Jornal Jurídico

The portuguese approach on undocumented migrants access to healthcare during the pandemic: A new step towards a more inclusive standard policy?

A abordagem portuguesa no acesso não documentado dos migrantes à saúde durante a pandemia: um novo passo para uma política padrão mais abrangente?

Patrícia Correa

Universidade Católica Portuguesa

pelcorrea@yahoo.com

Abstract

Despite being an old problem, the current coronavirus outbreak has shed a light on the lack of access to proper healthcare by undocumented migrants, which is one of the many violations of fundamental rights they face not only in Europe, but also all over the world. However, amidst the global response to the pandemic, the Portuguese policy of granting those migrants full citizenship rights in order to ensure full healthcare coverage has been a much-applauded one. It was of great value to public health and to the protection of other fundamental rights of migrants. This essay addresses the subject from the perspective of the European Union framework, presenting an overview of migrants' access to healthcare in Member States, especially in Portugal. Finally, it raises the question of the Portuguese approach of granting undocumented migrants access to healthcare during the pandemic can be the first step towards a more inclusive standard policy not only in Portugal, but also in Europe.

Keywords: Coronavirus; Pandemic; Undocumented migrants; Fundamental rights; Healthcare.

Resumo

Apesar de ser um problema antigo, o atual surto de coronavírus lançou luz sobre a falta de acesso a cuidados de saúde adequados para migrantes sem documentos, o que é uma das muitas violações dos direitos fundamentais que enfrentam não só na Europa, mas também em todo o mundo. No entanto, no contexto da resposta global à pandemia, tem sido muito aplaudida a política portuguesa de concessão de plenos direitos de cidadania a esses migrantes de forma a garantir uma cobertura integral de saúde. Foi de grande valor para a saúde pública e para a proteção de outros direitos fundamentais dos migrantes. O presente ensaio aborda o tema na perspetiva do quadro da União Europeia, apresentando um panorama do acesso dos migrantes aos cuidados de saúde nos Estados-Membros, especialmente em Portugal. Finalmente, levanta a questão de a abordagem portuguesa de conceder aos migrantes sem documentos acesso aos cuidados de saúde durante a pandemia pode ser o primeiro passo para uma política padrão mais inclusiva não só em Portugal, mas também na Europa.

Palavras-chave: Coronavírus; Pandemia; Migrantes indocumentados; Direitos fundamentais; Assistência médica.

1.Introduction

Immigration into Europe reached a recent all-time high in 2015, due to a large increase in border crossings by citizens of Syria, Afghanistan and Eritrea (European Parliamentary Research Service, n.d.) Since then, the European Union (EU) has implemented measures to better control external borders and migration flows, reducing irregular arrivals by more than 90% (European Council, n.d.)

Despite the decrease, many issues persist. One of them is the access to EU, comprising the ill-treatment of migrant by authorities, entry denial before the chance to apply for protection, and other problems. Other issue comprises the procedures for asylum, with challenges regarding identification, obstacles to the access of legal aids and the duration of the process, either because it is too long or rushed to be concluded faster, with little time for decision-making and appeals. Unaccompanied children poses another issue, as they usually do not have access to proper education while waiting, as well as problems regarding legal representation. Immigration detention is also a problem in many EU member states. Finally, the problem of poor reception conditions, lack of proper accommodation and provision of special care and support (European Agency for Fundamental Rights, 2018).

While all issues remain, the problem of poor reception conditions has come to light in the wake of the coronavirus outbreak. Self-isolation is impossible in overcrowded refugee camps. Many refugees have limited access to water, electricity and hygiene products, and many of them have no access to proper healthcare (Medecins sans frontiers, 2020). Although these problems are more common in refugee camps, migrants face similar situations all over EU, with limited healthcare services (as of 2017, no EU member Stater had an ongoing health strategy or action plan designed by ministries responsible for Health to specifically target migrants) (European Commission, 2018).

In this context, considering the fundamental nature of the right to health and the ongoing pandemic, it is of absolute importance that the needs of refugees and migrants are included in EU Member States health policies in response to COVID-19.

2.Migrants' Right of Access to Healthcare in the EU: A Brief Overview

The human right to health is a universal one (United Nations, 1948). The European Convention on Human Rights, however, does not explicitly state the human right to health, and the European Court of Human Rights (ECHR) has ruled that the Convention "…does not guarantee the right to any particular standard of medical services or the right to access to medical treatment in any particular country" (ECHR, *Wasilewski v. Poland*, 1999). Filling in the gap, the Charter of the

Fundamental Rights of the EU provides for the right to preventive health care and medical treatment in its Article 35. It also states that "A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities."

This protection is also granted to nationals of third countries legally residing within EU, according to the Council Regulation 859/2003, which extends the provisions of other Regulations on social security to nationals of third countries not already covered on the ground of nationality. Council Directive 2003/109 provides that long-term residents shall enjoy the same access to healthcare as nationals as defined by national law.

As to individuals to whom refugee status or subsidiary protection has been awarded, Directive 2011/95 grants access to adequate healthcare under the same eligibility conditions as nationals of the EU Member State with the same protection. During the asylum procedure, the applicants for international protection shall, at least, receive emergency care and essential treatment for illnesses and serious mental disorders, in accordance to the Directive 2013/33/EU (Reception Conditions Directive). It depends, however, on national legislation and so the level of protection is different in every Member State.

According to the World Health Organization (WHO), legal status is one of the most important determinants of the access of migrants to health services in a country (WHO, "Migration and health: key issues", n.d.) As indicated above, there are legal instruments assuring access to healthcare to legally resident migrants. Irregular migrants' access to healthcare, in general, is left to the discretion of each Member State. EU-level protection is scarce and only covers specific situations. This stems from the shared competence of the EU on national healthcare systems, according to Article 4(2)(k) of the TFEU. In relation to the period for voluntary departure and during periods for which removal has been postponed, emergency health care and essential treatment of illness must be provided according to Article 14 of the Directive 2008/115 (Return Directive). The same protection must be ensured for detained irregular migrants (Article 16(3)).

The situation of non-removable migrants is no better. Non-removable migrants, as Queiroz (2018) puts it, "…are third-country nationals who are illegally staying in the host Member State and have an atypical immigration legal situation", deriving from the combination of legal and illegal dimensions of that situation. The basic level of protection they are entitled to is also at Member States' discretion, falling in the scope of the Return Directive.

Regarding the subject, the ECHR has held that the expulsion of an HIV patient to Uganda, with uncertain access to medical treatment was not a violation of either Article 3 or Article 8 of The European Convention on Human Rights (ECHR, N. v. *The United Kingdom*, 2008). Regarding Article 3, the ECHR stated that ill-treatment must attain a minimum level of severity to constitute a violation of the prohibition of torture. The suffering from naturally occurring illness may be covered by Article 3 only in cases it is, or risks being, exacerbated by conditions of detention, expulsion or other measures (ECHR, N. v. *The United Kingdom*, 2008, para. 29). In these terms, the ECHR took the view that the expulsion of a dying HIV infected person to his country of origin where he

would not have access to adequate medical treatment, would amount to a violation of Article 3 (ECHR, D. v. *The United Kingdom*, 1997).

Along the same lines, in the joined cases *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, the Court of Justice of the European Union (CJEU) has held that "it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the [European Convention on Human Rights] (CJEU, 2011).

The *Abdida* case (CJEU, "Judgement", 2014) is also important. It regards social benefits that a Member State is required to grant to third-country individuals whose state of health require treatment while those persons await a ruling on the lawfulness of the decision rejecting the application to reside on medical grounds and ordering the departure from national territory. In his Opinion, General Advocate Bot held that despite the discretion of Member States to determine the extent of the provision for basic needs stated in Directive 2008/115, they should ensure that "…the subsistence needs of the person concerned are catered for as well as a decent standard of living adequate for that person's health…" (CJEU, "Opinion", 2014).

The Court endorsed Bot's Opinion, holding that the Directive provision must be interpreted as precluding national legislation that does not provide for the basic needs of a third country national suffering from a serious illness. The individual must have access to emergency healthcare and essential treatment of illness during the period in which the Member State concerned is required to postpone removal of the third country national following the lodging of an appeal against a decision ordering that person's return (CJEU, "Judgement", 2014, para. 62).

In this context of fragile protection and somewhat wide Member State discretion, the EU Commission issued a Communication providing for guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement during the pandemic (EU, 2020). The measures taken in the area of asylum, resettlement and return should also take full account of the health protection measures introduced by the Member States on their territories to prevent and contain the spread of the virus. It also states that treatment for COVID-19 shall be included in the scope of the health provisions of the Reception Conditions Directive and Return Directive.

Summing up, the access to healthcare for illegal immigrants in the EU is generally limited to emergencies or, as this pandemic have highlighted, when it poses a risk to the public health. Moreover, it falls within discretion of Member States, what reflects a lack of harmonization that hampers enforcement and supervision of minimum mandatory standards stated by EU regulations.

2.1. National health strategies within EU: Some illustrative examples

As of the end of 2017, no EU Member States had an ongoing health strategy or action plan specifically designed to target migrants (European Commission, "European Website on Integration…", 2018). Despite the lack of specific strategies, the Commission points out that

some countries started to issue recommendations for good practices regarding immigrants' healthcare following the refugee arrivals of 2015. As examples, the Commission cites Finland, United Kingdom, Italy, Sweden, Greece and Cyprus.

Assessing those countries' policies today – except for the United Kingdom that is no longer a Member State – it becomes clear that they are primarily aimed at legal migrants, refugees or asylum-seekers, also evidences the limbo situation of illegal and non-removable migrants. It usually includes only emergency and urgent care, except for pregnant women and children, who usually have access to a broader range of healthcare. This is, broadly, the case in Finland (FINLAND, n.d.), in Italy, in a program that also includes specific guidelines for the health of the detained and for tuberculosis care and prevention (ITALY, n.d.), in Sweden (SWEDEN, 2020), in Greece (in the context of the PHILOS program, designed to address the sanitary and psychosocial needs of refugees living in the open camps) (GREECE, n.d.) and in Cyprus (CYPRUS, n.d.).

The Commission goes on to praise the Maltese strategies addressing migrant health, noting the creation of a department dedicated solely to migrants and their access to healthcare (European Commission, 2018). However, the rights to undocumented migrants, as in the other countries mentioned, are limited do "emergency healthcare and essential treatment of illnesses, including of serious mental disorders" (MALTA, 2020).

The situation of illegal immigrants' access to healthcare in Spain is much better. Until 2012, illegal immigrants used to have access to healthcare. However, with the approval of Royal Decree-Law 16/2012, undocumented immigrants over 18 years of age could no longer access full healthcare, only emergency care (BOSO & VANCEA, 2016). In 2018, however, the Royal Decree-Law 7/2018 on universal access to the National Health System restored this right, granting full healthcare access to foreign individuals not registered or authorized as residents in Spain (SPAIN, 2018).

3.The Portuguese Response to the Pandemic: Granting Migrants Full Citizenship Rights In Order To Facilitate Healthcare Access

The right to health is set out in the Article 64 of the Portuguese Constitution. Up until 2019, illegal migrants were not explicitly entitled to general access to healthcare. The now revoked Law 48/90, which used to set the bases of Portuguese national health system, stated that were recipients of the national health system the Portuguese nationals, nationals from EU State Members, foreign legal residents in condition of reciprocity and stateless persons (Article XXV).

Nowadays, as stated by Law 95/2019, migrants with or without legal status are also entitled to healthcare, in accordance with the applicable legal framework (Article 21). That Law came into force in November 2019 and, to date, there is no specific regulation revoking the Order 25360/2001 that regulated the now revoked Law 48/90.

The current Strategic Plan for Migration establishes the need for a new regulatory Order (PORTUGAL, 2015-2020). In that context, despite the new wording by Law 95/2019, the access to health by undocumented migrants still refers, in practice, to emergency care and other specific cases (such as infectious diseases and protection of public health). One interesting exception stated in Circular 12/DQS/DMD refers to those in precarious social and economic situation attested by the Social Security Services (PORTUGAL, 2009, para. 7). In other situations, the access is not free of charge (PORTUGAL, 2015) – undocumented migrants pay "full" prices, whereas Portuguese nationals and legal migrants pay less due to "moderation tax"; and the patient have to submit a certificate of residence (PORTUGAL, 2001). In case no certificate is provided, the migrant still have access to healthcare. However, healthcare staff shall refer the situation to the immigration authority, what contributes to hamper access by migrants fearful of possible negative consequences (PORTUGAL, 2009, para. 6).

Nevertheless, in order to ensure their full access to proper healthcare during the pandemic, the Portuguese Government has granted full citizen rights to undocumented migrants who had already filed their residence paperwork within the immigration authority before the declaration of the state of emergency. According to the Order n.º 3863-B/2020, those migrants with pending regularization processes should be regarded as legal residents for all purposes, including for access to healthcare in the same conditions as Portuguese nationals (PORTUGAL, 2020).

Despite not including all undocumented migrants, but only those who had already applied for residency, that was a groundbreaking and much praised move. (ALBERTI & COTOVIO, 2020) (RAMIRO, 2020). Many irregular migrants now have access to preventive and primary healthcare, on top of emergency care. This is of essential importance, especially in the COVID-19 pandemic context, in which comorbidities increase death risk (GUAN, 2020).

4.Concluding Remarks

This coronavirus outbreak has highlighted an old problem: the restricted access to proper healthcare by irregular migrants. The hindered and partially restricted access indicates inequities between them and the national and legal resident population and violates their human right of access to healthcare. Up to 2018, the ethical principles do good, respect, and equity regarding undocumented migrants' access to healthcare were still unfulfilled in Europe and can only be achieved with EU cooperation on a legal base (BOLLIGER & ARO, 2018).

Many factors directly affect undocumented migrants' access to healthcare services, being legal status the most important (CHIARENZA *et al*., 2019). As previously demonstrated, many countries legally limit access by undocumented migrants to emergency healthcare (and other specific situations, such as the case of children and pregnant women, who have special attention). It has been demonstrated that

solutions aimed only at responding to emergencies "…often lead to fragmented and chaotic interventions, devolving attention from the need to develop structural changes in the EU health systems" (CHIARENZA *et al*., 2019).

Furthermore, there is the discretion of Member States to define their own policies, leading to significant differences in the treatment of the subject within EU, even though access for illegal immigrants is usually limited to emergencies or situations that pose a risk to public health (such as infectious disease). In contrast, Spain has recently granted full healthcare access to undocumented migrants and Portugal also has a more favorable legislation on the subject, having broadened its scope in the awake of the current coronavirus outbreak.

The cases of Spain and especially of Portugal could be indicative of future change regarding migrants' access to healthcare. Notwithstanding the lack of concern for those undocumented migrants that had not yet applied for residency by the time of the declaration of the State of Emergency, the Portuguese response to the matter emphasizes the need for inclusion of migrant and refugee populations in health protection responses. This is true especially because granting proper healthcare to undocumented immigrants is paramount to overall public health. The jurisprudence follows, Courts having held in some cases that legislation of Member States should provide for emergency care at least.

Despite the progress in national level, an EU-level approach to the subject would definitely render more effective results. It is important to notice that the EU competence on public health is shared with Member States, according to TFEU's Article 4(2)(k). By means of the Article 6(a) of the TFEU, the EU have competence to carry out actions to "support, coordinate or supplement the actions of the Member States".

In addition, it must be noted that the EU shall "respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care" (Article 168(7)). So, while it is up to the Member States to manage their health services, including the allocation of resources, the EU shall guarantee "[a] high level of human health […] in the definition and implementation of all Union policies and activities" (Article 168(1)).

In spite of the discretion of Member States to set up and manage their own health systems, the EU's obligation of ensuring a high level of human health leads to the need of more proactive action and regulation, as was the case with many EU's norms regarding migration that reflects on their access to healthcare (such as the Return and the Reception Conditions Directives).

Besides, according to Article 79 of the TFEU, the EU "shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows […]". Coupled with the obligation to guarantee optimal level of human health, it is hard to envision a policy of management of migration flows that do not ensure access to healthcare to undocumented migrants.

In light of the above, an EU-level harmonization of the subject would be more effective than just leave the migrants' (especially undocumented ones) access to healthcare to the discretion of Member States under their competence on health

system management. It would be optimal, therefore, if broader minimum standards were stated by EU regulation, thus guiding Member States national legislation towards more inclusive healthcare policies regarding undocumented migrants.

BIBLIOGRAFIA

ALBERTI, Mia; COTOVIO, Vasco. *Portugal gives migrants and asylum-seekers full citizenship rights during coronavirus outbreak* (31 March 2020). https://edition.cnn.com/2020/03/30/europe/portugal-migrants-citizenship-rights-coronavirus-intl/index.html

BOLLIGER, Larissa; ARO, Arja R. *Europe's Refugee Crisis and the Human Right of Access to Health Care: A Public Health Challenge from an Ethical Perspective*. Harvard Public Health Review. Vol. 20 (Fall 2018).

BOSO, Alex; VANCEA, Mihaela, *Should Irregular Migrants Have the Right to Healthcare: Lessons Learnt from the Spanish Case*. Critical Social Policy 36, no. 2 (May 2016) pp. 225-245.

CHIARENZA, A.; DAUVRIN, M.; CHIESA, V. et al. *Supporting access to healthcare for refugees and migrants in European countries under particular migratory pressure*. BMC Health Serv Res 19, 513 (2019). https://doi.org/10.1186/s12913-019-4353-1

CJEU. Case C-562/13. Judgement (Grand Chamber) of 18 December 2014.

_____. Case C-562/13. Opinion of General Advocate Bot of 4 September 2014. para. 157.

____. Joined Cases C-411/10 and C-493/10. Judgement (Grand Chamber) of 21 December 2011. para 80.

CYPRUS. Asylum Service. *Guide for Applicants of International Protections*. http://www.moi.gov.cy/moi/asylum/asylumservice.nsf/asylumservice10_en/asylumservice10_en?OpenDocument

ECHR. D. v. The United Kingdom, no. 30240/96, 1997.

_____. N. v. The United Kingdom [GC], no. 26565/05, 2008.

_____. *Wasilewski v. Poland* (dec.), no. 32734/96, 1999. para. 2.

EU. Communication from the Commission. COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement (2020/C 126/02).

__. Council Directive (EC) no. 2003/109 of 25 November 2003.

__. Council Regulation (EC) no. 859/2003 of 14 May 2003.

__. Directive 2008/115 of the European Parliament and of the Council of 16 December 2008.

__. Directive 2011/95 of the European Parliament and of the Council of 13 December 2011.

__. Directive 2013/33 of the European Parliament and of the Council of 26 June 2013.

__. European Agency for Fundamental Rights. Migration to EU: Five Persistent Challenges (Feb. 2018) https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-february-migration-report-focus-five-challenges_en.pdf

__. European Commission. European Website on Integration. Migrant Integration Information and good practices. Migrant health across Europe (12 February 2018) https://ec.europa.eu/migrant-integration/feature/migrant-health-across-europe

__. European Council. EU migration policy. N.d. https://www.consilium.europa.eu/en/policies/migratory-pressures/.

__. European Parliamentary Research Service. Migration and Asylum. N.d. https://www.europarl.europa.eu/thinktank/infographics/migration/public/?page=migration.

FINLAND. Finnish Institute for health and wellbeing. Immigrants' health and wellbeing. https://thl.fi/en/web/migration-and-cultural-diversity/immigrants-health-and-wellbeing

GREECE. National Public Health Organization. Philos. https://eody.gov.gr/en/philos/

GUAN, Wei-jie et al. Comorbidity and its impact on 1590 patients with Covid-19 in China: A Nationwide Analysis. The European respiratory journal, 2020, 55: 2000547. Advance online publication. https://doi.org/10.1183/13993003.00547-2020

ITALY. National Institute for Health, Migration and Poverty. Migrant Health Guidelines. https://www.inmp.it/index.php/ita/Rete-Nazionale/Linee-Guida-Salute-Migranti

MALTA. Health Entitlement to Refugees/Migrants (2020). https://deputyprimeminister.gov.mt/en/cbhc/Pages/Entitlement/Health-Entitlement-to-RefugeesMigrants.aspx

Medecins sans frontiers. Evacuation of squalid Greek camps more urgent than ever over COVID-19 fears (12 March 2020). https://www.msf.org/urgent-evacuation-squalid-camps-greece-needed-over-covid-19-fears

PORTUGAL. Directorate General for Health. Informative Circular no. 12/DQS/DMD (07 May 2009).

PORTUGAL. Strategic Plan for Migration (2015-2020). https://dre.pt/application/conteudo/66807913 (p. 10).

__________. Health Regulatory Entity. Access to Healthcare by Immigrants (June 2015). www.ers.pt/uploads/writer_file/document/1480/Estudo_ERS_-_Acesso_a_Cuidados_de_Saude_por_Imigrantes__v2_.pdf (p. 60)

__________. Order 25360/2001, Articles 4 and 5.

__________. Order no. 3863-B/2020, article 1.

QUEIROZ, Benedita Mendes. *Non-Removable Migrants in Europe: An Atypical Migration Status?* European Public Law vol. 24, no. 2 (2018) pp. 281-310.

RAMIRO, Joana. Faced With Coronavirus, Portugal Is Treating Migrants as Citizens — We Should, Too. Jacobin (2 April 2020). Retrieved from https://jacobinmag.com/2020/04/coronavirus-portugal-regularize-migrants-citizenship-covid-health

SPAIN. Real Decreto-ley 7/2018, de 27 de julio, sobre el acceso universal al Sistema Nacional de Salud.

SWEDEN. Sweden Migration Agency. Health care for Asylum Seekers (8 January 2020). https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/While-you-are-waiting-for-a-decision/Health-care.html

United Nations. The Universal Declaration of Human Rights, 1948. A/RES/217(III). Article 25.

WHO. Regional Office for Europe. Migration and health: key issues. n.d. http://www.euro.who.int/en/health-topics/health-determinants/migration-and-health/migration-and-health-in-the-european-region/migration-and-health-key-issues