based on our findings with a first-hand evaluation of the existing legislation in both countries. In the next section, previous knowledge in the field on both the international and national levels of the UK and Sweden is presented.

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<sup>7</sup> Lundberg, Anna and Strange, Michael "Negotiating Human Rights in Local Government – the case of access to education for undocumented youth in Malmö, Sweden" (forthcoming)

<sup>8</sup> Tengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation* (Brussels: PICUM, 2013); Bicocchi, Luca and LeVoy, Michele, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (Brussels: PICUM, 2008)

<sup>9</sup> Sigona, Nando and Hughes, Vanessa, *No way out, no way in: Irregular Migrant Children and Families in the UK* (Oxford: COMPAS, 2012), 6; *Human Rights of Undocumented Adolescents and Youth* (Brussels: 2013); Bicocchi, Luca and LeVoy, Michele, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (Brussels: PICUM, 2008)

## PREVIOUS RESEARCH REGARDING CHILDREN IN IRREGULARITY

There are several organisations as well as researchers specialized in research on children in an irregular situation. We will introduce some of their previous work, especially studies that have been helpful for writing this report. As several legislative changes concerning children in irregularity have been adopted during the past years both in Sweden and the UK, the information provided in previous studies should be treated with a cautious note, as the latest changes in legislation might not have been included.

In Europe, important contributors are, among others, PICUM, UNICEF and FRA. PICUM has thoroughly described undocumented children's entitlement to education, healthcare and housing in 9 EU countries (Belgium, France, Hungary, Italy, Malta, the Netherlands, Poland, Spain and the UK),<sup>10</sup> explained and exposed the legal framework governing undocumented children's rights, presented main challenges in exercising their rights and provided tools to surmount these challenges in order to realize undocumented children's rights.<sup>11</sup> They have spread understanding of the challenges children in an irregular situation face in accessing their fundamental rights and provided suggestions for practices and strategies to overcome these barriers.

Both UNICEF and PICUM contributed with perspectives of the undocumented children for the CRC 2012 Day of General Discussion on the rights of children in international migration. They also collaborated together with the UN and the National University of Lanús in a report providing an international perspective on the issues surrounding undocumented children.<sup>12</sup> FRA has compared the fundamental rights of undocumented migrants and the barriers they face upon exercising them, both in the international, EU and national level of regulation.

In the UK, Nando Sigona and Vanessa Hughes (COMPAS) have contributed significantly to the knowledge on undocumented children in the UK. They show how immigration and child welfare legislation contradict each other, and they have also contributed with statistical mapping of the undocumented population in the UK.<sup>13</sup> The report '*No Right to Dream*'<sup>14</sup>

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<sup>10</sup> Biccocchi, Luca and LeVoy, Michele, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (Brussels: PICUM, 2009)

<sup>11</sup> Iengar, Sangeetha and LeVoy, Michele, *Realising the Rights of Children and Families in an Irregular Migration Situation* (Brussels: PICUM, 2013)

<sup>12</sup> *Human Rights of Undocumented Adolescents and Youth* (Brussels: 2012)

<sup>13</sup> Sigona, Nando and Hughes, Vanessa, *No way out, no way in: Irregular Migrant Children and Families in the UK* (Oxford: COMPAS, 2012)

explored social and economic lives, motivations and aspirations of undocumented young migrants in England. The authors found that being in an undocumented situation has significant impact on their social, economic and practical lives, as these youth are in a constant limbo and cannot make any plans for their further life nor fulfil their true potential. Children's Legal Centre CORAM has published several documents on the legal framework for undocumented migrants in the UK, useful for example for people who may encounter undocumented people through their work and should be aware of the children's entitlements.

In Sweden, Alexander, Gunneflo, Inghammar, Noll and Tjernberg<sup>15</sup> conducted research on the regulations of undocumented migrants in Sweden and the world, examining to what extent undocumented migrants have access to their rights. An important finding of theirs is that, instead of being outside the law, it is rather the law that deprives undocumented migrants of their rights. They also find that practices and policies in the Swedish healthcare system do not fulfil the obligations put on the state by international human rights legislation. Cuadra and Staaf (2014) examine how the Public Social Services encounters with irregular migrants, an area of research where knowledge is scarce, and they find a high degree of discretion and lack of knowledge and clear guidance on how to treat cases involving undocumented migrants. The National Board of Health and Welfare published their "Social Report" in 2010 including one chapter on undocumented migrants. They highlight the most important challenges society and the migrants themselves face regarding social rights, as well as their marginalized position. In addition, Doctors without Borders Sweden and The Red Cross Sweden have published reports on the topic.

Prior to the project this report is part of, there has been no research comparing the situation of undocumented migrant children between the UK and Sweden. However, there are reports doing broad comparisons of several countries, from for example by FRA or PICUM. There have been more extensive studies conducted on the rights of undocumented children in the UK compared to the ones in Sweden, where the majority of the studies circle around the topic of healthcare for undocumented migrants. The present report hence may fill the gap in contextualizing the case of Sweden by contrasting it to a case where this issue has been given more attention.

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<sup>14</sup> Bloch, Alice et al., *No Right to Dream: The social and economic lives of undocumented migrants in Britain* (Oxford: Paul Hamlyn Foundation, 2010)

<sup>15</sup> Alexander, Shannon et al., "Papperslös, Laglös, Rättslös? Papperslösa Migranterns Rättsliga Ställning", *Europapolitisk Analys*, 8 (2010), 1–6

## THEORETICAL BACKGROUND

Accessing their human rights can become more difficult for children in irregularity than one might expect. This is because human rights can be seen as something else than what every human being is entitled to, and also because human rights legislation still leaves room for people to disregard it by grounding it to a protection of some other area of life. Thus, it may happen that children in irregularity are often not seen as children primarily but instead as part of a category that is subject to immigration control. This leads to two questions<sup>16</sup> – first, whose concern is it to protect the unprotected, and secondly, what are the social conditions reflected by lack of entitlement to rights, and what are the possibilities for its transformation?

Human rights can be viewed through four different perspectives, each reasoning the rights in a different way giving it thereby a different meaning. The first, the naturalist approach, embraces the most common view on human rights – human rights as rights that one possesses simply by being human.<sup>17</sup> In the second view, commonly referred to as the deliberative school of thought, human rights are political values that liberal societies have chosen and continuously choose to adopt.<sup>18</sup> The third view, represented by the protest school, perceive human rights as expressions of rightful claims made by or on behalf of the poor, the unprivileged and the oppressed.<sup>19</sup> According to the fourth approach, the so-called discourse school, human rights exist only because people talk about them.<sup>20</sup>

By this distribution, it comes clear that the reason and the aim of human rights is not always the same. Furthermore, when it comes to the human rights law, there are differences among these four schools in ideas of how the law has been, is, and will be, serving human rights. So, for example, by deliberative school, the law *is* the mode of existence of human rights, the protest school thinks it should be, but the law betrays the human rights ideas too often, and by the discourse school human rights law does not embody anything grand in itself.<sup>21</sup> By these different meanings and implementations it can be expected that human rights law cannot

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<sup>16</sup> Binion, Gayle, "Human rights: A feminist perspective", *Human Rights Quarterly*, 17/3 (1995)

<sup>17</sup> Dembour, Marie-Bénédicte, "What are Human Rights? Four Schools of Thought", *Human Rights Quarterly*, 32/1 (2010), 2

<sup>18</sup> *Ibid.*, 3

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, 4

<sup>21</sup> *Ibid.*, 11

always protect the ones it is meant for. Something else is needed for the rights to get fully secured for the ones needing them most.

From most feminist perspectives, human rights should be seen by everybody as a legal phenomenon. If human rights are not legalized, they become subject to the unilateral control of nation states, and their abuse can be subjected to nothing more than the *ad hoc* expression of moral outrage of those who disagree with the challenged behaviour.<sup>22</sup> This is also how and why activists have such important roles in protecting children in irregularity, as this is how the best interest of the child can still be kept feasible. Otherwise, these children are seen rather as migrants than as children, and so they are subject to double invisibility. They are not represented in the migration laws, policies and actions concerning children, so too do they stay invisible within policies and systems for protecting children.<sup>23</sup> Becoming subject to immigration control, the child has to encounter with various, often insuperable, obstacles and practical barriers to access his rights to have a multisided childhood.

James Ingram (2008) has pointed out three different ways of understanding the human rights based on the work of Hannah Arendt and her notion of “the right to have rights”. The first conception, conventional liberal interpretations, illustrate the problems that arise when universalistic moral aspirations are combined with a statist conception of politics: incapable of thinking ends and means together, the politics that results can end up sabotaging the very purpose of human rights.<sup>24</sup> People taking this view assume that their task is to identify justifiable uses of state power<sup>25</sup> and protect rather the nation state than an undocumented child. The second view seeks to bridge morality and law, yet cannot concretely envisage how to realize the aims it anticipates. The bearers of this view seek to outline how the state power should be organized.<sup>26</sup> The third, democratic conception insists that the politics of human rights must be rooted in the practices of right-bearers themselves, being therefore the most demanding notion.<sup>27</sup> Furthermore, they believe that it is their task to discover moments of autonomous political action. All these views and perceived tasks can have important practical

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<sup>22</sup> Binion, Gayle, "Human rights: A feminist perspective", *Human Rights Quarterly*, 17/3 (1995), 2

<sup>23</sup> Committee on the rights of the child, *Background paper: The rights of all children in the context of international migration*, (2012 Day of General Discussion), 2012, 18

<sup>24</sup> Ingram, James D., "What Is a 'Right to Have Rights'? Three Images of the Politics of Human Rights", *American Political Science Review*, 102/4 (2008), 401

<sup>25</sup> *Ibid.*, 402

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

implications, rendering certain problems and courses of action some self-evident and others invisible.<sup>28</sup>

How is the law in the end understood? How it is enacted? What are the consequences? These are questions that over and over again come up while thinking of undocumented children accessing their rights. As juridical language is characterized by certainty, authoritative monologue and formality, no room is assumed for discretion.<sup>29</sup> However, people choose to value certain things and create a dominant discourse, which is in time difficult to contest. By reproducing the securitization discourse while speaking of children in irregularity, the focus shifts from ‘being a human entitled to human rights’ or ‘protecting the rights of the ones who need it the most’ to ‘you are supposed to leave the country’. A positive change in these people’s everyday lives then becomes more difficult to achieve. A change in their lives is however much needed to take place as the lives of children in irregularity are often such that no child should have to encounter.

The point of departure of this report is a combination of both the naturalist and protest school of human rights: human rights are something every human being is entitled to, and stated as rightful claims made by or on behalf of the unprivileged and the oppressed. The juridical language has set limitations for these children accessing their rights and the politics have ended up sabotaging the initial reason for human rights. Therefore, it is important to find the contradictions in the legislation. That way we are able to see how the state power should be organised, by bridging the morality and law, so the children in a (triple) vulnerable situation would not have to experience the deprivation of their rights, and could instead possess the rights that mean to secure their well-being as children.

## TERMINOLOGY

We now go on to clarify the terminology that is central to this report. By *undocumented* we mean people that live in a country (in this case Sweden or the UK) without a residence permit, the term referring to an irregular migration status. There are many ways a migrant can end up in an irregular situation. It can be asylum seekers that got their application rejected and never

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<sup>28</sup> Ibid.

<sup>29</sup> Johannesson, Livia, "Performing Credibility: Assessments of Asylum Claims in Swedish Migration Courts", *Retfærd. Nordisk Juridisk Tidsskrift*, 3/138 (2012), 74

left the country, because they live clandestine or because they cannot be returned by the state. It can also be people that did not register when they got into the country, someone that came into the country on a valid visa, or by other legal means, but did not leave the country when the visa ran out (so-called overstayers), or children of undocumented parents.

Statistical information on undocumented migrants is uncertain and based on estimates. This is because these migrants usually try to stay away from authorities. In the EU, the research project Clandestino was aimed at collecting systematic data on the undocumented population in the EU.<sup>30</sup> They estimate a total number between 1.9 and 3.8 million undocumented migrants.<sup>31</sup> In Sweden, Clandestino estimates a total between 8000 and 12 000, but Swedish literature often refers to an estimate between 10 000 and 50 000 from Social Rapport (2010).<sup>32</sup> Also estimates as high as 35 000-50 000 and 40 000-75 000 appear in the literature,<sup>33</sup> but there is no account as to how these estimates have been calculated. It is believed that 2000-3000 undocumented migrants are children, but the same insecurities apply to this number. The majority of undocumented migrants are probably rejected asylum seekers.<sup>34</sup> In the UK, the estimated total of undocumented migrants is between 416 000 - 863 000, and the number mostly referred to is 618 000.<sup>35</sup> The majority of undocumented people are believed to be failed asylum seekers and visa overstayers.<sup>36</sup> The estimated total of undocumented children is 120 000, of which a majority is born in the UK.<sup>37</sup> These numbers appear more established and researched than the Swedish ones as the undocumented population has been more in the focus in the studies conducted about the UK, and there can be found clear accounts on how these estimates were developed.

Our focus here is on the *children* that live in an undocumented situation. They are potentially one of the most vulnerable groups in Europe, because of their triple vulnerability: they are

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<sup>30</sup> Clandestino project, *Information brochure* <[http://research.icmpd.org/fileadmin/Research-Website/Publications/Clandestino\\_Brochure\\_1\\_.pdf](http://research.icmpd.org/fileadmin/Research-Website/Publications/Clandestino_Brochure_1_.pdf)>, Accessed 15 Dec. 2014

<sup>31</sup> Clandestino project, *Final Report*, (2009) <[http://www.gla.ac.uk/media/media\\_147171\\_en.pdf](http://www.gla.ac.uk/media/media_147171_en.pdf)>, Accessed 15 Dec. 2014

<sup>32</sup> *Social Rapport 2010* (Stockholm: Socialstyrelsen, 2010), 13 <<http://www.socialstyrelsen.se/lists/artikelkatalog/attachments/17957/2010-3-11.pdf>>, Accessed 15 Dec. 2014

<sup>33</sup> *Ibid*; Alexander, Shannon et al., "Papperslös, Laglös, Rättslös? Papperslösa Migranternas Rättsliga Ställning", *Europapolitisk Analys*, 8 (2010), 1–6

<sup>34</sup> About 8156 persons in July 2009 of the total estimate of 10.000-35.000 (Social rapport, 2010)

<sup>35</sup> Gordon, Ian et al., *Economic Impact on London and the UK of an Earned Regularisation of Irregular Migrants in the UK* (London: Greater London Authority, 2009)

<sup>36</sup> *Ibid*.

<sup>37</sup> Sigona, Nando and Hughes, Vanessa, *No way out, no way in: Irregular Migrant Children and Families in the UK* (Oxford: COMPAS, 2012)

children, but they are also migrants, and they are undocumented.<sup>38</sup> These children usually end up in an undocumented situation because of the choices their parents made, and not because of something they did themselves. In most definitions (e.g. in the CRC) you are a child until you reach the age of 18. Yet it is important to consider the issues children face upon turning 18, as many of their rights get restricted from this age. The child lacking ID papers or having their authenticity questioned and then being given an age above 18 by the immigration authorities may put the child in conditions that are improper for a child and the child's further development.<sup>39</sup> The age assessment procedure is a complex issue that needs constant acknowledgement of the limitations and possibilities of the procedures and the context it takes place in. Contested understandings of age and childhood reflect the politics of age, especially where the representations of childhood are used to support legal and political agendas.<sup>40</sup> Children who do not succeed to conform to dominant notions of what it means to be a 'child' and how children should look and behave may not be accepted as being children at all.<sup>41</sup>

## METHOD

By comparing two cases, differences and similarities can be uncovered, and one case can help to put the other into perspective. It is important to make sure that the same phenomenon is being investigated in each case, to observe how an issue has been approached and handled either in a similar or different way.<sup>42</sup> This report is mainly descriptive, a first step comparison, focusing on an observation of what appears in each case. It can provide a basis for explanation in further research, by pointing towards some emerging tendencies.

Even though the countries were not selected with this particular report in mind, but within the project that it is part of, the comparability of the two countries and cases should be considered. On the superficial level, they are both traditional industrial countries, both are EU-members, but have kept their own currency and both have economies relying on exports.

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<sup>38</sup> Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation* (Brussels: PICUM, 2013), 5

<sup>39</sup> Aynsley-Green, Al et al., "Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control", *British Medical Bulletin*, 102/1 (2012)

<sup>40</sup> Ibid.; Crawley, Heaven, "'Asexual, apolitical beings': The Interpretation of Children's Identities and Experiences in the UK Asylum System", *Journal of Ethnic and Migration Studies*, 37/8 (2011)

<sup>41</sup> Crawley, Heaven, *When Is a Child Not a Child? Asylum, Age Disputes and the Process of Age Assessment* (London: Immigration Law Practitioners' Association, 2007)

<sup>42</sup> Nelken, David and Örucü, Esin (red.), *Comparative Law: A Handbook* (Oxford: Hart, 2007)

An important difference is to the welfare systems, which is much more extensive in Sweden. Both countries are parliamentary democracies.

On the political level, Koopmans et al.<sup>43</sup> find similarities between the UK and Sweden regarding citizenship policies and inclusiveness, with both countries scoring high on inclusive policies in 2008, and both score in the top three throughout the period 1980 to 2008. Other important highlighted similarities in this study are that both have a large electorate with immigrant backgrounds,<sup>44</sup> and relatively weak populist right wing parties up until recently.<sup>45</sup>

In Lijphart's study of different types of democracy,<sup>46</sup> where 36 countries are classified in a typology of democracy models, both differences and similarities in the political system in UK and Sweden are highlighted. The UK is a prime example and also the origin of the majoritarian model of democracy, which is most easily understood as a system where the political majority rule. The UK is traditionally a two-party system. The picture is however increasingly complicated, as the UK is slightly moving away from the typical two-party system with their first coalition government since the second world war, and multiple parties are represented at EU and local levels.<sup>47</sup> The political system is centralized and political power concentrated. The electoral system in the UK is classified as plural and quite disproportionate, with 10 % disproportionality, according to Lijphart.<sup>48</sup>

Sweden is, on the other hand, most commonly classified as a consensus democracy, a model that tries to govern for as many as possible, and not just a small majority of the population. It is a multi-party system meaning that there are several relevant conflict dimensions represented by a diverse range of political parties. Most governments have been single party majorities, but most have had a large majority in contrast to the UK, and coalition governments have dominated the past years. The system includes a shared power structure,

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<sup>43</sup> Koopmans, Ruud et al., "Citizenship Rights for Immigrants: National Political Processes and Cross-National Convergence in Western Europe 1980-2008", *American Journal of Sociology*, 117/4 (2012), 1202-45

<sup>44</sup> Ibid., 1241

<sup>45</sup> Ibid., 1220

<sup>46</sup> Lijphart, Arend, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Democracies* (New Haven, Conn.: Yale University Press, 1999)

<sup>47</sup> Lynch, Philip and Garner, Robert, "The Changing Party System", *Parliamentary Affairs*, 58/3 (2005), 533-554; Lynch, Philip, "Party System Change in Britain: Multi-Party Politics in a Multi-Level Polity", *British Politics*, 2 (2007), 323-346

<sup>48</sup> Lijphart, Arend, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Democracies* (New Haven, Conn.: Yale University Press, 1999), 162

and is relatively decentralized. The electoral system has proportional representation with a disproportionality of only 2%.<sup>49</sup>

Both Sweden and the UK have flexible constitutions, only requiring a regular majority to make changes. Sweden has weak judicial review, meaning that the power to decide whether a law is in conflict with the constitution or not lies with the parliament or with an independent body. The UK has no judicial review, as they have no single written constitution, which is unlike many other nations. The country is, however under the supranational judicial review of the European Court of Justice and the European Court of Human Rights.

Lijphart places Sweden and the UK on opposite scales on his executive-parties dimension, concerned with the executive branch and party- and electoral system. He also shows that they have moved away from each other on that same dimension in the period from 1971 to 1996.

Both countries are part of the EU, but the UK has opted out on many policies relating to immigration. They are not a part of the Schengen agreement, and have secured their ability to opt out of any EU asylum and immigration policies. They thus are free to choose which policy to implement on a case-by-case basis. Between 1999 and 2004, they signed 18 out of 37 of the EU agreements on migration and asylum policies, including all on asylum and most measures aimed towards management of irregular migration.<sup>50</sup> Today's immigration debate in the UK is centred on their relationship to the rest of Europe, but within national terms, like protecting their national border. Geddes concludes that the UK's participation in the EU migration policies is conditional, even though it is also partly Europeanised, especially where EU interests coincide with British national interests.<sup>51</sup> More recently, the Conservative Party, which is the party of the current prime minister D. Cameron, has proposed a strategy to change UK's human rights law.<sup>52</sup> One of the proposals put forward for example is to unbind the UK Supreme Court from the ECtHR so no change can be ordered from their behalf, and

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<sup>49</sup> Lijphart, Arend, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Democracies* (New Haven, Conn.: Yale University Press, 1999), 162

<sup>50</sup> Geddes, Andrew, "Getting the best of both worlds? Britain, the EU and migration policy", *International Affairs*, 81/4 (2005)

<sup>51</sup> Ibid.

<sup>52</sup> 'Conservatives plan to scrap the Human Rights Act', *The Guardian*, 'Politics' 3 Oct. 2014  
<<http://www.theguardian.com/politics/interactive/2014/oct/03/conservatives-human-rights-act-full-document>>, Accessed 22 Mar. 2015.

the UK would therefore be able to decide its own balance between rights and responsibilities.<sup>53</sup>

Sweden does not have a similar complicated relationship to the EU. The country is a part of the Schengen agreement, and has not opted out from any of the EU's collaborations on migration and asylum. Sweden's asylum policies are often described as the most generous in Europe, especially after offering all Syrian refugees permanent residence in 2013.<sup>54</sup> After the elections in 2014, the political debate has started to change, with some parties proposing changes to limit the costs of immigration for example by increasing the use of temporary residence permits.<sup>55</sup>

With regards to the subject of this report, there are some differences to consider in the population of undocumented migrants in the UK and Sweden. Statistical information on undocumented migrants is based on estimates, and is highly uncertain. Departing from the estimates described earlier, we can see that the UK has a larger share of the population that is undocumented than Sweden. Calculated from an estimate of 10 000, the undocumented migrant population in Sweden constitutes 0.1 % of the total, compared to 1% of the total in the UK (Calculated from 618 000). The percentage undocumented migrant children constitutes of the total children gives a similar figure, 0.1 % in Sweden (calculated from estimated 2500), and 0.9 % in the UK (calculated from 120 000). Although the percentages in both countries are not remarkably high, the number of children behind the percent surely is, as each and every one child of these groups have to encounter everyday struggles to have their basic needs covered.

Malmö is the third largest city in Sweden and has a population of 300 000 inhabitants, while Birmingham is second largest city in the UK and has 1 million inhabitants. Both cities have a young population compared to the average in each respective country. Both cities are large in size, but whereas a car or a form of public transport is often needed in Birmingham to get around, the distances in Malmö can more easily be covered on foot or a bicycle, making it therefore easier for people to get around without further expenses.

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<sup>53</sup> Ibid.

<sup>54</sup> Ekman, Iver, 'Stockholm Syndrome How Immigrants Are Changing Sweden's Welfare State' *Foreign Affairs* 19 May. 2014 <<http://www.foreignaffairs.com/articles/141437/ivar-ekman/stockholm-syndrome>>, Accessed 1 Feb. 2015.

<sup>55</sup> Hagberg, Sebastian. 'Sprickan i Alliansen: En laddad fråga' *Expressen* 1 Feb. 2015 <<http://www.aftonbladet.se/nyheter/article20248748.ab>>, Accessed 1 Feb. 2015.

The empirical material in the present study, i.e. legal and policy documents will be analysed through three different levels. The law regulates undocumented children's access to rights either by (1) explicit denial of rights, (2) conditional entitlement to rights, or (3) full entitlement to rights. Within each category, different ways of denying, limiting or granting access to rights exist, and this will be discussed throughout the analysis. Using only three categories to evaluate the entitlement to rights contains a limitation in itself, as the access in both countries is surely more a complex process rather than a simple action. As both of the countries have had changes in legislation, Sweden more recently and the UK over the past decade, we take into consideration the change in the law, and the direction of the law. Using these three categories to assess the current position of the law together with where it has stemmed from helps to show the initial nexus of the rights of children in irregularity and the contradictions within. It also helps to indicate if and how the four areas – healthcare, education, social services and housing – are seen as a part of a child's life when they potentially conflict with the immigration regulations.

The report will now proceed with the international human rights framework concerning children in irregularity and their rights concerning healthcare, education, social services and housing. Each section will be followed with an 'Obstacles and practical barriers' part to indicate also the non-legal contradictions. After introducing the international legislation, the legal framework of the UK and Sweden will be presented together with the local policies and regulations.

## THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

### HEALTHCARE

As noted in several reports,<sup>56</sup> healthcare is one of the fundamental basic rights that undocumented migrants risk exclusion from, even though most European countries offer emergency care to migrants in an irregular situation. A consequence of this exclusion can be serious for the health of an individual, but also for a country's public health.<sup>57</sup> Emergency healthcare is regarded as a minimum of what should be entitled to everyone, and a requirement to uphold a right to life and prohibition of degrading or inhumane treatment.<sup>58</sup>

International organisations also emphasize the right to *health*, which by the World Health Organization (WHO) is defined as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”,<sup>59</sup> and they identify poverty, employment, social exclusion, and equal treatment among important social determinants of health. A holistic approach of health like this implies that health is a crucial element to secure entitlement also to other rights, such as housing, education and social security, but to also include the aspects of mental and social well-being.<sup>60</sup>

Special provisions are often in place in the legal framework when it comes to children and women giving birth, through for example The Convention on the Rights of the Child (CRC) and The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), granting some extension of the entitlement to the right to health on paper.<sup>61</sup> It is of

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<sup>56</sup> See European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011); Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost: A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation* (Brussels: PICUM, 2013)

<sup>57</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 71

<sup>58</sup> *Ibid.*, 73

<sup>59</sup> Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100) and entered into force on 7 April 1948.

<sup>60</sup> Alexander, Shannon, "Humanitarian Bottom League-Sweden and the Right to Health for Undocumented Migrants", *European Journal of Migration and Law*, 12 (2010), 215-241

<sup>61</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 73

special importance to get primary, on-going care for children and pregnant women, as poor maternity care can have long-term consequences on a child's development.<sup>62</sup>

Children's right to healthcare is protected in several international instruments. In the CRC, Art. 24, it is stated that:

States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

This convention is ratified by most UN member states, and the rights of the convention apply to all children, regardless of their status.<sup>63</sup>

Also, The Universal Declaration of Human Rights (UDHR) states the right to health for all human beings, in Art. 25:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

While the UDHR is technically not legally binding, it is part of customary law.<sup>64</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) is stating in its' article 12(1) that: "The States Parties (...) recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." This covenant does not include any limitations for undocumented children, or any other limitations on the basis of nationality or status. The UN Expert Committee CESCR has specified the right to health for undocumented migrants in several General Comments (14, 19 and 20).<sup>65</sup>

Also relevant instruments to the right to healthcare at the international level are CRC Art. 25, stating the right to review of treatment in care, and Art. 39, stating the right to rehabilitation of child victims; the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) Art. 5b, stating the right to protection against violence, and the International Convention on the Protection of the Rights of All Migrant Workers and

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<sup>62</sup> Ruiz-Casares, Mónica, et al., "Right and Access to Healthcare for Undocumented Children: Addressing the Gap between International Conventions and Disparate Implementations in North America and Europe", *Social Science & Medicine*, 70/2 (2010), 330

<sup>63</sup> As is specified in UN Committee on the Rights of the Child (CRC), 'General comment No. 6' *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

<sup>64</sup> Danchin, Peter, "Influence of the UDHR Law", Preamble Section 4.

<sup>65</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union*, (Luxembourg: Publications Office of the European Union, 2011), 21

Members of Their Families (ICRMW) Art. 28, which states the right to emergency healthcare for migrant workers and their family. At the European Council level, a relevant instrument is the European Social Charter (ESC) art. 13, which states the right to medical assistance, but according to the Appendix of the treaty, is limited to citizens or legal residents.<sup>66</sup> While this excludes undocumented migrants from the scope of the ESC, case law from the European Committee on Social Rights<sup>67</sup> concludes that it is against ESC to deny healthcare to undocumented migrants as it would breach with the fundamental principle of human dignity.<sup>68</sup>

On the EU level, the European Charter of Fundamental Rights of the European Union, Ch. 4 Art. 35, concerns the right to health. This is restricted in the sense that the Charter grants the right to healthcare, among other rights, to everyone “according to national law and practices”. However, states are legally bound to grant this in national law through the ratified international treaties mentioned above. Furthermore the Treaty on the Functioning of the European Union, Art. 168, states that “a high level of human health protections shall be ensured in the definition and implementation of all Union policies and activities.” Even if these regulations are only relevant when EU law is applied, i.e. not in the relation between individuals and one EU-state, they provide a picture of a general intent in Europe.

## EDUCATION

Access to the educational system is undeniably important to all children. The school is established as a significant arena of social and cultural integration, and it serves as children’s primary introduction into society.<sup>69</sup> The right to education includes undocumented children, implicitly or explicitly, in most EU countries. The European Court of Human Rights (ECtHR) has concluded, consistent with ICESCR, that the state can require fees for higher education,

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<sup>66</sup> It is stated in the Appendix of the ESC that “The persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned”.

<sup>67</sup> *International Federation of Human Rights Leagues (FIDH) v. France (decision on the merits)*, Complaint No. 14/2003, Council of Europe: European Committee of Social Rights, 8 September 2004.

<sup>68</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 24

<sup>69</sup> Bilocchi, Luca and LeVoy, Michele, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, (Brussels: PICUM, 2008), 11; European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 85

but primary education should be free and available to all. Secondary education falls somewhere in between, implying that requiring fees might be justifiable.<sup>70</sup>

All children's right to education is widely recognized in international instruments. UDHR and CRC are clearly formulated in a way that makes it applicable to all children without distinction:

UDHR Art. 26(1):

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

CRC Art. 28(1, 2):

States Parties recognize the right of the child to education, and (...) take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

There are also other instruments of relevance to undocumented children. ICESCR Art. 13 and 14 recognize "the right of everyone to education." There is no distinction made in ICESCR regarding nationality or legal status, and the ECSCR has noted that, following the CRC Art. 2, the right to education should also apply to undocumented children.<sup>71</sup> The ICERD Art. 5 encourages state parties to prohibit all forms of racial discrimination, but the convention allows for different treatment between citizens and non-citizens in article 1(2). However, guarantees of non-discrimination regard all non-citizens irrespective of immigration status.<sup>72</sup> The ICRMW Art. 30 states the right to education for children of migrant workers, no matter their legal status.

At the European Council level we find the European Convention on Human Rights (ECHR) Protocol 1, Art. 2: "No person shall be denied the right to education", which has a general applicability. The ESC Art. 17 states the right to education for all children in school age, but as previously mentioned, limits this to legal residents.

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<sup>70</sup>European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 87; *Ponomaryov v. Bulgaria*, Application No. 5335/05, Council of Europe: The European Court of Human Rights 21 June 2011.

<sup>71</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 13' *The right to education (Article 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10 para 34.

<sup>72</sup> UN Committee on the Elimination of Racial Discrimination (CERD) *General Comment No. 30: Discrimination against non-citizens*, 1 October 2004, C/64/Misc.11/rev.3 para 7.

## SOCIAL SERVICES AND HOUSING

Entitlement to adequate housing is important and can be seen as a pre-condition to exercise other basic rights. A report from the UK-based NGO Shelter<sup>73</sup> states that children living in inadequate housing conditions have a 25% higher risk of ill health and disabilities during childhood and early adulthood, leaving an impact on their mental and physical health, which also affects their performance at school.

When the law speaks of *shelter* or *adequate housing* it means more than just a roof over ones head – an adequate standard of living should include sufficient privacy, space and security.

The ICESCR defines adequate housing as “the right to live somewhere in security, peace and dignity.”<sup>74</sup> It is controversial whether states have a duty to provide migrants in an irregular situation shelter, but according to the European Committee of Social Rights (ECSR), undocumented children have this right under the ESC because of the close link to the right to life and health, and the respect of a person’s human dignity.<sup>75</sup>

The right to social services and housing is granted for undocumented children through several international legal documents.

The CRC focuses on the right to an adequate standard of living in article 27(1, 3):

States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. (...) States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

The CRC also states the right to social security in its article 26:

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

The right to an adequate standard of living is also enshrined in the ICESCR Art. 11(1):

The States Parties (...) recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing (...) The States Parties will take appropriate steps to ensure the realization of this right (...)

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<sup>73</sup> Harker, Lisa, *Chance of a Lifetime: The Impact of Bad Housing on Children's Lives* (Shelter, 2006)

<sup>74</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), ‘General Comment No. 4’ *The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

<sup>75</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 59

UDHR Art. 25, quoted in the healthcare section, states the right to housing, social security and social services, as does the ICERD Art. 5(e). In CEDAW Art. 14(2c,h) the right to housing and social security for women in rural areas is manifested. At the European Council level, the ESC Art. 31 states a right to housing. According to FRA, this is not limited to legal residents, as in the case of ESC's articles on education and healthcare.<sup>76</sup> The European Committee on Social Rights stated in *Defence for Children International v. The Netherlands* that the right to shelter is closely linked to the right to life, respect for human dignity and the best interest of the child and concluded that state parties are required, under Art. 31, to provide shelter to undocumented children residing within their territory.<sup>77</sup>

At the EU level of juridical proceedings, CFREU Art. 34 protects the right to social security and housing, but as said in connection to the right to health care, CFREU restricts Art. 34 and 35 among others, "according to national law and practices." Another limitation found at the EU level is the EU Facilitation Directive, expressing that member states have the duty to penalise persons who intentionally assist undocumented migrants to reside in the EU for financial gain, which means that landlords that rent out to undocumented migrants should be punished, making it difficult to find accommodation for migrants in an undocumented situation.<sup>78</sup>

To sum up, international legislation contains a number of instruments that state the undocumented migrant children's entitlement to their fundamental rights in the areas of healthcare, education, social services and housing. Both case law and previous research highlight that these rights also apply to undocumented migrants, and the states' obligations cannot be denied. Still, several factors may hinder the undocumented children in accessing their rights. Therefore, we will continue with important practical barriers that previous research have found to be of importance.

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<sup>76</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 24

<sup>77</sup> *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Council of Europe: European Committee of Social Rights, 20 Oct. 2009.

<sup>78</sup> European Union: Council of the European Union, *Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence*, 28 November 2002.; European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011)

## PRACTICAL BARRIERS

### HEALTHCARE

In practice, undocumented migrants face a number of barriers in accessing their right to healthcare. According to a study from the European Observatory on access to healthcare, conducted among 11 European countries, 14% of all irregular migrants were refused the last time they sought healthcare.<sup>79</sup> These barriers can cause undocumented migrants to avoid seeking help for their children, avoid follow-ups, and can have serious consequences and long-term impact of the child's health.<sup>80</sup>

FRA, the European Agency for Fundamental Rights, identifies the following five main obstacles that undocumented migrants can encounter when trying to access healthcare:<sup>81</sup>

1. Unclear standards about what services to undocumented migrants are entitled to under the national legal framework.
2. Unclear information about what services undocumented migrants should be offered.
3. Discretion when decided if care should be given, for example if it should be classified as emergency aid or not.
4. Obligations to report undocumented migrants, or unclear when to report or not.
5. Data exchange between health services and immigration authorities.

The lack of awareness of legal entitlements, fear of detection and deportation, and language problems, are among the obstacles highlighted in PICUMs report *Children First and Foremost*.<sup>82</sup> The lack of awareness and knowledge can be found in both ends. As information is unclear, the undocumented migrant families do not know what they are entitled to or how to receive care, and healthcare professionals might report the families because they do not

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<sup>79</sup>Chauvin, Pierre, Parizot, Isabelle and Simonnot, Nathalie, *Access to healthcare for undocumented migrants in 11 European countries* (Paris: Médecins du Monde, 2009), 10-12

<sup>80</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 82; Iengar, Sangeetha, and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013), 45; Ruiz-Casares, Mónica, et al., "Right and Access to Healthcare for Undocumented Children: Addressing the Gap between International Conventions and Disparate Implementations in North America and Europe", *Social Science & Medicine*, 70/2 (2010), 330

<sup>81</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 83

<sup>82</sup>Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation* (Brussels: PICUM, 2013), 45

receive proper instructions about the rights of undocumented migrants, and lack knowledge about their entitlements or when to report or not.<sup>83</sup>

NGO:s work to reduce the gaps between rights on paper and rights in practice by spreading information, and by helping undocumented families access healthcare services, but this only helps those children within the network of the NGO, excluding others. As argued by Iengar and LeVoy (2013) it is therefore important that healthcare professionals have knowledge of their responsibilities towards undocumented children and what care they should be offered, to equalize the access to healthcare.<sup>84</sup>

## EDUCATION

A number of obstacles can hinder undocumented children in going to school, even if there is a right on paper. The most common barrier might be documentation requirements like evidence of identity, proof of address or health documents. Other serious obstacles that are being brought up by PICUM and FRA are reporting obligations, data exchange or police access to education sites.<sup>85</sup>

FRA puts forward civil engagement, like principals admitting children in an irregular situation without the required documents, by this making access to education possible, when legal circumstances alone would hinder it.<sup>86</sup>

Even when the children have obtained access to the school system, other obstacles might appear. An important aspect here is discrimination, for example putting them in special needs classes because of their language or other learning difficulties, even if the help they need may only be to get over the language barrier.<sup>87</sup> In addition, difficulties funding indirect costs of education, like materials or transport, or difficulties receiving a diploma upon finished

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<sup>83</sup> Ibid., 45

<sup>84</sup> Ibid., 47

<sup>85</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011); Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013); Bilocchi, Luca and Michele LeVoy, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (Brussels: PICUM, 2008)

<sup>86</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 92

<sup>87</sup> Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013), 41

education, constitute a barrier.<sup>88</sup> Children's performance in school is reported to be lower than that of citizen children, often as a result of their financial situation that is forcing them to work in addition to going to school.<sup>89</sup>

## SOCIAL SERVICES AND HOUSING

Undocumented children and their families usually face difficulties in having a place to stay, and accessing social housing provided by the state because of their irregular situation. This forces them to rent on the private market, often facing discrimination, exploitation and unreasonably high rents. The need for documents like passport, tax ID number, social security number, proof of income etc. can make it difficult to get a contract, and many landlords also require residence permits,<sup>90</sup> excluding undocumented children and their families from the more regulated part of the private housing market.

Legislation aimed at combating trafficking and smuggling of irregular migrants (for example the 2002 EU Facilitation Directive 2002/90), can undermine the rights of undocumented migrants to access housing. Laws that criminalize facilitation of stay for undocumented migrants (mainly for profit) might be aimed at smugglers, but can have the effect of making it more difficult to rent a place of residence on the private market, when landlords risk punishment for renting out to people in this situation.<sup>91</sup>

Mothers with children can, in some cases, be offered temporary housing, but according to the report *Children First and Foremost*,<sup>92</sup> authorities are often reluctant to house undocumented migrants out of a concern that they will be an on-going burden to public funds. This shows that financial considerations overlook the best interests of the child-principle. Another

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<sup>88</sup>European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 91

<sup>89</sup>Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013), 41

European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011); Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013), 48

<sup>91</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 61; Iengar, Sangeetha and LeVoy, Michele *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013), 50

<sup>92</sup> Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013)

temporary solution can be shelter for homeless people, but these do not always allow undocumented migrants, and is mostly seen as a last resort when all other possibilities are exhausted.<sup>93</sup> It is also not likely that these shelters are suitable and decent, or that they fulfil the unique needs of children.<sup>94</sup>

NGO:s try to limit practical obstacles to access housing by renting apartments directly from landlords,<sup>95</sup> but also this is a measure that applies unequally, excluding undocumented that are not in contact with these NGO:s.

With the obligations that international law put on nation states, and the common practical barriers often faced by undocumented children in mind, we now go on to look deeper into the situation in the UK and Sweden respectively, in the following two chapters.

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<sup>93</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 64

<sup>94</sup> Iengar, Sangeetha and LeVoy, Michele, *Children First and Foremost. A Guide to Realising the Rights of Children and Families in an Irregular Migration Situation*. (Brussels: PICUM, 2013), 50

<sup>95</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 64

## UNITED KINGDOM

The UK has ratified most basic conventions that entitle various rights to people in irregularity. Yet, even when the UK has ratified numerous conventions,<sup>96</sup> compared to Sweden there are less treaties ratified and more declarations and reservations placed on the ones ratified. The most relevant international documents connected to the rights of children in irregularity together with the reservations and declarations can be seen in the table below:

**Table 1 Relevant Human Rights Instruments Ratified by the UK**

Document <sup>97</sup>	Year of ratification	Reservations and declarations
<p><b>The Convention on the Rights of the Child (CRC)<sup>98</sup></b></p> <ul style="list-style-type: none"> <li>· Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-AC)</li> <li>· Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRC-SC)</li> </ul>	1991	<p><i>Declarations:</i></p> <p>On children deprived from liberty:</p> <ul style="list-style-type: none"> <li>· Where at any time there is a lack of suitable detention facilities or where the mixing of adults and children is deemed to be mutually beneficial, the United Kingdom, in respect of each of its dependent territories, reserves the right not to apply article 37 (c) in so far as those provisions require children who are detained to be accommodated separately from adults.</li> </ul>
<p><b>European Convention on Human Rights (ECHR)<sup>99</sup></b></p> <p>Also, its</p> <ul style="list-style-type: none"> <li>· Protocol 1 in 1952</li> <li>· Protocol 4 in 1963</li> <li>· Protocol 6 in 1999</li> <li>· Protocol 13 in 2003</li> <li>· Protocol 14 in 2005</li> <li>· Protocol 15 in 2013</li> </ul>	1951	-

<sup>96</sup> The whole list can be accessed here: <http://indicators.ohchr.org> (Accessed: 10.01.2015)

<sup>97</sup> The UK has also ratified the European Union Charter on Fundamental Rights in 2000, but it applies only to the decisions made in the institutions and bodies of the EU considering the principle of subsidiarity, or the national authorities while implementing EU law.

<sup>98</sup> The UK had a reservation on the CRC until 2008, stating that CRC doesn't apply to children subject to immigration control.

<sup>99</sup> This document has been transposed into the national law with the 1998 *Human Rights Act*.

<b>The International Covenant on Economic, Social and Cultural Rights (ICESCR)</b>	1976	-
<b>International Covenant on Civil and Political Rights (ICCPR)</b>	1976	<p>Declarations upon ratification:</p> <p>On children deprived from liberty:  “Where at any time there is a lack of suitable prison facilities or where the mixing of adults and juveniles is deemed to be mutually beneficial, the Government of the United Kingdom reserve the right not to apply article 10 (2) (b) and 10 (3), so far as those provisions require juveniles who are detained to be accommodated separately from adults /.../”</p> <p>Unlawfully depriving one from the right to enter his own country:  “The Government of the United Kingdom reserve the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12 (4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories.”</p> <p>On acquiring nationality:  “The Government of the United Kingdom reserve the right to enact such nationality legislation as they may deem necessary from time to time to reserve the acquisition and possession of citizenship under such legislation to those having sufficient connection with the United Kingdom or any of its dependent territories and accordingly their acceptance of article 24 (3) (<i>Every child has the right to acquire a nationality</i>) and of the other provisions of the Covenant is subject to the provisions of any such legislation.”</p> <p>On filling its obligations under the covenant:  “The Government of the United Kingdom declare under article 41 (when another State Party claims that another State Party is not fulfilling its obligations under the present Covenant) of this Covenant that it recognizes the competence of the Human Rights Committee to receive and consider communications submitted by another State Party, provided that such other State Party has, not less than twelve months prior to the submission by it of a communication relating to the United Kingdom made a declaration under article 41 recognizing the competence of the Committee to receive and consider communications relating to itself.”</p>
<b>The International Convention on the Elimination of all forms of Racial Discrimination (ICERD)</b>	1951	-

<p><b>The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</b></p> <ul style="list-style-type: none"> <li>· Optional Protocol in 2004</li> </ul>	1986	<p>Declarations:</p> <p>On nationality: "Article 9 The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children."</p> <p>On children's well-being and custody: "As regards sub-paragraph 1 (f) of Article 16, the UK does not regard the reference to the paramountcy of the interests of the children as being directly relevant to the elimination of discrimination against women, and declares in this connection that the legislation of the United Kingdom regulating adoption, while giving a principal position to the promotion of the children's welfare, does not give to the child's interests the same paramount place as in issues concerning custody over children."</p>
<p><b>Convention on the Rights of Persons with Disabilities (CRPD)</b></p>		<p>Reservations:</p> <ul style="list-style-type: none"> <li>· Education (Art. 24 Clause 2 (a) and 2 (b)) on education for disabled children</li> </ul> <p>The United Kingdom reserves the right for disabled children to be educated outside their local community where more appropriate education provision is available elsewhere. Nevertheless, parents of disabled children have the same opportunity as other parents to state a preference for the school at which they wish their child to be educated.</p> <ul style="list-style-type: none"> <li>· Liberty of Movement</li> </ul> <p>The United Kingdom reserves the right to apply such legislation, insofar as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, as it may deem necessary from time to time.</p>
<p><b>The European Social Charter (ESC)</b></p>	<p>1962</p> <p>The UK has signed but not ratified the <b>Revised Charter</b> proposed in 1996</p>	-

In the national legislation, children in irregularity or migrant children that are vulnerable for another reason, are referred to as persons "not having the right to remain in the UK" and people "subject to immigration control". On the national level of legislation, the most

important laws regarding children in irregularity are the *Children's Act*, the *Nationality, Immigration and Asylum Act*, the *Immigration Act* and the *Human Rights Act*. The latter distinguishes the UK from Sweden concerning the human right's legislation in the sense that human rights have been adopted to the national law directly. The *Human Rights Act* came into force in 2000 with the aim to give further effect of the EDHR in the UK laws, so there would be a decreased need to turn to ECtHR. The Act applies to public authorities (courts and tribunals and persons whose functions are of a public nature) but not to the House of Parliament or any proceedings connected to the Parliament.<sup>100</sup>

Art 14. in the *Human Rights Act* (1998) states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Act could potentially serve as a securitization of rights for children in irregularity but as is not applicable to the Parliament and proceedings connected to it, it cannot fulfill this task.

An important thing to mention concerning the UK legislation on undocumented children is the *Nationality, Immigration and Asylum Act* (2002) Section 129 placing an obligation on local authorities, i.e. housing, some education institutions, libraries, social services, transport, police,<sup>101</sup> to report people who they suspect have committed immigration offenses. These offenses are connected to *Immigration Act* (1971) section 24, 24A and 26, namely:

By Section 24 **Illegal entry and similar offences** (1)(a), (b), (c), (e), (f): (a) if a person knowingly enters the United Kingdom in breach of a deportation order or without leave; (b) if, having only a limited leave to enter or remain in the United Kingdom, he knowingly either remains beyond the time limited by the leave or does not follow the condition of the leave; (c) enters lawfully the United Kingdom, but remains without leave beyond the time allowed by section 8(1); (e) if, without reasonable excuse, he fails to observe any restriction imposed on him under Schedule 2 or 3 to this Act as to residence as to his employment or occupation or as to reporting to the police to an immigration officer or to the Secretary of State; or (f) if he disembarks in the United Kingdom from a ship or aircraft after being placed on board under Schedule 2 or 3 to this Act with a view to his removal from the United Kingdom.

By Section 24A (1) **Deception**: if a person who is not a British citizen is guilty of an offence which includes deception by him and a) he obtains or seeks to obtain leave to enter or remain in the United Kingdom; or b) secures or seeks to secure the avoidance, postponement or revocation of enforcement action against him.

Or, by Section 26 **General offences in connection with administration of Act** (1)(c) or (d):

If a person (c) on any examination or otherwise makes or causes to be made to an immigration officer or other person lawfully acting in the execution of a relevant enactment a return, statement or

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<sup>100</sup> *Human Rights Act* 1998, Art. 6 (3)

<sup>101</sup> The Government of the UK, *Understand How Your Council Works* (2014) <<https://www.gov.uk/understand-how-your-council-works/types-of-council>>, Accessed 15 Dec. 2014

representation which he knows to be false or does not believe to be true; or (d) if, without lawful authority, he alters any certificate of entitlement, entry clearance, work permit or other document issued or made under or for the purposes of this Act, or uses for the purposes of this Act, or has in his possession for such use, any passport, certificate of entitlement, entry clearance, work permit or other document which he knows or has reasonable cause to believe to be false.

The obligation to report does not apply to members of the public (this also includes schools) or non-statutory<sup>102</sup> organisations such as companies or voluntary sector organisations. It is emphasized that in case of an information request, the best interests and the well-being of the child should be kept in mind, in addition to the confidentiality and ethical requirements in respect of the privacy of the child.<sup>103</sup> Altogether, there are several suggestions on how an organization should deal with a request for information from the UK Border Agency (UKBA).<sup>104</sup> For example, the information should only be disclosed with the informed consent in writing of the child or young person who is the subject of the request, or a person with parental responsibility.<sup>105</sup> Hence, the people working in different institutions and organisations have to be aware of whom this obligation is directed to and whether a specific employee is actually obliged according to the law to report or not, and, in the case it has to be done, how it should be done and what information has to be passed on.

Although people do not get penalized for helping people in irregular situation, it may feel like they might as the government has taken steps towards making the society more hostile by distributing the responsibility to identify people who do not have a legal permit to live in the UK. As an example – when a person rents out his/her property to a person subject to immigration control, the landlord can face a fine up to £3000 if they do not report a person they know is residing without authorisation, or just not check the right of residence.<sup>106</sup>

## HEALTHCARE

In the UK, undocumented children are entitled to access free primary care from GP (general practitioner), emergency care, family planning, treatment of communicable diseases (excluding HIV) and help concerning serious mental health cases. For any other hospital

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<sup>102</sup> Non-statutory organisation is an organization that does not govern a state, city or county.

<sup>103</sup> Coram, *Migrant Children's Project Factsheet: Information Sharing*. (Coram Children's Legal Centre, 2013), 1-4

<sup>104</sup> Ibid., 4

<sup>105</sup> Ibid.

<sup>106</sup> *Immigration Act* (2014), Art. 23

treatment or diagnosis that is considered ‘non-urgent’, they are liable to pay full costs or expected to wait until returning home.<sup>107</sup>

In *the Statement of the Chief Executive’s Responsibilities as the Accounting Officer of Birmingham Children’s Hospital NHS Foundation Trust* in Birmingham Children’s Hospital’s Annual Report and Accounts 2013/14 it is stated that “The Accounting Officer is also responsible for safeguarding the assets of the NHS foundation trust and hence for taking reasonable steps for the prevention and detection of fraud and other irregularities”.<sup>108</sup> Yet, it is not specified what kind of irregularities or fraud this refers to, hereby leaving room for uncertainty whether the hospital would be giving help or reporting the request. This indicates how children in an irregular situation do not find a place of sanctuary in hospitals.

## EDUCATION

According to the *Education Act* (1996) there is a legal duty on local authorities to secure that primary and secondary education is available to all children of compulsory school age (5-16) in their area.<sup>109</sup> By Section 13A in the same document, the local education authorities have “a duty to promote high standards and the fulfillment of potential” by providing education to all children of compulsory school age. This is reiterated in the *Education and Inspections Act* (2006).<sup>110</sup>

However, it is worth stating that in Birmingham, access to school is likely to be complicated as it is stated in both the *Booklet for primary education for the year 2015* and *Booklet for secondary education from the year 2015* that as a requirement to all admissions for a place in a school, the school may require the proof of permanent residence.<sup>111</sup> This is because the child is ought to be placed in a school that is located within three miles from their home address as a three-mile distance is considered to be a ‘statutory’ walking distance.<sup>112</sup> In practice this may

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<sup>107</sup> *National Health Service Act* 2006, Section 175; Statutory Instruments No. 614 of 2004, The National Health Service (Charges to Overseas Visitors)(Amendment) Regulations 2004

<sup>108</sup> Birmingham Children’s Hospital, *Annual Report and Accounts 2013/14* (2014)

<[https://www.bch.nhs.uk/sites/bch/files/annual\\_report\\_2013-14\\_print\\_low\\_res\\_2.pdf](https://www.bch.nhs.uk/sites/bch/files/annual_report_2013-14_print_low_res_2.pdf)>, Accessed 9 Dec. 2014.

<sup>109</sup> *Education Act* (1996), Section 14

<sup>110</sup> *Education and Inspections Act* 2006, Section 1

<sup>111</sup> Booklets for primary education and secondary education for year 2015 can be accessed here:

<http://www.birmingham.gov.uk/cs/Satellite/schooladmissions?packedargs=website%3D4&rendermode=live>

<sup>112</sup> *Ibid.*

become a great barrier as schools are often full<sup>113</sup> and when a child applies for a place in school outside the three-mile radius, the address-verification process may reveal the child's living conditions. Furthermore, as children in irregularity are not entitled to transport compensation,<sup>114</sup> the cost of daily mobility can become more than they can afford resulting the child not being able to attend school. In Birmingham, however, some individual schools use their discretion to pay for the school transport.<sup>115</sup> All in all, school's obligation to check permanent residency, whether implemented or not, puts extra fear into everyday the lives of undocumented children.

Concerning other expenses, the child in an irregular situation is not entitled to free school meals and compensation for school uniform,<sup>116</sup> should the child get a place in school. Nevertheless, in Birmingham, there are some schools that provide all children free meals on a discretionary basis and most schools are said to be doing this.<sup>117</sup> Also, it is stated in the *Education Act* (1996) that when a pupil

“(...) is unable by reason of the inadequacy or unsuitability of his clothing to take full advantage of the education provided at the school, the authority may provide him with such clothing as in their opinion is necessary for the purpose of ensuring that he is sufficiently and suitably dressed while he remains a pupil at the school”.<sup>118</sup>

One actor concerning the compensation for some school-related expenses for children who are not eligible for benefits based on a passport and therefore have to endure living in poverty and material deprivation is the organization Children's Society in Birmingham, that has sometimes been successful in advocating directly to schools to use their discretion to offer free school meals to children and support in paying for uniforms. Yet they have said it to be a lengthy and ineffective process.<sup>119</sup>

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<sup>113</sup> REFERENCE

<sup>114</sup> *Education Act* 1996, Section 509

<sup>115</sup> Birmingham City Council, *Children and Families with No Recourse to Public Funds* (Birmingham: Overview and Scrutiny, 2013), 18

<sup>116</sup> *Education Act* 1996, Section 510, 512

<sup>117</sup> Birmingham City Council, *Children and Families with No Recourse to Public Funds* (Birmingham: Overview and Scrutiny, 2013), 18

<sup>118</sup> *Education Act* 1996, Section 510 (3)

<sup>119</sup> Birmingham City Council, *Children and Families with No Recourse to Public Funds* (Birmingham: Overview and Scrutiny, 2013), 18-19

## SOCIAL SERVICES

Undocumented children are subject to immigration control and have 'No recourse to public funds' (NRPF). This is a condition imposed by the Home Office on many categories of persons subject to immigration control. There are organizations who help people who are subject to NRPF, and other vulnerable persons, to still access the support from the local authorities, one of these groups is an organisation called Project 17.<sup>120</sup> Project 17 works towards ensuring that local authorities comply with the duties imposed on them by Section 17 of the *Children Act* (1989) to safeguard and promote the welfare of children in need.

By Section 17 Art. 3,

Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.

Section 17 enables local councils to provide accommodation and financial support to avoid children being taken into the care of the local authority.<sup>121</sup> Still, if help is required based on Section 17, this includes another threat in itself as the Social Services have a duty to report to the UKBA that they have been approached for support.<sup>122</sup> UKBA may speed their decision of the immigration claim and if the claim is strong, this could be a positive result, but for weak claims it could lead to a quick refusal.<sup>123</sup> Another possibility is that the local authority may offer to take the child into care instead of providing support under Section 17 but this is only possible with the consent of the parent unless there is a court order.<sup>124</sup> This shows that the right to family is respected in this case.

All in all, there has been a dramatic increase in the numbers of supported children and family cases across the UK to help people who are subject to the NRPF. The majority of them entered the UK on visas, but are waiting for an application to obtain the leave to remain in the UK under the ECHR and would be destitute without the support from the local authority.<sup>125</sup> This is an example of both the undocumented as well as documented migrants sharing similar financial challenges. In Birmingham, there is said to be an average increase of two or three

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<sup>120</sup> Project 17 <<http://www.project17.org.uk/>>, Accessed 15 Dec. 2014

<sup>121</sup> Project 17, *About us* <<http://www.project17.org.uk/about-us/>>, Accessed 15. Dec. 2014

<sup>122</sup> Based on Schedule 3 of the *Nationality, Immigration and Asylum Act* (2002)

<sup>123</sup> Project 17, *Section 17 of the Children Act 1989* (2013), 3 <<http://www.project17.org.uk/media/7763/s17-Factsheet-May-13.pdf>>, Accessed 15 Dec. 2014

<sup>124</sup> Ibid.

<sup>125</sup> Birmingham City Council, *Children and Families with No Recourse to Public Funds* (Birmingham: Overview and Scrutiny, 2013), 19

families each month asking for support.<sup>126</sup> In 2011, there were 83 local authorities out of 204 (in England, Scotland and Wales) who were identified as likely to have significant NRPF case loads.<sup>127</sup> However, more specific and recent data is difficult to access as it is not collected in many cases and this is why it is difficult to say whether and to what extent do the local authorities support people with NRPF, especially after the recent changes in the legislation.

Following the *Immigration Bill* (2014), which is an amendment to the *Immigration Act*, undocumented children are no longer entitled to free legal aid. A way to still access it is to get the legal help paid by the children's services. Yet, as the change was recent, the bigger financial burden placed on the local government results in insufficient financial resources and because of this, the children may not access legal help when it is most needed.

At the local level, in Birmingham, the City Council can pay an allowance to families with NRPF, worthy of £5 per child per day, for food and other essentials. In addition, there may be other support provided as well that is seen to be necessary to prevent the destitution of the child.<sup>128</sup> On a family basis, in 2013, NRPF families received a weekly payment of £35 per family member plus a £15 utility payment, i.e. a one child one adult family received £85 per week, a two children one adult family £120 and so on. The £15 utility payment was to cover gas and electricity.<sup>129</sup>

Also, in 2013, there was a weekly difference in the welfare benefits payments to that of the current Section 17 payments made to families. In summary, a family consisting of one child and one adult (the majority in Birmingham) would receive £154.78 (income support, child tax credits and child benefit) whilst the same family receiving assistance under NRPF would receive £69.78.<sup>130</sup>

## HOUSING

Local authorities have an obligation to provide support (therefore also housing) to avoid breach of their human rights. It is also stated in the *Children's Act* (1989) that:

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<sup>126</sup> Ibid., 15

<sup>127</sup> *Social Services Support to People with No Recourse to Public Funds: A National Picture*, (London: NRPF Network, 2011)

<sup>128</sup> Birmingham City Council, *Children and Families with No Recourse to Public Funds* (Birmingham: Overview and Scrutiny, 2013), 18

<sup>129</sup> Ibid., 15

<sup>130</sup> Ibid, 16

Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of (a) there being no person who has parental responsibility for him; (b) his being lost or having been abandoned; or (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care and a local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.<sup>131</sup>

In the *Housing Act* (1996) it is stated that a person who does not have the right for housing according to the *Asylum and Immigration Act* (1996), is also not eligible to housing.<sup>132</sup> Also, as undocumented families are subject to immigration control, they have no recourse to public funds,<sup>133</sup> which includes social housing as well as housing benefits.

The situation for undocumented people got even worse in 2014 as the new Immigration Bill got enacted making landlords obliged to check the immigration status of their tenants before making a contract with them. Furthermore, according to the new *Immigration Act* (2014), Art. 23, the landlord can be charged a fine up to £3,000 (approx. 35 000 SEK) if the Home Office detects that the landlord has been renting out the property without checking the immigration status of the tenant or renting out the property to a person subject to immigration control on purpose for financial benefit.

If a child's right to housing from the local authority depends on whether the child has a parent that should take care of him/her, this may easily result in separating the child from the family as the child has better outlook to claim his/her rights as an unaccompanied child. This would be directly against the right to respect for family life under the ECHR (Art 8.1) and CRC (Art 9.1) and also the best interests of the child-principle in CRC (Art 3.1). This leads back to the question whether the child should be treated rather as a child than a migrant or someone who is subject to immigration control. The law should work in a way that helps to hold the family together rather than breaking up the family. This in turn leads back to the fundamental question about the law, namely, whom do the system serve?

In sum, because the UK has set up different restrictions and divided the responsibility to detect the people who are subject to immigrant control, the children and families who live in irregular situation face more difficulties while accessing their rights, this especially concerning social services and housing, this potentially resulting in putting more children in

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<sup>131</sup> *Children Act* 1989, Section 20(1) and 20(3)

<sup>132</sup> *Housing Act* 1996, Parts VI and VII

<sup>133</sup> 'No recourse to public funds' (NRPF) is a condition imposed by the Home Office on many categories of person subject to immigration control.

severe destitution. The right to education is the only right that is fully entitled, yet it may often be hindered by some practical barriers. Entitlement to healthcare remains problematic as well as at the moment children in irregularity are entitled to only primary healthcare.

## SWEDEN

Sweden has ratified a number of UN and European conventions (see Table 2) that implicitly grant undocumented migrants and undocumented migrant children rights. Most important is the Convention on the Rights of the Child (CRC). Swedish law is adapted to the convention through transformation of separate articles into national legislations. There is an ongoing process of fully incorporating the convention into Swedish law.<sup>134</sup> An evaluation from the Ministry of Social Affairs<sup>135</sup> examines how Swedish law is consistent with the CRC, and concludes that Swedish law mostly corresponds to the minimum requirements set forth by the Committee. However, it recognizes criticism from the CRC Committee on, among other things, the issue of securing all children a right to medical care, also pointed to by previous research and reports.<sup>136</sup> It is important to note that this evaluation was conducted before a significant change in the Swedish legislation implemented in 2013.

These recent changes in legislation might mark a change in Sweden, as it grants explicit entitlement to some basic rights for undocumented migrants staying in the country. The responsibility for education, healthcare and social services are divided between the state, county councils and the municipalities. Because of this, the municipality of Malmö and the County Council Skåne can, and already did, grant some extended rights in regard to education, social services and healthcare before this was implemented into the national legislation.

In the legislations, it is reflected that these migrants are first and foremost seen as subjects of migration control, in how they are addressed. Swedish law refers to undocumented migrants in three ways: as people that "reside in the country without necessary permission",<sup>137</sup> "without

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<sup>134</sup> Wallström, Margot, Lövin, Isabella and Regnér, Åsa 'Barnkonventionen ska göras till lag' *Svenska Dagbladet* 19 Oct. 2014 <[http://www.svd.se/opinion/brannpunkt/barnkonventionen-ska-goras-till-lag\\_4023807.svd](http://www.svd.se/opinion/brannpunkt/barnkonventionen-ska-goras-till-lag_4023807.svd)>, Accessed 09 Dec. 2014.

<sup>135</sup> Socialdepartementet, *Hur svensk lagstiftning och praxis överensstämmer med rättigheterna i barnkonventionen*, (2011)

<sup>136</sup> Alexander, Shannon, "Humanitarian Bottom League-Sweden and the Right to Health for Undocumented Migrants", *European Journal of Migration and Law*, 12 (2010), 215; European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011)

<sup>137</sup> Lag (SFS 2013:407) om hälso- och sjukvård till vissa utlänningar som vistas i Sverige utan nödvändiga tillstånd.

support in an official decision"<sup>138</sup> or people that "abscond enforcements of decisions or expulsion".<sup>139</sup> With the recent changes, undocumented migrant's rights are to a smaller extent regulated in the legislations specifically concerned with migrants and asylum seekers, and instead included in the main documents like the *Education Act* (SFS 2013:298).

**Table 2 Relevant Human Rights Instruments Ratified by Sweden\***

<b>Document (Year of adoption)</b>	<b>Year of Ratification</b>	<b>Reservations and declarations</b>
<b>The Convention on the Rights of the Child (CRC) (1989)</b>	1990	
Optional protocol on the involvement of children in armed conflict (2000)	2003	
Optional protocol on the sale of children, child prostitution and child pornography (2000)	2007	
Optional protocol on Communication of complaints (2011)		
<b>International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)</b>	1971	Reservation: article 7 (d)
Optional protocol establishing complaint and inquiry mechanisms (2008)		
<b>International Covenant on Civil and Political Rights (ICCPR) (1966)</b>	1971	Reservations: "Art. 10, paragraph 3, with regard to the obligation to segregate juvenile offenders from adults, the provisions of article 14, paragraph 7, and the provisions of article 20, paragraph 1, of the Covenant."
Optional Protocol to the International Covenant on Civil and Political Rights, establishing mechanisms for individual complaint (1966)	1971	Reservation article 5, paragraph 2
<b>International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1966)</b>	1971	

<sup>138</sup> Skollagen (SFS 2010:800/2013:298)

<sup>139</sup> Lag om hälso- och sjukvård åt asylsökande m.fl. (SFS 2013:647/2008:344)

<b>Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)</b>	1980	
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (1999)	2003	
<b>European Convention on Human Rights (ECHR)</b>	1952**	
<b>European Social Charter (1961)</b>	1962	
Revised European Social Charter (1996)	1998	

\*Sweden has also ratified the European Union Charter on Fundamental Rights in 2000, but it applies only to the decisions made in the institutions and bodies of the EU considering the principle of subsidiarity, or the national authorities while implementing EU law.

\*\*Including Protocol 1, 4, 6, 7, 13

Sources: <https://treaties.un.org/Pages/Index.aspx>

<http://www.manskligarattigheter.se/en/human-rights-in-sweden/conventions-to-which-sweden-has-acceded>

## HEALTHCARE

From July 1st 2013, changes in the legislation grant undocumented children an explicit right to healthcare in Sweden. The new legislation<sup>140</sup> includes foreigners that reside in the country "without support in an official decision", but does not include foreigners that are regarded as temporarily residing in Sweden. It grants undocumented people below 18 healthcare to the same extent that is offered to nationals, including dental care. From 18, they have the same right to healthcare as adult asylum seekers (maternity care, medicine, abortion, prevention guidance and check-ups, in addition to emergency care, and care that cannot wait, including acute dental care).<sup>141</sup>

Before this change, Sweden was acknowledged as one of the more restrictive countries in Europe when it comes to healthcare for undocumented migrants (see for example FRA report *Fundamental Rights of Migrants in an Irregular Situation in the European Union*). They were only entitled to emergency aid or so-called "care that cannot wait", and they had to pay high fees. Shannon Alexander gives a thorough account of undocumented migrants' right to

<sup>140</sup> Lag (2013:407) om hälso- och sjukvård till vissa utlänningar som vistas i Sverige utan nödvändiga tillstånd

<sup>141</sup> *Vård för papperslösa – Vård som inte kan anstå, dokumentation och identifiering vid vård till personer som vistas i landet utan tillstånd* (Stockholm: Socialstyrelsen, 2014)

<<http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/19381/2014-2-28.pdf>>, Accessed 15 Dec. 2014

healthcare in Sweden, and concludes that practice and policy do not correspond to the obligations put on the state by the international human rights instruments ratified.<sup>142</sup>

“Care that cannot wait” was in the preparatory work<sup>143</sup> clarified to mean care and treatment of conditions or injuries where delay can have serious consequences for the patient, care given to counteract a more serious health situation, or avoid increasingly extensive care and treatment, care for people with special needs (torture, serious assaults, trauma), aid for people with a disability. The doctor is responsible for determining in each case if it is emergency, or need for care that cannot wait. It was expressed by professionals within healthcare that according ethics enshrined in care professions, the only determining factor for giving aid should be need, not social or legal status.<sup>144</sup> The National Board of Health and Welfare concludes that the term ‘care that cannot await’ is not consistent with the ethical guidelines that healthcare professionals are entitled to follow or the goals set forth in the *Health and Medical Services Act* (SFS 1982:763).<sup>145</sup> The difficulties their parents have accessing the healthcare system indirectly, but most of all might affect children directly as the parents may believe that the same rules apply to their children.

According to the National Board of Health and Welfare, there is a need to identify a patient. First of all, to fulfill needs of journaling, in cases of long-term follow-ups, handing out prescriptions, and in needs of contacting the person etc. It is also needed to identify the patient to determine whether a persons is covered by EU law, and whether they are asylum seekers. They acknowledge the problems with this when it comes to securing the trust among the undocumented population, and highlight the importance of getting out reliable information and the important role of NGO:s as intermediaries.<sup>146</sup>

The Swedish Red Cross sums up the results of the new law one year after it was enforced, by looking at experiences from Gothenburg and Stockholm. They see change in that fewer undocumented migrants contact them for referral, and are now able to contact health care services on their own. There are still some barriers hindering access to healthcare. The Red

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<sup>142</sup> Alexander, Shannon, "Humanitarian Bottom League-Sweden and the Right to Health for Undocumented Migrants", *European Journal of Migration and Law*, 12 (2010), 215-241

<sup>143</sup> Proposition 2012/13:109

<sup>144</sup> *Vård för papperslösa – Vård som inte kan anstå, dokumentation och identifiering vid vård till personer som vistas i landet utan tillstånd* (Stockholm: Socialstyrelsen, 2014), 14

<<http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/19381/2014-2-28.pdf>>, Accessed 15 Dec. 2014

<sup>145</sup> *Ibid.*, 28

<sup>146</sup> *Ibid.*

Cross notices that many working in health care facilities are not familiar enough with the latest law and what rights it gives to undocumented migrants. It occurs that the migrants are charged full price, or are informed that they should pay full price. Some caregivers deny healthcare for undocumented, or demand proof of their situation as undocumented. Most difficult is to access mental health care or dental care. According to the Red Cross, many caregivers find it difficult to assess what kind of care should be included in the term 'care that cannot wait'. Even if the law is a change towards a better situation, there is still work left to do before undocumented migrants can be said to have access to the healthcare they are entitled to.<sup>147</sup>

At the local level, changes began somewhat earlier than nationally. Skåne County Council has granted undocumented children right to healthcare on equal basis since 2008.<sup>148</sup>

Regarding mental health care, Malmö city offers refugees help with traumas from war and torture through their Team for traumatised and war wounded (TKT). Here they can get individual or group treatment lasting from 12 weeks to 12 months. They aim to offer a warm atmosphere and continuity in their treatment.<sup>149</sup> In their study from 2012, Lundberg and Söderman point to this as a service that meets the needs of undocumented children in a good way.<sup>150</sup>

## EDUCATION

The right to education was explicitly stated through a change in the laws coming into force 1st July 2013. The law states that under the *Education Act* (SFS 2013:298), undocumented children should be regarded as residents in Sweden, and thus give undocumented children the right to primary education and gymnasium if they start education before the age of 18, within their municipality. Children that reside in Sweden "without support in an official decision"

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<sup>147</sup> The Red Cross Sweden, *Vårdgivare saknar kunskap om lag för vård för papperslösa* (24 Dec. 2014) <<http://www.mynewsdesk.com/se/rodakorset/pressreleases/vardgivare-saknar-kunskap-om-lag-foer-vaard-foer-papperloesa-1011494>>, Accessed 18 Dec. 2014

<sup>148</sup> Regionstyrelsen Skåne, *Policy och riktlinjer gällande vård för personer från andra länder* <[http://www.skane.se/globalassets/styrandedokument/rf\\_110503\\_35\\_1100466.pdf](http://www.skane.se/globalassets/styrandedokument/rf_110503_35_1100466.pdf)>, Accessed: 8 Oct. 2014.

<sup>149</sup> Mental Health Skåne, *Team for traumatised and war wounded* <<http://www.skane.se/sv/Webbplatser/Psykiatri-Skane/Barn--Ungdomspsykiatri/Mottagningar/Malmo/Specialistteam/Team-for-krigs--och-tortyrskadade-TKT/>>, Accessed 18 Dec. 2014

<sup>150</sup> Lundberg, Anna and Söderman, Emma, "Emergence of and negotiations concerning undocumented children's human rights on city level of governance. Reflections from a bottom-up perspective" (forthcoming)

should be regarded as residing in Sweden until he/she leaves the country.<sup>151</sup> Regarding the right to attend gymnasium, it is clarified that in cases where the youth do not have the language capacity to follow the classes in an ordinary gymnasium program, they should be offered a place in language introduction programs directed towards newly arrived migrants.<sup>152</sup> In addition to the *right* to go to school, Swedish children also have a *duty* to go to school, which undocumented children are excepted from because it would not be realistic to sustain, according to the government.<sup>153</sup>

Some children are offered special education because of illness or due to other conditions that hinder them in attending school in a regular manner. *The Education Act* (SFS 2013:298) chapter 24 gives undocumented children entitlement to these special forms of education. Preparatory work notes that living in an undocumented situation is not conditions that in itself qualify for a special form of education.<sup>154</sup>

Schools are not obliged to actively contact families with undocumented children to inform about schooling, as they usually do with parents that have children in school age. The government highlights the importance of getting the information out to the families through other channels, for example online or with support from NGO:s or activist networks.<sup>155</sup> School transport and possibility to attend study trips is also a legal right in Sweden, aimed at equalizing entitlement to school. The government imposed no exception to this right for undocumented children. Since the children and their families often want to keep their place of residence hidden, the government concludes that this right will not be much in use, and an exception would be unnecessary. This contrasts to the case in the UK, where checks for permanent residency without prior notice can be carried out.

In the *Aliens ordinance* (SFS 2006:97) it was stated prior to the changes in 2013 that municipalities are obliged to report any undocumented child upon first-time enrolment in school, to the police authorities, including name, date of birth, citizenship and address.<sup>156</sup> The *Education Act* (SFS 2013:298) abandons this obligation, because it would limit the safety and

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<sup>151</sup> Lag om ändring i skollagen, SFS 2013:298/2010:800 Chapter 29, §2, 3

<sup>152</sup> proposition 2012/13:58, 21

<sup>153</sup> Ibid., 17-20

<sup>154</sup> Ibid., 15

<sup>155</sup> Ibid.

<sup>156</sup> Utlänningsförordningen, SFS 2006:97 ch.7 1 §

trust of the school for undocumented children and their families, and thus put barriers to the children's right to education.<sup>157</sup>

No sanctuaries exist in Sweden, where undocumented children and adults can be safe from police control and arrest. The law does not stop the police from picking up children in schools, but the preparatory work states that the police should exercise caution when intervening against children. According to §20 in the *Police Act* (SFS 1984:387) can police only search for a specific person or item, meaning that they have to know who they are looking for, before going to a school. The government judges the existing laws and practices as sufficiently restricting the police in picking up children in schools, but they state in the preparatory work that they will follow closely the effects of this, and consider this over again if it turns out that the police work is restricting children's access to education.<sup>158</sup>

Before the change in legislation, asylum-seeking children and children with a rejected asylum application waiting to be deported had the right to go to school, but not in cases where the child or the family was hiding to avoid rejection or deportation. Municipalities could still accept these children on a voluntary basis. In Malmö, a cross party agreement between the Social Democrats, the Left Party and the Green Party stated that the City of Malmö should offer undocumented children primary education.<sup>159</sup>

## SOCIAL SERVICES

According to the *Social Services Act* (SFS 2001:453), aid should be given when an individual cannot fulfil their needs on their own or in any other ways. It is primarily the responsibility of the municipality to make sure that the residents are receiving aid when necessary. A guiding principle of the social services in Sweden is that everyone staying in the country should be able to turn to the social services for support and assistance.<sup>160</sup> Being present, or resident in a municipality without being registered, gives the right to emergency assistance from the social services, as stated in the *Social Services Act* (SFS 2001:453).<sup>161</sup> What is considered

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<sup>157</sup> Proposition 2012/13:58, 29

<sup>158</sup> Proposition 2012/13:58, 33

<sup>159</sup> *Riktlinjer för det politiska samarbetet i Malmö under mandatperioden 2010-2014*

<[http://malmo.se/download/18.5e17dc6a12be77c8317800010393/Samverkan\\_s\\_v\\_och\\_mp.pdf](http://malmo.se/download/18.5e17dc6a12be77c8317800010393/Samverkan_s_v_och_mp.pdf)>, Accessed 8 Oct. 2014

<sup>160</sup> Proposition 2000/01:80

<sup>161</sup> Socialtjänstlag, SFS 2001:453 Chapter 2,2

emergency assistance is to be assessed in each individual case, but can be concretised as a short term protection from poverty.<sup>162</sup> It also states that in matters concerning children, the best interests of the child should be given special consideration (Chapter 2a, §2).<sup>163</sup> What is considered emergency aid is assessed in every individual case.

Also recently changed is the obligation for the social Welfare Board to disclose information to police authorities about an undocumented migrant upon first contact with the services. As stated in the current *Aliens Act* (SFS 2005:716) the Social Welfare Board is now only obliged to provide this information upon request from police authority, the Swedish Security Service, the Swedish Migration Board, a migration court, the Migration Court of Appeal or the Government instead of automatically at first contact.<sup>164</sup> It is too early at this point to say anything about the consequences of the change, as the law was put into force 1st of August 2014. But loosening up on the obligation of social service providers to report undocumented migrants, may make rights more accessible to them, as reporting obligations is perceived as having a big impact on undocumented migrants access to social rights.<sup>165</sup> The same goes for reporting obligations in health- and education services as well.

In Malmö a decision was adopted stating that undocumented children should have right to social aid at the same level as children registered in the city.<sup>166</sup> This interpretation of the *Social Service Act* (SFS 2001:453) has support in the best interests of the child-principle, but it is up to each municipality whether to interpret it in this way.

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<sup>162</sup>Cuadra, Carin Björngren and Staaf, Annika, "Public Social Services' Encounters with Irregular Migrants in Sweden: Amid Values of Social Work and Control of Migration", *European Journal of Social Work*, 17/1 (2014), 88–103.

<sup>163</sup> Socialtjänstlag, SFS 2001:453 Chapter 2a,2

<sup>164</sup> Utlänningslagen, SFS 2005:716, Chapter 17,1:

*"The municipal social welfare committee shall disclose information about an alien's personal situation if a police authority, the Swedish Security Service, the Swedish Migration Board, a migration court, the Migration Court of Appeal or the Government requests this and the information is needed for a decision in a case concerning a residence permit or long-term resident status in Sweden for a third-country national or to enforce a refusal-of-entry or expulsion order. This also applies when the question has arisen of whether the alien has a right of residence."*

<sup>165</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011)

<sup>166</sup> *Riktlinjer för handläggning av försörjningsstöd och ekonomiskt bistånd för livsföring i övrigt* (Malmö: Stadskontoret Malmö Stad)

<[http://malmo.se/download/18.1d68919c1431f1e2a9636e7/1389365268757/Riktlinjer+f%C3%B6r+handl%C3%A4ggning+av+f%C3%B6rs%C3%B6rjningsst%C3%B6d+och+ekonomiskt+bist%C3%A5nd\\_Malm%C3%B6+stad.pdf](http://malmo.se/download/18.1d68919c1431f1e2a9636e7/1389365268757/Riktlinjer+f%C3%B6r+handl%C3%A4ggning+av+f%C3%B6rs%C3%B6rjningsst%C3%B6d+och+ekonomiskt+bist%C3%A5nd_Malm%C3%B6+stad.pdf)>, Accessed 4 Nov. 2014

## HOUSING

Housing is a part of the social service aid given by the municipality, and the right to housing is included in the right to this aid. In addition, the *Social Service Act* (SFS 2001:453 Ch. 4,1) states that aid should be given to secure a reasonable standard of living, and strengthen the possibilities for the individual to live in an independent way. A reasonable standard of living reflects a minimum quality.<sup>167</sup> In some extraordinary situations, one can get housing through the social services. However, when trying to access housing at the private market, undocumented migrants are restrained as contracts often require a social security number.

In the city of Malmö, housing is part of the rights that are granted to undocumented families with support in their interpretation of the *Social Service Act* (SFS 2001:453).<sup>168</sup>

To conclude, the Swedish legislation includes undocumented children's rights to healthcare and education. It is less clear when it comes to their entitlement to social services and housing, opening up for discretion, different practices in different municipalities, and can potentially cause uncertainties as to what rights undocumented children really are entitled to under the law. With recent changes, the development is going in a positive direction, but the practical effects of this remain to be seen.

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<sup>167</sup> Proposition 2000/01:80

<sup>168</sup> *Riktlinjer för handläggning av försörjningsstöd och ekonomiskt bistånd för livsföring i övrigt* (Malmö: Stadskontoret Malmö Stad)  
<[http://malmo.se/download/18.1d68919c1431f1e2a9636e7/1389365268757/Riktlinjer+f%C3%B6r+handl%C3%A4ggning+av+f%C3%B6rs%C3%B6rjningsst%C3%B6d+och+ekonomiskt+bist%C3%A5nd\\_Malm%C3%B6+stad.pdf](http://malmo.se/download/18.1d68919c1431f1e2a9636e7/1389365268757/Riktlinjer+f%C3%B6r+handl%C3%A4ggning+av+f%C3%B6rs%C3%B6rjningsst%C3%B6d+och+ekonomiskt+bist%C3%A5nd_Malm%C3%B6+stad.pdf)>, Accessed 4 Nov. 2014

## DISCUSSION

While Sweden enacted several significant legislative changes in 2013 after years of advocacy and political discussions, the UK has been making many smaller changes over the past decade. The changes in Sweden and the UK seem to go in contrary directions, and thereby have different implications. The development in Sweden is clear and straightforward in explicitly stating that undocumented children have entitlement to education and healthcare on the same level as nationals. The UK has been implementing policies that limit undocumented children's access to fundamental rights in a more subtle way, mostly by emphasizing reporting obligations and ID-checks, with the effect that people who do not have a right to be in the country, cannot feel comfortable in any way.

It seems to be the overall tactics of the UK to leave a considerable amount of vagueness into the legislation and regulations, in order to make case-based micro evaluations possible. It is possible that this creates insecurities that can have signal effects, causing people to avoid claiming their human rights.

Both countries pay attention to international and European human rights treaties, but are also affected by EU's immigration control policies, and as highlighted by for example FRA, and this leads to tensions between different interests. Sweden has ratified more international conventions than the UK and also placed less reservations and declarations on them. For example, the UK did not ratify the Revised Charter of the European Social Charter proposed in 2006. This decision points to the UK's overall direction - away from the EU and the Union's obligations. On the other hand, the UK has the Human Rights Act, which, at least from a legal perspective, makes the UK a "better human rights country".

However, human rights do not seem to sufficiently protect the rights of children in an undocumented situation, as they get significantly limited on the national level. These mechanisms are examined by Gregor Noll, who argues that when undocumented migrants claim their fundamental human rights, this also triggers other parts of the law, like immigration control, which at the same time limits their rights. They are not vulnerable because they are outside the law, but because the law deprives them of their rights. In Noll's

understanding, the main obstacle is the law itself, and the solution is to untie the different parts of the law by, for example, removing obligations to report.<sup>169</sup>

From the empirical information presented in this report, we can identify that the law regulates undocumented children's access to rights either by (1) explicit denial of rights, (2) conditional entitlement to rights, or (3) full entitlement to rights. Also, a few other aspects emerged as important concerning the children's ability to access rights. The obligation for local authorities to report is one that can potentially be very limiting for claiming rights. The constant threat of detection and deportation makes the undocumented migrants avoid establishments in all four categories, which in return may result in serious consequences, should a sick child avoid going to the doctor for example. This is also what the previous research has concluded – the risk of detection and deportation are together mainly hindering access to rights, both in the UK and in Sweden. The lack of safe spaces, or sanctuaries, also increases the distress from living under uncertainty and constant fear.

**Table 3. Entitlement to rights, categorizations for UK and Sweden before and after recent changes**

	<b>UK</b>	UK Before	<b>Sweden</b>	Sweden before
Healthcare	<b>conditional entitlement</b>	conditional entitlement	<b>full entitlement</b>	conditional entitlement
Education	<b>full entitlement</b>	full entitlement	<b>full entitlement</b>	conditional entitlement
Social services	<b>conditional entitlement</b>	conditional entitlement	<b>conditional entitlement</b>	conditional entitlement
Housing	<b>explicit denial</b>	explicit denial	<b>conditional entitlement</b>	conditional entitlement

Using these three levels of entitlement to rights, we have scored the entitlement to rights according to law in each country (Table 3). This is a simplified presentation, and our empirical descriptions give more specific nuances to the actual situation. By *full entitlement*

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<sup>169</sup> Noll, Gregor, "Why Human Rights Fail to Protect Undocumented Migrants", *European Journal of Migration & Law*, 12 (2010), 241

we mean that the legislation is in every way granting the access to the right. With *conditional entitlement* we mean some kind of partial entitlement, for example when undocumented children have access to emergency healthcare but not to the primary healthcare system. By *explicit denial* we mean that the legislation explicitly does not support the right.

## HEALTHCARE

In the table above, we have placed the UK in the *conditional entitlement* category on current healthcare policies, as undocumented children have a legal right to access the primary healthcare system, but have to pay full price for any non-urgent secondary care and dental care. Sweden took an important step in a positive direction, from before only allowing emergency healthcare, placing them in the *conditional* category, and to legally providing full entitlement to the primary and secondary healthcare system therefore now placing them in the *full entitlement* category.

This is an example of a case where the UK used to have a less discriminatory legislation than Sweden, as accessing primary healthcare was made possible, at least on paper. Yet, with the latest changes in the legislation, the two countries have switched places. Currently, the UK does not compensate dental care and the access to different types of treatment is still limited, mostly requiring self-financing the treatment of whatever non-acute care. Sweden on the other hand gives the same entitlement as to all other children in Sweden with full coverage. And Skåne, the county where Malmö is located in, had this already before it got enacted into the national law.

Access to healthcare can still be problematic as healthcare workers might be unfamiliar with the changes in the legislation. This is why the child in an irregular situation often needs someone to help them claim their rights. This can for example be a support person or activist who is familiar with the legislation, that accompanies him/her and makes it clear that there is no reason not to offer the child medical help. And again, access might be complicated with the fear of being detected. The lack of awareness of legal entitlements and fear of detection has been brought up as an important barrier for medical help also in the previous research.<sup>170</sup>

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<sup>170</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011), 82; Iengar

As this seems to be a continuing problem, both from the legal and practical point of view, further emphasis should be put in the healthcare area as deprivation of medical help could have serious and long-term consequences on the child's health.

## EDUCATION

Education is another section where Sweden has taken an important step to improve access for children in irregularity, being now on the same level concerning this area as the UK. When it comes to education, we categorize the UK as providing *full entitlement*. Undocumented children have on paper an implicit right to school since the law states that all children have an entitlement to primary and secondary education. As Sweden changed the law so that it now explicitly expresses the right to education for undocumented children, they are also placed in the *full entitlement* category. However, the legal obligation to attend school does not apply to undocumented children, and the schools in Sweden are not safe havens. These are factors that still limit undocumented children's *de facto* access to education.

Although the schools in the UK have been open to children in irregularity to the same extent as nationals, the new regulations may hinder accessing school. So, for example, on the local level in Birmingham the school may check the child's address and permanent residence, which again, contains another threat for being caught. Furthermore, as the child is not by the national law covered with compensation for transport, school meals or school uniform, the child can have financial reasons for not attending school. Some schools in Birmingham help children in such situations on their own discretion, but this is not something that can be taken as a standard. Our findings show the same results as the previous research has indicated – even if there is a right on paper, a number of practical obstacles may hinder children from going to school. The obstacles seem to be somewhat bigger in the UK, but it may also be a bit soon to evaluate the latest changes in the Swedish Education Act.

## SOCIAL SERVICES AND HOUSING

In the UK, undocumented migrants do not have an entitlement to social services, but there are still ways of receiving economic assistance, for example through organisations that are directed toward people with NRPF. Therefore, we put them in the *conditioned* category.

According to Swedish law, undocumented migrants are entitled to social services in cases of emergency, also placing them in the *conditioned* category. Malmö, and possibly also other municipalities have opened up for giving full access to social aid to children and families, making the situation for people in irregularity more relieved from a risk of being destitute. This is up to each municipality in Sweden to decide.

The situation in the UK has become particularly tricky concerning social services, as in some services the situation has worsened, in some it has not, or new possibilities for undocumented people have emerged. For example, help from organisation Project 17, directed towards people who are subject to NRPF, helps children to access their rights under Section 17 in the *Children Act* (1989), sometimes offering help not only to children but their parents as well, as the *family's* wellbeing is needed to safeguard the *child's* welfare. From a financial perspective, there are notable differences in the size of the help, as on a weekly basis the help from Birmingham's City Council was more than twice less than the family (one adult, one child, the majority in Birmingham) would have received with Sweden's Section 17 support.<sup>171</sup>

While Swedish Social Welfare Board does not have to disclose information to police authorities when contacted by undocumented migrants anymore, contacting any social services in the UK entails another threat to get caught, as they have a duty to report an inquiry to the UK Border Agency. The UK has also put more responsibilities on local authorities, making it difficult for them to cope with the financial obligations. It may be expected that in case the provided funds run out, the undocumented people could be the first ones excluded from the social benefits.

Housing is the most difficult area to access for children in irregularity in both of the countries. Especially when the child is accompanied with parent(s) because there is a pressure in the private market and this brings to the surface the financial challenges of irregular migrants. In the UK, to get housing, one has to be street homeless and also *prove* to be "street homeless".

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<sup>171</sup> Birmingham City Council, *Children and Families with No Recourse to Public Funds* (Birmingham: Overview and Scrutiny, 2013), 16

There is no system granting undocumented migrants and their children access to housing from the social services in the UK, with the exception of cases where the child is unaccompanied. Furthermore, their access to the private market is limited through a new obligation on landlords to check immigration status of their tenants. This earns the UK the *denied* category. In Sweden, the right to housing is connected to the social services, and may then be granted in cases of an emergency. At the private market they are limited by a housing contract requiring a social security number. Therefore, Sweden is placed in the *limited* category on housing policies.

Lack of access to social services and housing can put children in irregularity and their families in a destitute situation. Concerning housing, for example, they might not have any other choice but to pay an unreasonably high rent or endure other forms of discrimination or exploitation, as this might be their only option to have a roof over their head.<sup>172</sup> Some families with irregular status find help from their friends, but usually the living conditions do not come near what the family and children would need. Yet, getting help from friends offers at least some relief to the situation.

In addition to these four important factors, *reporting obligations* emerged as an element that is central, since it entails the possibility to significantly limit the *de facto* access to other rights. Sweden has moderated public services obligations to report in recent changes to the legislation. Reporting obligations have either been taken away or moderated, only applying when immigration or police authorities requests it from the social services, and never from schools. The UK seems to increasingly encourage public services to report undocumented migrants.

Overall, implementing restrictive immigration and asylum policies in hope to create signal effects to discourage migrants have uncertain consequences. It is argued for example by Stephen Castles et al. that irregularity is a result of stricter immigration control, because it limits the possibilities for regular migration while the motivations, or the push-factors, to migrate remain.<sup>173</sup>

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<sup>172</sup> European Union Agency for Fundamental Rights (FRA), *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (Luxembourg: Publications Office of the European Union, 2011)

<sup>173</sup> Castles, Stephen et al., *The Age of Migration. International Population Movements in the Modern World* (Basingstoke: Palgrave Macmillan, 2013), 5-7

## CONCLUSIONS

The aim of this report was to give an account of the fundamental human rights that are relevant to undocumented children and their families, and investigate to what degree Sweden and the UK secure these rights. We presented the relevant international legal framework of human rights and how they relate to undocumented children. We compared the situation in the UK and Sweden in light of these rights and common practical obstacles according to previous studies. The most central finding in our material is the way the countries have developed. Entitlement to some fundamental rights for undocumented children was possible in the UK for some time, as opposed to in Sweden where undocumented children were excluded in the law until recently, when Sweden enacted several laws including undocumented children in 2013. This resulted in fundamental rights now being more accessible in Sweden than in the UK according to the legislation. The UK is for the most part making it more difficult by complicating the system and making obligations to report more strict and unexpected. We find that there are mainly three different levels of regulating entitlement to rights, namely denied entitlement, conditional entitlement and full entitlement.

The results of the law and other regulations restricting access to basic human rights for children in irregularity can only be guessed. It became clear that even if there seems to be a full entitlement to the right on paper, other obstacles and practical barriers hinder accessing the rights in practice. The size of the population of these children in both countries is remarkable and the possibility that these children may lack education or needed medical help, in addition to having a place to live or something to eat should set off several warning lights.

Apart from the law, access to fundamental rights is mainly limited by obligations to report, and the lack of safe havens. The obligations to report irregular migrants as they make claims to their entitlement to essential services are a tool that connects the fundamental rights and the immigration control laws together, making it impossible to claim one without activating the other. For human rights to be able to protect irregular migrants they must be disconnected from immigration control by limiting these reporting obligations as in the case of Sweden. When the UK enhances these obligations, they tie the two components of law tighter together, in turn creating an environment where it is even more challenging to claim rights as an irregular migrant. Yet, because of the embeddedness of the law, this untying cannot happen

without a discussion about the situation of irregular migrants, as well as beginning to see them as political human beings and not as offenders.<sup>174</sup>

We leave the explanations of the differences between the UK and Sweden for further research on this topic. Some possible explanatory factors that could be explored are the different discourses on immigration, which seem to be more hostile in the UK than in Sweden. This might be affected by the rising relevance of right wing populist parties, making the current developments in Sweden interesting where a similar movement has now emerged. In what ways do changes in legislation towards undocumented persons relate to the common immigration policies of the EU? It can seem as if the rights granted to undocumented children are connected to the overall immigration policies as Sweden has been more open to immigration in the recent years than the UK, but this connection needs to be explored further. In the UK, the development is to an increasing extent to view undocumented children as *migrants* and thus subject to immigration control, instead of as *children* and right holders. A different development can be observed in the case of Sweden, where undocumented children have had their rights extended, while reporting obligations have been limited.

A lack of sanctuaries or safe places, together with uncertainty around reporting obligations are factors that almost invariably increase the insecurity under which undocumented children live. This is a situation of insecurity where detention or deportation can happen at any time, and there is nowhere to feel safe from this threat. Even though they might have an entitlement to their fundamental rights, they are still deportable. It needs further attention to shift away the concentration while speaking of children in irregularity from the *migrant child* subject to immigration control to a *child* whose best interest should be kept in mind in every way possible.

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<sup>174</sup> Noll, Gregor, "Why Human Rights Fail to Protect Undocumented Migrants", *European Journal of Migration & Law*, 12 (2010)

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