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INTERNATIONAL MIGRATION AND THE LAW

LEGAL APPROACHES TO A GLOBAL CHALLENGE

Edited by

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ROUTLEDGE

This volume collects the final results of the Research Project of Relevant National Interest (PRIN) "International Migrations, State, Sovereignty and Human Rights: Open Legal Issues" (2019-2024). Four research units have been financed by the Italian Ministry of University and Research to carry on the PRIN, namely the units of the following Universities: Salerno, Campania "Luigi Vanvitelli", Bari "Aldo Moro", and Teramo. The researchers have worked under the guidance of Angela Di Stasi, as principal Investigator, and Ida Caracciolo, Gianni Cellamare and Pietro Gargiulo, as associate Investigators.
Adopting a multilevel and multidisciplinary approach, the book aims to explore existing and future trends in the development of migration policy from the local to the global level, highlighting the challenges and gaps in the protection of migrants, and providing concepts and empirical findings with implications also for practitioners and lawyers.

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Chapter 4

ON THE SOCIAL RIGHTS OF IRREGULAR MIGRANTS

Giovanni Cellamare

ABSTRACT: *The Return Directive contains provisions on certain social rights of non-removable irregular migrants. The Directive refrains from addressing the general problem of access to those rights by all irregular migrants. However, while the European Social Charter does not expressly refer to irregular migrants, arguments connected to respecting human dignity may well lead to applying the Charter to them. The problem in question must be addressed in light of the Charter of Fundamental Rights as well as the international conventions on human rights to which the EU Member States are parties. Accounts should be taken of the indications of the ECHR and the CESCR.*

1. Human dignity and the recognition of social rights to irregular migrants in the EU

As is widely known, the discipline of irregular migration plays a pivotal role in the EU's activity on migration.[1] In this respect, it is worth recalling the importance recognised by the Commission to the conclusion of agreements and "other arrangements" for the readmission of irregu-

[1] See G. CELLAMARE (2021), *La disciplina dell'immigrazione irregolare nell'Unione europea*, Torino, 29 ff.

lar migrants.[2] This has encouraged Member States to enter into informal readmission agreements. Moreover, the report accompanying the proposal to recast the return directive shows that the legislation in force has not produced the expected results, and that the number of returnees is significantly lower than the return decisions.[3] Since repatriation policy does not work, a problem arises with treating people who cannot be repatriated. On the other hand, Art. 9 of the same directive provides for cases in which the States must (in order to guarantee non-*refoulement*) or can (because of the third country national's physical or mental conditions, for technical reasons of transport or lack of identification) postpone removal. There are, therefore, situations in which it is not possible to repatriate irregular migrants, nor is it possible to issue a residence permit to them, as a result of the directive.[4]

Despite its constitutional dimension, the treatment of individuals does not seem to play a key role in the New Pact on Migration and Asy-

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[2] Communication, *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, 12.9.2018, COM(2018) 634 final; COMMISSION SERVICE, *Non-Paper on a Strategic Approach on Readmission Agreements and Arrangements*, 29.4.2022, available online; the *Report on Migration and Asylum*, 6.10.2022, COM(2022) 740 final. A problem arises with the treatment of people, the "arrangements" referred to in the text are not subject to the "parliamentary scrutiny and democratic and judicial oversight that according to the Treaties, the conclusion of formal readmission agreements would warrant parliamentary scrutiny and democratic oversight" (EUROPEAN PARLIAMENT, *Draft Report on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, 21.2.2020, *sub* Amendment 41, available online). See also Art. 7 of the Proposal for a Regulation of the European Parliament and of the Council, *on asylum and migration management and amending Council Directive (EC) 2003/109* and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] – General approach of 6 June 2023, n. 10084/23).

[3] See nt. 2; https://ec.europa.eu/eurostat/en/web/products-eurostat-news/-/ddn-20221003-1; EUROPEAN COMMISSION, *Statistics on migration to Europe*, update on 1st January 2021, available online; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Migration: Key Fundamental Rights Concerns, Quarterly Bulletin*, available online; P. STUTZ, F. TRAUNER, *The EU's 'return rate' with third countries: Why EU Readmission Agreements Do Not Make Much Difference*, in *IM*, 2021, 60, 155 ff.

[4] ECJ, Grand Chamber, judgment 22.11.2022, *X* v. *Staatssecretaris van Justitie en Veiligheid*, case C-69/21.

lum;[5] nor is the current version of the abovementioned proposal innovative with respect to the directive's scant provisions on non-removable irregular migrants, despite what is hoped within the European Parliament and the indications of well-known human rights treaty bodies.[6]

These provisions can thus be summarised as follows. Reiterating what is stated in the Preamble (para. 24) – which refers to the European Charter of Fundamental Rights (EU Charter) –, Art. 1 affirms the directive's functioning in respect of individual rights as derived from the general principles "of Community law and international law". On such premises, the following indications are provided for treating non-repatriable persons under Art. 9, whereas in general the Member States have the competence to regulate that treatment in their respective legal systems (Preamble, para. 12). The States must take into due consideration the child's best interests, family life and health conditions (Art. 5); furthermore, Art. 9 recalls the need to protect the health of people awaiting removal. Above all, Art. 14 draws the States' attention to consider, as much as possible, some principles for the treatment of third-country nationals awaiting voluntary return and during the periods for which removal has been postponed under Art. 9. Those principles concern family unity, access to emergency health services and essential treatment of diseases; minors' access to the education system, considering the duration of stay. Attention is also paid to the special needs of vulnerable people.

The latter indication and the importance of people's health conditions are reiterated for the treatment of people detained for the purpose of removal (Art. 16).

The situations mentioned above differ from those presupposed by

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[5] See Communication, *A New Pact on Migration and Asylum*, 23.9.2020, COM(2020) 609 final.

[6] Communication, *Proposal for a Directive*, cit.; EUROPEAN PARLIAMENT, *Draft report*, cit.; for the position of the European Council, see the *Partial general approach on the Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)*, 13.6.2019, available online; see also EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2019), *The Recast Return Directive and its Fundamental Rights Implications: Opinion of the European Union Agency for Fundamental Rights*, Vienna; K. EISELE, E. MUIR, C. MOLINARI, M. FERNANDES, A. GALEA (2019), *The Proposed Return Directive (recast): Substitute Impact Assessment*, Brussels (European Parliamentary Research Service), available online.

Art. 79(1) TFEU: in line with Art. 72(1), that provision foresees a common migration policy including the fair treatment of foreigners "of third-country nationals residing legally in Member States", together with "enhanced measures to combat illegal immigration".

However, since it is not possible to envisage an even minimal common regulation of the diverse situations considered by the directive, the discrepancy remains between the Member States' legislations in the *subiecta materia*. Moreover, this encourages possible secondary movements of people (from one of those States to another) in search of the most favourable treatment. This consideration was unsuccessfully taken into account by the Commission in support of the reform of the scant regulation just referred to.[7] Indeed, it is an aspect of irregular stay affecting the "common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows" (Art. 79(1) TFEU).

As mentioned above, Art. 14 of the directive draws Member States' attention to the need for individual protection in situations in which the principles indicated by the directive may come into play. These are situations in which rights referred to by those principles and considered fundamental for treating irregular non-removable migrants or those awaiting voluntary return are likely to work.

In this regard, it is legitimate to argue that Art. 14 contains indications that can be extended to all irregular migrants. Furthermore, this is in consideration of the effectiveness of the rights in question, which operate regardless of the irregular condition of the person concerned.

Art. 14 implicitly but unequivocally recalls some social rights provided for by Arts. 14(1)(f) ("Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education") and 35 ("Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities") of the EU Charter. The two provisions of the Charter guarantee those rights to "everyone". However, Art. 34 limits the right to social security and social benefits only to individuals residing or moving legally within the EU.

In the sense indicated, the need to protect individual positions emerges incisively from the conclusions of the Advocate General Bot in

[7] Art. 8, Communication, *Proposal for a Directive*, cit., 7.

the *Abdida* case. Here, we read that "The purpose of the directive is to establish an effective removal and repatriation policy, […] in a humane manner and with full respect for their fundamental rights and dignity. […] To have one's most basic needs catered for is […] an essential right which cannot depend on the legal status of the person concerned". Hence, although "the extent of the provision for basic needs must be determined by each of the Member States, given the discretion conferred on them by Directive 2008/115 […] such provision must be sufficient to ensure the subsistence needs of the person concerned are catered for as well as a decent standard of living adequate for that person's health, by enabling him, inter alia, to secure accommodation and by taking into account any special needs that he may have". [8]

Regardless of the migrants' *status*, the focus is here on the individual worthy of a "decent standard of living". Human dignity is recognised as essential in directing State behaviour and recognising individual rights suitable for satisfying "basic needs" in pertinent situations. Indeed, there may be rights instrumental to others to guarantee a dignified life: their identification is possible thanks to relationships of autonomy, cross-reference and reciprocal presupposition between the essential functions of the rights coming into play in each situation. [9]

In this vein, it is worth recalling the observations made by the Court of Justice of the European Union (ECJ) in the *Haqbin* case. [10] The Grand Chamber ruled that even a temporary withdrawal of the benefit of the applicant's material reception conditions for international protection conflicts with the obligation to guarantee the individual a decent standard of living. The considerations were based on Art. 1 of the EU Charter on the inviolability of human dignity, which "must be respected

[8] Opinion of Advocate General Y. BOT, delivered on 4.9.2014, in the case C-562/13, *Abdida*, para. 156 ff.

[9] See A. RUGGERI (2011), *Rapporti tra Corte Costituzionale e Corti europee, bilanciamenti interordinamentali e «controlimiti» mobili a garanzia dei diritti fondamentali*, in *Rivista AIC*, 1.

[10] ECJ, Grand Chamber, judgment 12.11.2019, *Haqbin*, case C-233/18, para. 57. See also the conclusions of Advocate General N. EMILIOU, delivered on 4.5.2023, in the case C-294/22, *Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos v Valstybinė duomenų apsaugos inspekcija, joined parties: 'IT sprendimai sėkmei' UAB, Lietuvos Respublikos sveikatos apsaugos ministerija*.

and protected" and represents one of the values on which the EU is founded" (Art. 2 TEU).[11]

Similarly, some rulings of the European Court of Human Rights (ECHtR) are worthy of note,[12] and the European Committee of Social Rights (ECS) followed the same approach. As is known, irregular migrants do not fall within the scope of the European Social Charter; however, this did not prevent the Committee from establishing that, in some situations, human dignity entails the recognition of certain rights in favour of irregular migrants.[13]

From the perspective of the Italian legal system (the analysis of which goes beyond the scope of this paper), it is opportune to recall the following point. In judgment n. 187 of 2010, the Constitutional Court established the complete equivalence between the immigrant and the citizen, where the benefit envisaged in favour of the citizen is "a remedy designed to allow the concrete satisfaction of 'primary needs' inherent in the sphere of protection of the human person, which is the duty of the Republic to promote and safeguard". In fact, human dignity is present in the relevant sentences of the Constitutional Court, whereby po-

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[11] C. DUPRÉ (2014), *Article 1 Human Dignity*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford-Portland, 3 ff.; see also the Preamble of the Universal Declaration of Human Rights; the Preamble and Art. 26 of the European Social Charter; the Preamble and Art. 1 of the Convention on Human Rights and Biomedicine.

[12] For the developments preceding the inclusion of the "human dignity" concept in the Convention system made by Protocol no. 13, see ECHR, judgment 7.12.1992, application no. 25803/94, *Selmouni v. France*; judgment 22.11.1995, application no. 20166/92, *SW. v. The United Kingdom*; judgment 11.7.2002, application no. 28957/95, *Goodwin v. The United Kingdom*, para. 9: "the very essence of the Convention is respect for human dignity and human freedom"; judgment 3.10.2019, application no. 34215/16, *Kaak and others v. Greece*, para. 63. For more indications see G. CELLAMARE (2020), *Osservazioni sulla politica dell'UE in materia di rimpatri*, in A. DI STASI, L.S. ROSSI (eds.), *Lo spazio di libertà sicurezza e giustizia a vent'anni dal Consiglio europeo di Tampere*, Napoli, 426 ff.; G. LE MOLI (2021), *Human Dignity in International Law*, Cambridge, 216 ff.; the article by A. DI STASI in this volume.

[13] ECSR, decision 20.10.2009, *DCI v. Netherlands*; decision 5.12.2007, *FEANTSA v. France*; decision 23.10.2012, *DCI v. Belgium*, para. 36; decision 1.7.2014, *CEC v. Netherands*, para. 142 ff. See also decision 8.9.2004, *Conclusions 2005 on article 11 of the Charter*; decision 24.1.2018, *International Federation of Human Rights League (FIDH) v. France*.

sitions that are likely to negatively affect "the inviolable sphere" of human dignity are discarded. [14]

2. Criticising the opinion according to which the recognition of social rights to irregular migrants encourages irregularity

Other well-known human rights treaty bodies that monitor implementation of international human rights treaties to which the EU Member States are parties have also provided useful indications on the access of irregular migrants to social rights. This is not without significance, given that, as is known, the ECJ affirmed the principle of respect for fundamental rights, stating that these are anchored in the general principles of Community law protected by the Court; [15] that they draw on the common constitutional traditions of the Member States and on international treaties for the protection of human rights to which the Member States "have collaborated or of which they are signatories". [16] Among these, in addition to the ECHR referred to in Art. 6 TEU, the two well-known 1966 UN Covenants and the UN Convention on the Rights of the Child, mentioned in para. 22 of the preamble of the return directive.

The qualification reaffirmed by Art. 1 of the directive of individual rights as principles of the EU legal system entails its prevalence over the rules contained in the EU secondary legislation and orients the content and the solution of concrete problems by safeguarding fundamental rights. [17]

The international obligations in question, on the one hand, direct the interpretation of the return directive by protecting the individual rights envisaged by them; on the other, they affect the prerogatives of the Member States, parties to the relevant conventions, in regulating the treatment of migrants, in the absence of different indications, and regardless of their *status*. [18]

Despite the cases law of the human rights treaty bodies, also during the debates on the recast of the return directive, in the opposite direc-

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[14] Judgment no. 269, 7.7.2010; See also judgment no. 252, 17.7.2001.

[15] CJEC, judgment 12.11.1969, *Stauder*, case 29-69.

[16] CJEC, judgment 14.5.1974, *Nold*, case 4-73.

[17] G. GAJA (2016), *Lo statuto della ECHR dei diritti dell'uomo nel diritto dell'Unione*, in *Riv. dir. int.*, (3), 677 ff.

[18] EUROPEAN PARLIAMENT, *Draft report*, cit., 99.

tion to the recognition of rights of a social nature to irregular migrants, it has been generally alleged that this recognition encourages irregular migration. [19]

The fact that EU Member States recognise these rights to those migrants does not affect the sovereign powers of control over migratory movements by these States, nor does that acknowledgment regularise the condition of the persons concerned. [20]

In this regard, the approach followed by ECSR, which has just been mentioned, is noteworthy, recognising certain rights in favour of irregular migrants, even if they do not fall within the scope of application of the Social Charter. In that approach, the treatment of people deriving from the operation of human dignity is independent of the person's *status* (whether regular or irregular). The same approach would be scarcely congruent with the Social Charter, if it favoured the irregular migration excluded from the Charters' scope of application. However, this is implausible.

In this regard, it is worth mentioning Art. 35 of the 1990 UN Convention on the rights of all migrant workers and members of their families. In that provision, it is stated that the recognition of the rights listed in the third part of the Convention in favour of persons in an irregular condition "shall [not] be interpreted as implying the regularization of the situation […], or any right to such regularization of their situation […]". This provision is incompatible with the idea that the recognition of rights to irregular migrants takes place in a direction favourable to irregular migration.

3. The existence of "minimum core obligations" for the States parties to the Covenant on Economic, Social and Cultural Rights (ICESCR)

Since it was adopted within the framework of the UN, that Convention has represented a manifestation of the international organisation's inter-

[19] S. DA LOMBA, *The ECHR and the Protection of Irregular Migrants in the Social Sphere*, in *IJMGR*, 2015, 22, 39. On the reform of the return directive see nt. 2.

[20] I. MAJCHER (2020), *The European Union Return Directive and Its Compatibility with International Human Rights Law. Analyses of Return Decision, Entry Ban, Detention, and Removal*, Leiden-Boston, 227 ff.; G. CELLAMARE (2021), *La disciplina*, cit., 87.

est in treating third-country nationals without residence permits. This interest also results from the activities of the Council of Europe and the ILO.[21] Furthermore, given the place of its adoption, the 1990 Convention is indicative of fundamental rights to be recognised, as such, to all migrants. The immigration States of the EU and other geographical areas are not parties to that Convention. Moreover, among those rights (Arts. 28-30) are also those referred to by the principles indicated by the return directive. On the other hand, in favour of foreign workers in an irregular condition, the UN Convention provides rights already recognised by the ICESCR to all individuals subject to the jurisdiction of the relevant State, regardless of their *status*. Art. 2(2) provides that States parties to the Covenant are committed to ensuring that the rights set forth therein are exercised without discrimination "of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The last reference includes discrimination based on the migrant's (irregular) *status*. The Committee on Economic, Social and Cultural Rights (CESCR) has specified that the nationality of the persons concerned can not preclude access to the rights provided for by the Covenant; they are also open to non-citizens, regardless of their legal *status*. This implies, for instance, the recognition of the right to access medical care for every migrant,[22] resulting into relationships of interdependence between the right to health and other rights.[23]

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[21] Recommendation, *sur la protection des droits des femmes et des filles migrantes, réfugiées et demandeuses d'asile, adoptée par le Comité des Ministres le 20 mai 2022*, 20.5.2022, CM/Rec(2022)17; ILO Constitution; ILO Convention no. 143 concerning *Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*. C. O'CINNEIDE (2020), *The Human Rights of Migrants with Irregular Status: Giving Substance to Aspirations of Universalism*, in S. SPENCER, A. TRIANDAFYLLIDOU (eds.), *Migrants with Irregular Status in Europe: Evolving Conceptual and Policy Challenges*, available online, 51 ff.

[22] CESCR, General Comment no. 19, 4.2.2008, *The Right to Social Security (art. 9)*, E/C.12/GC/19, para. 37; CESCR, General Comment no. 14, 11.8.2000, *The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4, paras. 18, 19, 39; CMW, Joint General Comment no. 3 (2017) and no. 22 (2017), 16.11.2007, *of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3, paras. 5, 18, 21 and 32.

[23] R. PISILLO MAZZESCHI (2020), *Diritto internazionale dei diritti umani*, Torino, 255 ff.

More generally, based on its own experience, the Committee has established that the Covenant contains a "minimum core obligation" without which the Covenant would otherwise have no "raison d'être". Of course, this does not exclude considering the availability of resources of the host State for the fulfilment of the international obligations assumed, with the consequent recognition of a certain margin of discretion in fulfilling the same obligations. In other words, there are immediate minimum obligations, which vary from State to State, in consideration of their economic situation,[24] resulting in different standards of protection. The Covenant's obligations are complied with if the State demonstrates that it has made every effort to use the available resources and satisfy those "minimum obligations".[25] Ultimately, the condition of irregularity cannot be considered a factor diluting the universal scope of some rights: in the tension between the exercise of the power to control migration and the applicability of some rights in the social sphere, the coherence between the State's choices and the fulfilment of the international obligations assumed in the exercise of its sovereignty comes into play.

In this approach, the non-discriminatory clause is central in configuring an inalienable nucleus of rights. The role played by the non-discrimination clause is consolidated by the direct applicability of the clause and its incompatibility with unjustified regressive measures. In other words, such measures must also be justified in light of the non-discrimination principle.

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[24] R. CHOLEWINSKI (2005), *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, available online; ID. (2009), *Irregular Migrants, Access to Minimum Social Rights. On the obligations with immediate effect, and the relationship between available resources and discrimination*; CESCR, Statement 13.3.2017, *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2017/1.

[25] See CESCR, General Comment no. 3, 14.12.1990, *The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, E/1991/23; CESCR, General Comment no. 20, 2.7.2009, *Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, para. 30: "The Covenant rights apply to everyone including non-nationals, […] regardless of legal status and documentation". See also R. CHOLEWINSKI, (2005), *Study*, cit. On the concepts of "core rights", "core content" and "core obligations" see R. PISILLO MAZZESCHI (2020), *Diritto*, cit., 191 ff.

4. The application limits of the so-called social dimension of the ECHR in favour of irregular migrants: the reasonableness and objectivity of the non-discrimination clause and the role of the margin of appreciation in the application of the Convention

Some observations of the ECtHR are in line with those of the CESCR referred to above.[26] Unlike the Covenant, the ECHR – with rare exceptions, such as access to education – does not provide for social rights. This has not prevented the Court from recognising certain social rights to individuals, precisely because of the non-discrimination clause or the protection *par ricochet*. A social dimension of the ECHR emerges,[27] which also works in favour of third-country nationals.

The Court has repeatedly stated that "Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter". Furthermore, "[t]he prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It also applies to those additional rights, falling within the general scope of any Article of the Convention or its Protocols, which the State has voluntarily decided to provide". The ruling includes any social rights[28] which can also work in favour of irregular migrants.

As in the case of the CESCR, the European Court has repeatedly clarified the limits within which discrimination is admissible in the en-

[26] See ECHR, judgment 27.12.2011, application no. 56328/07, *Bah v. the United Kingdom*, para. 45 ff.

[27] See ECHR, judgment 23.5.1996, application no. 39/1995/545/631, *Gaygusuz v. Austria*. In general, see S. DA LOMBA, *The ECHR*, cit.; I. LEIJTEN (2017), *Core Socio-Economic Rights and the European Court of Human Rights*, Cambridge; A. RUGGERI (2018), *I diritti sociali al tempo delle migrazioni*, in *Oss. AIC*, 2; on the integrated approach to the recognition of rights of different natures and their indivisibility see International Commission of Jurists (2021), *Accesso alla Giustizia per la tutela dei diritti economici, sociali e culturali. Materiale di formazione sull'accesso alla giustizia per i migranti*, available online.

[28] ECHR, judgment 9.10.1979, application no. 6289/73, *Airey c. Irlanda*, para. 26 (on free legal aid *ex* Art. 6(1) ECHR).

joyment of the rights guaranteed by it: this is possible for the fulfilment of legitimate aims through measures proportionate to that purpose.

There is discrimination if, in "relevantly similar situations", there are different treatments without objective and reasonable reasons; that is, if the discrimination does not pursue any legitimate aims and the means used are not proportionate to the aim to be achieved. Indeed, States have a margin of appreciation "in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary based on the circumstances and context of the pending case. Of course, this "margin of appreciation" is wide "when it comes to general measures of economic or social strategy", but only "very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention". [29]

Investigating the relationship between the non-discriminatory clause and the margin of appreciation, the European Court has had the occasion to observe that, unlike what happens for migrants, the *status* of refugees is not due to a choice; however, differences in the treatment of those people must still be objectively and reasonably justifiable. [30] Therefore, in the presence of irregular migration, the voluntary element underlying it favours greater flexibility in terms of the justifications that the State provides in differentiating the treatment of migrants from refugees.

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[29] ECHR, judgment 28.11.2011, application no. 5335/05, *Ponomaryovi v. Bulgaria*, paras. 48-53; the same concept was already present in: judgment 18.2.2009, application no. 55707/00, *Andrejeva v. Latvia*. It seems to us, however, that the Court's observations must be understood in light of the case to which they pertain in similar situations. "No objective and reasonable justification" means that the distinction at issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized […]. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment […]. The scope of this margin will vary according to the circumstances, the subject matter and its background […]; indeed, in certain circumstances, a failure to attempt to correct inequality through different treatment may, without an objective and reasonable justification, give rise to a breach of that Article".

[30] ECHR, *Bah*, cit., paras. 42-45 ("while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality"); ECHR, judgment 6.2.2013, application no. 22341/09, *Hode and Abdi v. the United Kingdom*, para. 46 ff.

It has been observed that the Court's reference to the voluntary element weakens the operativity of the non-discrimination clause, and that even religious and political convictions are the result of choice; therefore, the approach followed by the Court could extend to discrimination on religious and political grounds. This being implausible, the unreasonableness of that approach is thus shown. [31]

The Court's observations must be understood in light of the case to which they pertain. As stated by the Court, the pending case concerned the provision of housing to the needy; therefore, it was predominantly socio-economic in nature, with the consequent attribution to the government of a relatively wide margin of discretion in the allocation of accommodation. In that case, the applicant was a migrant and not a refugee who could not return to his own country; the applicant's condition thus justified a difference in treatment between the migrants themselves, based on their conditions, given the accommodation assignment. [32] Hence, the Court did not exclude but rather confirmed the modalities of action for the non-discrimination clause, based on the reasonableness and objectivity of discrimination causes. [33]

It should be noted that the Court has distinguished between people (refugees) who have not chosen to emigrate, and others who desire to emigrate. This differentiation leads to the exclusion that, in recognition of social rights, distinctions could be made between irregular migrants that can be expelled and those that cannot be removed, for example, applying the return directive. Indeed, in both cases, we are dealing with people who have chosen to emigrate (and to violate the migration laws of the host State). However, this does not exclude the possibility of a distinction between irregular migrants in consideration of the specific vulnerability of the person concerned.

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[31] N. CAICEDO CAMACHO (2021), *Social Rights and Migrants before the European Court of Human Rights*, in D. MOYA, G. MILIOS (eds.), *Aliens before the European Court of Human Rights. Ensuring Minimum Standards of Human Rights Protection*, Leiden-Boston, 208.

[32] ECHR, *Bah*, cit., para. 46 ff. "the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an 'other status' for the purposes of Article 14 […]"; "a wide range of legal and other effects flow from a person's immigration status". However, "Given the element of choice involved in migration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality".

[33] See *amplius* ECHR, *Ponomaryovi*, cit., para. 48 ff.

5. The components of the margin of appreciation and their functioning in the access of irregular migrants to some social rights

The Court has admitted that reasons related to the State budget could constitute objective and reasonable justifications for a distinction between regular and irregular migrants in accessing social services, given that the latter do not contribute to State finances.[34] Indeed, "a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal migrants, who, as a rule, do not contribute to their funding.[35]

The latitude of the margin of appreciation must be understood in light of the elements determining its functioning:[36] the convergence extent of State practices and legislation in the regulation of the pending case; the circumstance that the State concerned is in the best position to make assessments and choices of a social nature; in particular, the provision in the European Convention of the alleged right at stake in the pending case. In other words, it is not indifferent whether the Convention provides for that right and, where foreseen, whether it is absolute.[37]

In this sense, the case law concerning access to education and medical care for irregular migrants is worthy of note.

"Unlike some other public services", such as health, "education is a right that enjoys direct protection under the Convention". It implies a "stricter scrutiny by the Court of the proportionality of the measure af-

[34] ECHR, judgment 8.4.2014, application no. 17120/09, *Dhabbi v. Italy*, para. 52.

[35] ECHR, *Ponomaryovi*, cit., para. 54: "the Court starts by observing that a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. In certain circumstances, it may justifiably differentiate between different categories of aliens residing in its territory".

[36] See F. IPPOLITO, C. PÉREZ CONZALÉS, (2021), *"Handle with Care" in Starsbourg: The Effective Access of Vulnerable Undocumented Migrants to Minimum Socio-economic Rights*, in B. ÇALI, L. BIANKU, I. MOTOC (eds.), *Migration and the European Convention on Human Rights*, Oxford, 251 ff.; V. ZAGREBELSKY, R. CHENAL, L. TOMASI, (2022), *Manuale dei diritti fondamentali in Europa*, III ed., Bologna, 40 ff.

[37] ECHR, *Ponomaryovi*, cit., paras. 56 and 58.

fecting the applicants".[38] Regarding access to education, the Court considered, together with its provisions in the conventional system, economic-financial profiles also present in the observations of the CESCR (*i.e.*, the impact that the State's capacity to address the costs of education may have). On these bases, the scope of the State's margin of appreciation is proportional to the level of education: the same is broad in the indication of expenses for access to university studies but narrows considerably when it comes to access to primary education.[39] In fact, compulsory education is widely provided, even if it varies over time, in many States; it is recognised as having a fundamental social role in the development of people and is functional to the exercise of other rights.[40]

In this regard, it is worth recalling that the Convention on the Rights of the Child, referred to in the return directive, provides for the objective of making primary education compulsory and free (Art. 28(1)). More incisively, the Charter of Fundamental Rights establishes the right of access of every individual to that level of education. On these bases, following Art. 13(1) of the Covenant on civil and political rights, access to education is to be considered in relation to human dignity, the inviolability of which is established by the Charter itself (Art. 1).[41]

Art. 14 of the directive, as we know, draws the attention also to the access to education. The previous observations are relevant not only from the point of view of the interpretation of that Article, but also for the indications it provides beyond its scope of application.

As for access to medical care, unlike the ICESR,[42] which contains a broad definition of the right to health, the ECHR does not provide for

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[38] ECHR, *Ponomaryovi*, cit., paras. 55, 58 and 60.

[39] There, para. 57; for more indications, see R. PISILLO MAZZESCHI (2020), *Diritto*, cit., 328 ff. For comparative views within the praxis of European States, see EUROPEAN COMMISSION, *The structure of the European education systems. Schematic diagrams Eurydice – Facts and Figures*, available online.

[40] ECHR, *Ponomaryovi*, cit., para. 55 ff. Between these two extremes is secondary education, at stake in the pending process, which is increasingly recognised as having a central role in personal development. In the Italian legal system, see Art. 33 of the Constitution and art. 37 f. of "Testo unico sull'immigrazione" (decreto legislativo no. 286, 18 August 1998).

[41] See CESCR, General Comment no. 13, cit., para. 57.

[42] CESCR, General Comment no. 14, 11.8.2000, *The Right to the Highest Attainable Standard of Health (Art. 12)*, E/C.12/2000/4; see also General Comment no. 19, cit. In the Italian legal system see Art. 32 of the Constitution and Arts. 19, para. 4 and 35 of "Testo unico sull'immigrazione", cit.

that right; this does not exclude that it may operate indirectly for the application of other rights provided for by the Convention.[43] In other words, the Court ascertained the violation *par ricochet* of the Convention due to decisions or behaviours of the Member States harmful to the mental and physical well-being of people.[44]

This is a sector marked by the diversity of practices and legislation between the EU Member States to which that directive refers drawing their attention to access to medical care. In the absence of convergence between the Member States on implementing the right in question, the margin of appreciation allowed to them in that sector is high. In fact, we are dealing with a sector in which, as in others, "such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation".[45] Therefore, national authorities enjoy "a wide margin of appreciation" in implementing the relevant policy choices.

This breadth of the margin of appreciation corresponds to the exceptional nature of the situations in which the Court has found a violation of the conventional rules in the absence of access to medical care.

In this regard, the applicants have invoked health protection needs as limits to expulsion, alleging the violation of Arts. 2, 3 and 8 of the ECHR, often combined with Art. 14. The Court's approach in deciding applications submitted to it limited the protection of the applicants' health to exceptional circumstances as a result of the indirect application of the European Convention. This is a careful approach to avoid the ECHR taking the form of an international act that protects rights of a socio-economic nature, which the Convention does not contain.

Such an approach also characterises cases in which the alleged violation, *par ricochet*, of the absolute right guaranteed by Art. 3 of the Convention comes into play. Art. 3 operates as a limit to expulsion where

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[43] See R. PISILLO MAZZESCHI (2020), *Diritto*, cit., 255 ff.

[44] ECHR, judgment 9.6.1988, application no. 23413/94, *LCB v. The United Kingdom*, paras. 35 ff. and 218 ff.; ECHR, judgment 28.6.2011, application no. 8319/07, *Sufi and Elmi v. The United Kingdom*. See below for the exceptional nature of the approach referred to in the text.

[45] ECHR, Plenary, judgment 19.12.1989, applications no. 10522/83; 11011/84; 11070/84, *Mellacher and Others v. Austria*, para. 45 ff.

"the humanitarian grounds against the removal are compelling".[46] In order for the exceptional circumstances to arise which allow the application of Art. 3, in addition to the seriousness of the clinical picture, the Court initially took into consideration the real risks to which the applicant would have been exposed in the absence of medical treatment in the country of expulsion; in particular, the availability in that country of medical care and assistance provided by the applicant's family members and friends to the applicant. Of course, given the different degrees of medical assistance between those States parties to the ECHR and those of origin of the applicants, Art. 3 could not entail the obligation of the former to reduce these differences, allowing access to medical care to people without the right to stay. Arguing to the contrary "would place too great a burden on the Contracting States".

This is an approach that overlooks the specific vulnerability of the individuals concerned.[47]

However, a less restrictive approach can be deduced from the *Paposhvili* case. In that case, given the possible removal of the applicant, the Court took into consideration its pathology, the existence of a real risk, even if not immediate, of loss of life because of the transfer, the real risk of irreparable deterioration of health conditions, the possible suffering that the person concerned would have faced or the reduction in life expectancy. In addition to being formulated in alternative terms, this condition is not accompanied by the reference, considered in the previous case law, to the presence in the country of destination of family assistance or friends.[48] This results in a reduction of the (exceptional)

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[46] ECHR, Grand Chamber, judgment 27.5.2008, application no. 26565/05, *N. v. the United Kingdom*, para. 42. For critical comments see F. IPPOLITO, C. PÉREZ GONZÁLES (2021), *'Handle with Care'*, cit., 150 ff.

[47] See the joint dissenting opinion of Judges Tulkens, Bonello and Spielmann in *N.*, cit.; the dissenting opinion of Judge Lemmens in ECHR, judgment 4.4.2005, application no. 65692/12, *Tatar v. Switzerland*; the partly concurring opinion of Judges Tulkens, Jočienė, Popović, Karkaş, Raimondi, and Pinto De Albuquerque (para. 5 ff.), in *Mwanje v. Belgium* (ECHR, judgment 20.12.2011, application no. 10486/10, *Mwanje v. Belgium*).

[48] ECHR, Grand Chamber, judgment 13.12.2016, application no. 41738/10, *Paposhvili v. Belgium*, para. 189 ff. In particular, "The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, alt-

conditions that must exist for it to be possible to have access to medical care, albeit indirectly.

Furthermore, in the same judgment, the European Court ruled that the competent State authorities had not conducted an appropriate investigation into the applicant's condition and needs, and that those authorities had not acquired adequate information on the receiving State's situation. In this way, the effectiveness of conventional protection was enhanced considering the applicant's vulnerable situation. This approach recalls the one already followed in the *M.S.S.* case, in which emphasis was placed on people's extreme poverty and dependence on State care and, therefore, the need for social protection of the interested parties. A similar approach can be deduced from the *Tarakhel* case.[49] Of course, unlike the Inter-American Court Human Rights,[50] the European Court has not established a correlation between the condition of irregularity of the migrant and its vulnerability. Moreover, this did not prevent the latter Court from taking into consideration the condition of the extreme vulnerability of the individuals concerned to recognise their social rights.[51]

It follows that considering vulnerability affects the vague nature of the concept of exceptional circumstances, with its three components mentioned above.

Taking that situation into consideration is consistent with checking the reasonableness and proportionality of State activities,[52] and has the

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hough not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness" (para. 183).

[49] ECHR, Grand Chamber, judgment 4.11.2014, application no. 29217/12, *Tarakhel v. Swizerland*; see also ECJ, judgment 24.6.2015, *H.T.*, case C-373/13 ("access to means of subsistence in situations where a refugee's residence permit is revoked").

[50] Judgment 23.11.2010, *Vélez Loor v. Panamá*. See also the *Report* in E/CN.4/2005/85/Add.1, available online; Resolution 1506, 27.6.2006 of the Parliamentary Assembly of The Council of Europe.

[51] ECHR, Plenary, judgment 13.6.1979, application no. 6833/74, *Marckx v. Belgium*; and nt. 52.

[52] See V. ZAGREBELSKY, R. CHENAL, L. TOMMASI (2022), *Manuale*, cit., 50 ff.; the dissenting opinion of judge Lemmens, cit., nt. 50.

effect of mitigating the operation of the margin of appreciation tendentially granted to States in this subject matter.

This may favourably affect the recognition of rights whose scope is above the minimum level of protection that emerges from the operating margin of appreciation in the system of ECHR. On this point, it must be considered that the approach consisting in granting the margin of appreciation, on the one hand, can be subject to critical evaluation as it limits access to some rights considered fundamental; on the other hand, it favours the standardisation of the results following the application of the margin of appreciation as regards the right at stake; through this, it favours the configuration of the human rights' minimum level of protection, as widely provided for in the internal legal systems of the States parties to the ECHR.[53] The case law of other international human rights treaty bodies contributes to this, as well as the dialogue that is established in the matter in question between the European Court and the EU Court of Justice. This is not indifferent from the point of view of the operation of the return directive.

6. The dialogue between ECtHR and ECJ on access to medical care for irregular migrants. Some concluding remarks

The *Paposhvili* judgment, more in line with the individual's personal needs, evokes the approach followed by the Court of Justice, placing the condition of the migrant in the background. That judgment helped to reduce the gap between the previous position taken by the European Court and the one which, in the material sector under consideration, emerges from the judgment of the Court of Justice in the *Abdida* case. In this case, the Court of Justice ruled out the immediate implementation of a decision ordering a third-country national to leave the territory of a Member State, where there is a severe risk of serious and irreversible deterioration of his state of health. Furthermore, the Court established the taking charge, as far as possible, of the primary needs of third-country nationals to guarantee the effectiveness of the care and essential treatment of the disease pending the appeal brought by the same person against the expulsion decision.

Above all, in the dialogue between the two Courts, the judgment in the *X* v. *Staatssecretaris van JustitieenVeiligheid* case is worthy of note.[54]

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[53] See V. ZAGREBELSKY (2019), *Nove anni come giudice italiano a Strasburgo*, in *Quest. giust.*

[54] ECJ, Grand Chamber, judgment 22.11.2022, *Staatssecretaris van Justitie*

Here, the Court of Justice extensively referred to the *Paposhvili* ruling to interpret the scope of Art. 4 of the Charter of Fundamental Rights. The Court of Justice recalled that Art. 3 of the ECHR includes pain resulting from a disease due to natural causes. In light of Art. 52(3) of the Charter, the return decision is likely to violate Art. 4 of the Charter itself, where that decision risks increasing pain. On these bases, the legislative provision of time limits for assessing pain does not exclude that the authorities concretely examine the situation of the person concerned. Furthermore, the Court recalled that Art. 7 of the Charter has the same meaning as Art. 8 of the ECHR and that the medical care a citizen enjoys in the territory of a Member State forms part of his private life, resulting in a possible violation of the corresponding right where there is no access to that treatment. Moreover, unlike Art. 3, Art. 8 has no absolute value, so the right provided by it must be balanced with the general interest in implementing the expulsion or removal decision.

What has been observed in the preceding pages is not indifferent from the point of view of applying Art. 14 of the return directive. In addition to limiting the States' discretion in regulating the situations implicitly but unequivocally referred to, the latter attracts – pedagogically – their attention in general to the need to consider, pending removal, the areas of protection considered. These find their discipline in EU and international law mandatory for the Member States and concisely referred to in Art. 1 of the directive.

Furthermore, regardless of the scope of the application of Art. 14, for the reasons previously stated, those rights must be recognised for all irregular migrants, not only those who cannot be repatriated because of the application of the directive. In effect, the directive concerns third-country nationals irregularly staying on the territory of a Member State, keeping them implicitly but unequivocally distinct from regular ones without identifying and regulating an intermediate *tertium genus*, even though particular attention must be paid to the "special needs" of vulnerable people.

Finally, regarding those individuals, that same provision, read in light of Art. 1 of the EU Charter, allows for an opening to situations of vulnerability in general, even if Art. 3(9) of the directive provides an exhaustive list of "vulnerable persons".

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en Veiligheid, case C-69/21. See also the conclusions of Advocate General N. EMILIOU, cit., *supra*, nt. 10 "étroitement lié au respect de la dignité humaine".