

**MIGRANT WOMEN'S ACCESS TO JUSTICE IN SPAIN.  
SPECIAL REFERENCE TO WOMEN IN AN  
IRREGULAR ADMINISTRATIVE SITUATION**

**Contribution to the General Discussion  
on “access to justice” of the  
Committee on the Elimination of All  
Forms of Discrimination against  
Women (CEDAW)**

Report by:



Andalucía **Acoge**

Member of:

 **PICUM**

PLATFORM FOR INTERNATIONAL COOPERATION ON  
UNDOCUMENTED MIGRANTS

## FIRST. MIGRANT WOMEN (THIRD COUNTRY NATIONALS) IN AN IRREGULAR SITUATION, VICTIMS OF CRIMES SUCH AS THEFT, LESIONS, SEXUAL AGGRESSION, ETC.

- ✘ **Opening of an administrative disciplinary file of expulsion for foreign individuals in irregular situation in Spain who have resorted to the police to report having been victims of crimes such as theft, lesions, sexual aggression, etc.<sup>1</sup>**
- ✘ **Similarly, there are cases in which the disciplinary file was ended with the establishing of a fine.**
- ✘ The Spanish Ombudsman has pointed out that the situation of administrative irregularity and the inherent fear that such a situation will be criminalised by the authorities, contribute to “ensuring the impunity for certain types of crimes—and particularly those that are based on a situation of material lack of protection for the victim—or, at the very least, to notably hinder their persecution”. This mechanistic practice increases the margin of impunity for perpetrators and can lead to migrants’ criminalisation, as they become easy targets due to their particular institutional vulnerability. For example, the Ombudsman has pronounced himself on this matter:
  - ✘ In his Year Report of 2004, he formulated **Recommendation 70/2004** of 21 September, regarding the treatment of migrants in irregular situation who turn to the police to denounce a crime of which they have been victims, establishing the following: **“By this General Directive, appropriate instructions are given to the effect that no administrative file sanctioning a crime be initiated, under the Aliens Act, towards foreigners in irregular situation that turn to police stations to report having been victims of a crime”**.
  - ✘ In his Year Report of 2005, he insisted on the relevance and legality of the abovementioned Recommendation, even though in his 2006 Report he made reference to the fact that the Ministry of Security and the Ministry of Migration had rejected the Recommendation of the Ombudsman.

<sup>1</sup> Cases detected in our member organisations on a daily basis. It is not unfounded to affirm that there have been and will be many other cases that go undetected.

## SECOND. MIGRANT WOMEN (THIRD COUNTRY NATIONALS) IN AN IRREGULAR SITUATION, VICTIMS OF VIOLENCE AND OFFENCES AGAINST SEXUAL FREEDOM

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The Help and Assistance to Victims of Violent Crimes and Crimes Against Sexual Freedom Act (*Ley de ayudas y asistencia a las víctimas de delitos violentos y contra la libertad sexual*, Law no. 35/95, of 11 December 1995), establishes, in its Article 2.1<sup>2</sup> the beneficiaries of an Act the purpose of which is to provide help to victims of violent intent crimes that have as result death, grave bodily injury or grave physical or mental health harm.<sup>3</sup>

- ❏ Migrant victims who do not have a regular residence status in Spain are excluded from the right to obtain the corresponding help and protection. This applies as well to those women who have subsequently regularised their residence status but who, at the time of the crime, had an irregular status.
- ❏ It is further ignored that:
  - ❏ This social group is in need of institutional support, as it is at greater risk of being subject of violent crimes, with a racist or xenophobic undertone.
  - ❏ There is a public interest for supporting potential victims of human trafficking with the purpose of sexual exploitation or irregular migration, as an instrument to support the persecution of mafias.

Andalucía Acoge has sought the modification of this Act since 1999.<sup>4</sup>

<sup>2</sup> Article 2. Beneficiaries

**1. Eligible for protection** shall be those victims who, **at the time when the crime was perpetrated**, were Spanish nationals or nationals of any other Member State to the European Union or **those who, not being such, have permanent residence in Spain or are nationals of another state that recognises a similar assistance to Spanish citizens in its own territory.**

In case of death, the abovementioned provisions shall be payable to the beneficiaries by way of indirect victimhood, regardless of the nationality or usual residence of the deceased.

<sup>3</sup> Article 1. Objective

1. A system of public aid is established to benefit the direct and indirect victims of violent and fraudulent crimes committed in Spain that result in death or serious bodily injury or serious damage to physical or mental health.
2. Also eligible for aid under this Act are victims of crimes against sexual freedom, even if they were perpetrated without the use of violence.

<sup>4</sup> See the book "PROPUESTAS PARA UNA POLÍTICA ALTERNATIVA SOBRE INMIGRACIÓN", pages 98-99, available on the website of Andalucía Acoge. Link: <http://www.acoge.org/index.php/es/documentacion/publicaciones/politicas-alternativas>

### **THIRD. MIGRANTS WOMEN (THIRD COUNTRY NATIONALS) IN AN IRREGULAR SITUATION, THAT HAVE BEEN DEPRIVED OF THEIR LIBERTY BY BEING HELD IN AN IMMIGRATION DETENTION FACILITY (CENTRO DE INTERNAMIENTO DE EXTRANJEROS, CIE) WAITING FOR THE EVENTUAL EXECUTION OF AN EXPULSION ORDER OR DEPORTATION FROM THE COUNTRY**

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NGOs and other Spanish organisations monitoring the situation in migration detention facilities and the conditions of detained individuals, agree in highlighting the almost complete lack of access that they have to these women. It is an inaccessible social group, due to diverse issues, but this has as a consequence that the possibility of suffering situations of discrimination tend to be larger.

The invisibility of these women is, in itself, a large hurdle to their right of access to justice and therefore adequate solutions must be found by the state and NGOs together.

The situation of women detained in migration detention facilities has been specifically dealt with in a Report of the international human rights organisation Women's Link Worldwide.

Within the general group of women in detention centres, special attention must be given to women who may have been victims of human trafficking. We shall refer to them specifically in a later section.

### **FOURTH. MIGRANT WOMEN (THIRD COUNTRY NATIONALS) VICTIMS OF GENDER VIOLENCE**

We second the Amnesty International Report of 2012<sup>5</sup> that presents an overview of the past seven years since the enactment of the Comprehensive Act against Gender Violence (Ley Integral contra la Violencia de Género, Ley Orgánica 1/2004, of 28 December 2004).

AI has identified six realms that are particularly worrisome, since they evidence the great lack of protection and/or lack of due diligence in the protection of women and girls victims of violence that have decided to report the matter:

1) The right to obtain adequate information about their rights. Nevertheless, “the organisation [AI] keeps finding cases of women that lack effective access to this basic right that shall be secured from the beginning. It is worrisome that this obstacle grows even larger for women with less knowledge of the language and/or their rights and less knowledge of how the criminal system works. Amnesty International reminds of the importance of ensuring quality interpretation, both at the police

<sup>5</sup> Link to the Report in Spanish: “¿Qué justicia especializada?. A siete años de la Ley Integral contra la Violencia de Género: Obstáculos al acceso y obtención de justicia y protección”: <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/Que%20justicia%20especializada.informe%202012?CMD=VEROBJ&MLKOB=32130865353>

station and in courts. The lack of them, or their lack of quality can become a critical obstacle that prevents many foreign women to have access to and obtain justice and protection”.

2) A deficit in the availability and quality of legal assistance. Currently, budget cuts in the Justice sector may be undermining even further the availability of appointed legal counsel. AI has documented cases in which women victims only met with their legal counsel mere minutes before the proceedings began.

3) Lack of diligence in the criminal investigation. Oftentimes the victim herself has to submit the appropriate evidence and thus runs the risk of dismissal without any ex-officio investigation by the competent courts or the prosecutor.

4) Without “physical marks”, obstacles multiply. According to the same report “It is of concern the lack of resources available for the investigation of cases of psychological harassment, threats and other forms of psychological violence. Amnesty International has documented cases in which this type of conduct, that has great impact on the psychological integrity of women, is not properly investigated and remains unpunished”.

5) Counterclaims as an impunity strategy. There can be said to be *re-victimisation*. Thus, “the double condition of victim-defendant is used by some aggressors to negotiate the non-appearance of the woman in the trial, which often results in an acquittal for both parties”.

6) Prejudice and disrespectful treatment in the obtainment of victim testimony. Foreign women in irregular situation face comments or suspicion related to the use of the complaint to obtain a residence permit. They are also subject to harsh interrogations in an attempt to “discredit” their testimony, a practice contrary to the recommendations of international organizations.

## **FIFTH. FOREIGN WOMEN (CITIZENS OF THIRD COUNTRIES) VICTIMS OF HUMAN TRAFFICKING**

Our basis is the definition of Human Trafficking established in the Council of Europe Convention no. 197, on Action against Trafficking in Human Beings, no. 197, of 16 May, 2005:

“recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. *Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;*”

- As pointed out in a Report of Migreurop España<sup>6</sup>, it is **“worrysome that the status of refugee has not been granted to any victim of human trafficking in Spain**. This is due to the fact that the state is interpreting the international norm on asylum and subsidiary protection wrongly, when understanding that the victims of human trafficking have a protection system already established in the aliens regulations that excludes the access to the international protection system [...]”. This report quotes the Final Observations contained in CEDAW reports for several years, that point in the same direction.
- Related to our third contribution, women victims of human trafficking (with the purpose of sexual exploitation or other), suffer the additional invisibility given by placement in CIE** as a precautionary measure seeking to guarantee the execution of expulsion and deportation orders.
- We have been made aware of cases of **women, potential trafficking victims, separated from their underage children**: the women in CIE centers and the children under the custody of Child Protective Services of the appropriate Spanish authorities. Some aspects that have presented deficiencies in their daily practice are: adequate access to justice that guarantees the right of mothers to a visitation regime with their children, correct legal counsel that prevents minors from being declared neglected or abandoned, etc.

## SIXTH. FOREIGN WOMEN (CITIZENS OF THIRD COUNTRIES) IN A REGULAR STAY SITUATION

Having legal residence does not prevent foreign women from being a target for discrimination, particularly referring to access to justice in fair and equal conditions.

In this line, it is necessary to quote from the Decision by the TEDH of 24 July 2012, on the matter B.S. v. España, that condemned this country for violating the right of Beauty Solomon, a Nigerian woman, legally residing in Spain, to freedom from inhuman or degrading treatment and freedom from discrimination, by not fulfilling its obligation of conducting an effective investigation into the sexist and racist acts of police violence denounced by her.

- The decision in the matter B.S. v. España<sup>7</sup> sets an extremely important precedent, since it recognises the extreme vulnerability that African women face (in this case, even when their residence situation in the country is regular). The concept of “intersectionality”<sup>8</sup> is taken into

<sup>6</sup> Report “La protección de los derechos de las personas migrantes en Europa: España”, November 2012. It is a report presented before the Human Rights Commission of the Council of Europe available at the following link: <http://www.acoge.org/index.php/es/documentacion/informes/comision-europea>

<sup>7</sup> Link: [http://www.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id\\_decision=445](http://www.womenslinkworldwide.org/wlw/new.php?modo=observatorio&id_decision=445)

<sup>8</sup> See, for example, General Recommendation nº 28 of the CEDAW Committee, regarding Article 2 of the Convention for the Elimination of All Forms of Discrimination against Women Doc. ONU CEDAW/C/GC/28, of 16 December 2010: “Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in

account in this sentencing. The defence and legal representation were undertaken by the international human rights organisations Women's Link Worldwide.

## SEVENTH. OTHER DIFFICULTIES

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We would also like to make a note of other issues in which the foreign woman may be suffering discrimination in her attempt to have access to justice:

A) Regarding the legal custody of minors, in the context of criminal proceedings related to abuse against women: on many occasions, the legal position of the children of the couple is not addressed; therefore if the man is expelled from the country, any legal proceeding in Spain that affects their children is subject to obtaining the previous consent of the abuser.

B) Single mothers: as an example, Moroccan mothers who, because they cannot obtain documents for their children in their Consulate (as there is "no man present"), then face difficulties when carrying out procedures such as applying for citizenship in Spain.

C) Women in irregular situation that apply for and obtain the Presumption of Spanish Nationality for their children (born in Spain) and, upon applying for identity papers for their children at the local police headquarters, are open to expulsion proceedings for being in Spain irregularly (even though it seems that with the Family Origins<sup>9</sup> reform, this practice is rather residual).

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article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men [...]"

<sup>9</sup> Reform introduced in the Aliens Regulations (Reglamento de Extranjería, RD 557/2011), in compliance with the judgment of the STJUE of 8 March, 2011, Case C-34/09, Gerardo Ruiz Zambrano vs. Office national de l'emploi (ONEm).