

# Provision of welfare to irregular migrants (PROVIR) - Norwegian perspectives

EMN Conference 10 October 2011

Professor Karl Harald Søvig  
Faculty of law, University of Bergen

# Dilemmas for a (modern) welfare state based on the rule of law

- Regulation of immigration is under public international mainly under the domain of the states (with certain exceptions)
- Restrictions on access to welfare services is a legitimate tool in regulating migration, and the reasoning for limitations may be based on:
  - Lack of connection
  - Prevention
- An expectation (both from the public and from a legal point of view) that a modern welfare state provides health care to all persons being in the country
- Limited knowledge on whether restriction of services have an impact on (irregular) migrations flows



# How big is the challenge?

- Different estimates on migrants without a permit to stay in Norway (Statistics Norway (2008) estimates 18 000)
- The term: “without a permit to stay”, “undocumented migrants” and “illegal stay” etc. is an issue at itself, and not to be discussed here (IRM= irregular migrant)
- The group is defined by immigration law, and the two major groups are
  - Persons entering Norway without necessary permit
  - Persons not leaving Norway after a permit has expired (including those on temporary stay under asylum procedure)
- All persons without a permit to stay may be in need of health services, both in general and due to particular circumstances

# Multilevel regulation

- Human rights
  - UN Convention on migrant workers (UN CMW)
    - Directly addressing the issue (art. 28 and 30), but only ratified by few states
  - UN Covenant on economic, social and political rights
    - No provision targeting UDM, but “case-law” from the committee (see later)
  - European social charter (revisited)
    - Several cases before the Committee (inter alia case 14/2003)
  - Council of Europe (Coe): Res. 1506 (2006) on “Human Rights of irregular migrants”
    - Soft law (not legally binding)
- Also other instruments of interest
  - ILO-conventions, general human rights instruments (European Convention on Human Rights; but few cases on access to services for IRM)



# Multilevel regulation (cont.)

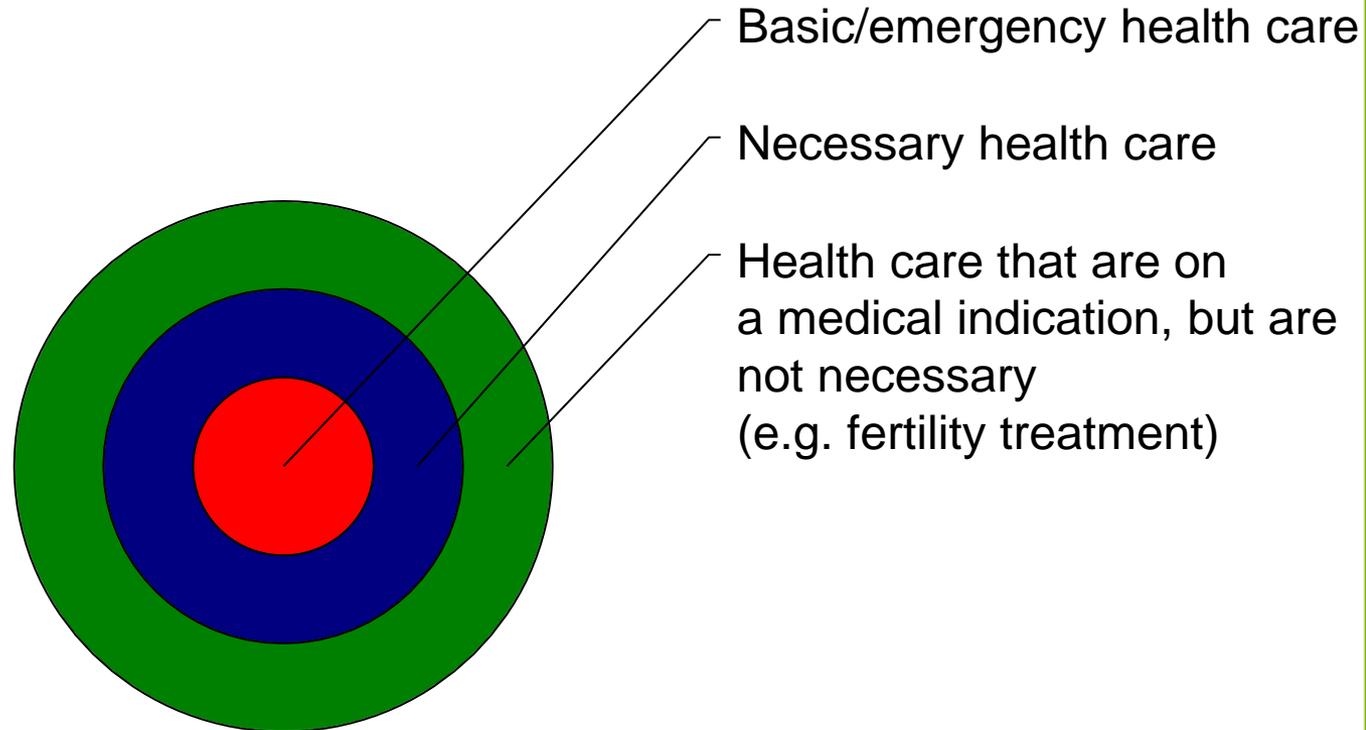
- European Union (and for Norway: EEA)
  - Directive 2008/115 (common standards and procedures in Member States for returning “illegally staying” third-country nationals)
  - Directive 2009/52 (minimum standards on sanctions and measures against employers of “illegally staying” third-country nationals)
  - See also COM 2008 (359)
- National regulation
  - For an overview, see <http://www.nowhereland.info/>
  - For Norway in particular
    - UN ESCR, UN CRC (and three other conventions) are incorporated through the Human Rights Act and with supremacy over concurring legislation
    - Specific provisions in the Patient’s Rights Act etc.

# Two set of approaches

- Irregular immigrants are a group who shall be secured "basic human rights"
  - UN CMV art. 28 ("emergency medical care")
  - Dir. 2008/114 art. 14 ("emergency health care")
  - EU COM (2008) 359 no. 9 ("basic health care")
  - COE Res 1509 13.2 ("emergency health care")
- What is "basic rights" is a question of dispute
  - Some rights are indispensable (right to life)
- Irregular immigrants shall not be discriminated, cf. UN ESCR art. 2 and CESCR General Comment (GC) no. 13 § 34, GC 14 § 34 and GC 20 § 30 (on children) and COE Res 1509 13.3 (children and social protection)
- Basic question: Whom to compare with? Nationals or other groups with a temporary domicile?
- Also this approach has its limits, i.e. fertility treatment

NB: The same instrument can have both approaches, i.e. giving children a more preferable position than adults

# To set of approaches (cont.)



The different approaches can especially lead to different results in the middle (blue) sector (necessary health care)

# Different approaches to different questions

- The irregular immigrants right to ... or the states possibility to deny an illegal immigrant health care services (a negative obligation with positive elements)
  - Best monitored by individual complaints
- The states obligations to facilitate (positive obligation)
  - Has the state an obligation to inform illegal immigrants (i.e. when rejecting their application for asylum) of their rights or an obligation to set up facilities for housing or emergency health care?
  - Best monitored by conventions with a reporting system
- The states obligations to refrain from
  - The states obligation to combat illegal immigration, i.e. by criminalising humanitarian assistance to irregular migrants by civil society
- The fundamental substantial rights must be seen in coordination with other rules
  - Information flow from health personnel to immigration authorities, cf. COE Res 1509 no. 16.4



# Local challenges: Norway as a case study

- Necessary to conduct analysis on each separate field of law. Here: health law as an example
- Historically (i.e. until June 2011) a fragmented regulation, where access to welfare for IRM is not addressed directly in the statutory provisions (but in preparatory works, secondary regulation etc.)
  - As a consequence: Limited political debate
- The revision of the regulation on prioritization from June 2011
  - Clarifies the legal situation, and introduces new legal challenges
  - Children are still in a favourable position compared with adults (and a proposal to limit children's position was not followed up)

# Norway (cont.)

- The revision of the regulation on prioritization from June 2011
  - Clarifies the legal situation, and introduces new legal challenges
  - Children are still in a favourable position compared with adults (and a proposal to limit children's position was not followed up)
  - Still: the services and the costs (IRM are to reimburse the costs, but after treatment) are seen as to different questions
    - Is this reasoning fair and in conformity with human rights obligations?



# Some concluding remarks

- Much public and political debate on IRM. Still; limited legal research
- Regarding adults
  - National legal challenges
  - International legal challenges
    - There is a “legal jungle”. A need for a more coherent approach?
    - IRM as a group, or the need of different sub categories?
- Clear tendency to place children in a more preferable legal position than adults, both in national and international law.
  - However, the legal situation is fragmented, and it would strengthen irregular children's legal position if it was clearer laid down in the wording of the international legal instruments that children should have a special position
- Important not only to focus on the rights of IRM to welfare, but also on the states obligation to facilitate services
  - In this respect medical confidentiality plays a crucial role
- Law in books vs. law in action
  - This is not only about legal phrases, and when appropriate legislation is enacted the work has only begun to secure that the rights of IRM are in fact allocated to them



# Thanks for your attention!

- References

- Cholewinski, R. et. al. Irregular migrants: access to minimum social rights, (Strasbourg: Council of Europe Publishing, 2005) pp. 47-52
- Zhang, L. (2008): Developing methods for determining the number of unauthorized foreigners in Norway. Statistics Norway, Report 11/2008.
- Søvig, K.H. (2011): Provision of Health Services to Irregular Migrants with a Special Focus on Children, European Journal of Health Law 18, pp. 43-54
- Special issue of European Journal of Migration and Law 12 (2010), with contributions from G. Noll et. al.

