Food, Shelter, and Health Services

The State's Responsibilities Regarding Persons Without Legal Residence

Senter mot etnisk diskriminering

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Written by Ann Helen Aarø and Heidi Wyller

Mailing Address:
P.O. Box 677 Sentrum
NO-0106 Oslo, Norway

Street Address:
Prinsensgate 22, Oslo, Norway

Tel.: +47 22 24 69 70
Fax: +47 22 24 69 72
E-mail: smed@smed.no
Website: www.smed.no

Design: Cazawa Dezign
Illustration: M.M. Malvin
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FOREWORD

Since 1998, The Centre for Combating Ethnic Discrimination (SMED) has provided individuals with legal aid and contributed to the documentation of the variety and scope of discrimination in Norway. Our documentation has been primarily based on our legal aid work. Through the course of providing legal aid we have encountered individuals in need of help as a result of experienced discrimination; some face acutely difficult circumstances, while others seek answers to less pressing questions.

This report, "Food, Shelter, and Health Services," is based on information collected while providing legal aid to persons without legal residence status, who were effected by the State's attempts to "rationalize" immigration policy. In the interest of ensuring true accessibility, SMED accommodated its legal aid services to meet the needs of those without a permanent address, telephone, or the ability to communicate through written or spoken Norwegian. These individuals found themselves in extremely difficult circumstances.

SMED provided aid to individuals who were without food, shelter, or other basic necessities after having lost the right to housing in a reception centre, or to public subsistence benefits, because they did not wish to cooperate in being returned to their country of origin. SMED documented these individuals' attempts at maintaining a basic level of subsistence through contacting public welfare agencies. We were able to see how difficult it is for individuals in such a vulnerable position to argue their own case before public authorities; some were sent away, others had their applications rejected, and those who did receive help received highly variable treatment.

Should SMED be engaged in cases were questions of law, ethics, and politics melt together? In making this report we have done so. Questions regarding which policies should be implemented in order to reduce the number of groundless applications of asylum and to ensure that as many as possible voluntarily return to their country of origin are ethical and political in nature. The value judgements relevant to answering these questions, however, are irrelevant with concern to whether or not the policies are legitimate with respect to the affected individuals- whether or not the policies are, in fact, legal. The question which SMED seeks to answer is whether or not these people were subjected to discrimination or other forms of injustice, and whether or not the authorities acted sufficiently in order to ensure that also members of this group were ensured the- admittedly few- rights to which they are entitled.

SMED's primary focus in this report is the consequences faced by individuals who applied for, and were ultimately denied, help in obtaining food and shelter, because they would not comply with policies requiring them to voluntarily return to their country of origin. Whether or not individuals are subjected to unduly harsh treatment as the result of official policies regarding access to food, shelter, and necessary health services is not just a question of ethics or politics, it is also a question of basic human rights.

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1 INTRODUCTION

1.1 SELF-INFLICTED EMERGENCY?

Let's call him Jamshed. Jamshed came to Norway from an African country in 1993. Young and healthy, motivated for work and education. He sought asylum, was granted a temporary work permit, started education and found a partner.

The authorities rejected the asylum application, and cast doubt on his identity and need of protection. At the time the rejection came Jamshed and his girlfriend were expecting their first child, and his desire to remain in Norway was heightened. Jamshed applied for family reunification, but was rejected. The authorities tried in vain to return him to the country that they believed to be his country of origin.

The relationship with the child's mother ended, and in the same way as in many break-ups, attempts to reach an agreement on access to the child failed. The mother did not want the father to visit the child, and Jamshed brought the case to court. Jamshed's problem was that the court for its part could only grant limited access because he did not have a residence permit, and could be deported, and that the immigration authorities for their part would not give him a residence permit because the access arrangements were not of sufficient scope. Jamshed believed that the way in which the immigration authorities and the court presented their arguments, each on their side, put him in an impossible situation.

However, by the beginning of 2004, Jamshed's situation became even worse; he could not renew his temporary work permit, he lost his established offer of housing at a reception centre, and his application for benefits through the Social Services Act was rejected. Jamshed's safety network now comprised his own private network with many who were in the same situation as himself. This became too much for Jamshed, he was admitted to hospital as an emergency measure, since he was depressed and suicidal. The institution that treated Jamshed chose to extend the treatment because the doctor knew that Jamshed had no offer of care once he was discharged.

For Jamshed the turning point came at the eleventh hour; the High Court, as the second court of appeal, ruled that he and the child's mother should have divided parental responsibility and that he should have access rights to his daughter. UNE found that there were strong humane grounds - particularly regarding the contact between father and child - and approved a residence permit.

1.2 ACCESS TO FOOD, SHELTER AND HEALTH SERVICES – DISCRIMINATION OR OTHER ILLEGAL TREATMENT?

Is Jamshed facing discrimination due to his ethnic or national origin? Or is he being discriminated against for other reasons, or are we missing the point when we discuss the authorities' treatment of people without legal residence as a question of discrimination in general? Jamshed and others in similar situations, could become subjected to unfair treatment without it necessarily being a question of discrimination.

Through our legal aid work, SMED often sees people who believe they have been discriminated against, though these persons have not been discriminated against in legal terms, but subjected to another form of illegal treatment, for example they have not received the benefits they are entitled to under the Social Security Act. On other occasions, we see that people are discriminated against, but it is unclear as to whether the grounds for discrimination are ethnic or national origin. With regard to access to benefits based on legal rights, SMED believes that the question of discrimination is seldom widely highlighted because the individual is mainly interested in gaining access to the benefits or service.

It is professionally indefensible to reduce the question of whether people who have received a final rejection in response to their application for asylum are subject to illegal treatment to one of whether these people are discriminated against based on ethnic or national origin. The question of discrimination and the reasons for discrimination form part of such a discussion.

The subject of access to food, shelter and health services for people who have received a final rejection to their application for asylum will therefore involve our addressing the following legal questions:

1. The government's obligation to ensure that Norwegian law complies with international human rights, cf ECHR Articles 1, 3 and 8, CCPR Articles 2, 3, 7, 17 and ESCR Articles 2 and 11,
2. The government's obligation to ensure that no discrimination takes place with regard to rights provided by the convention, cf ECHR Article 14 and Protocol 12 and CCPR Articles 2 and 26, ESCR Article 2,
3. Norwegian law that ensures that those in need receive food, shelter and health services cf health and social legislation, common law, and application of the law and assessment measures based on these regulations,
4. National legal rights that protect against discrimination with regard to the rights that apply to those in need.

Individual complaints brought before international monitoring bodies regularly contain submissions for breaches of the convention's ban on discrimination. If the monitoring authority establishes a breach of a provision of the convention, further convention provisions are not discussed. As an example, we saw this in connection with the statement from the UN's human rights committee in the case on religious studies, in which the committee established a breach of CCPR Article 18 no. 4 without touching on the question of discrimination cf CCPR Article 26.[1] The same treatment can often constitute both a violation of one or more of the provisions laid down by the bill of rights as well as discrimination.

SMED's approach in this report is one of 'and/or', since we wish to approach the question from a legal perspective and a discrimination perspective. This is the only professionally defensible approach concerning access to rights that will prevent the individual from falling by the wayside.

1.3 PROTECTION AGAINST DISCRIMINATION IN NORWAY

Formal Norwegian law does not give the individual general protection against discrimination. In practice Norwegian law only places a general ban on discrimination on account of gender. Within different areas of society there are sector regulations concerning bans on discrimination on certain grounds, for example the Working Environment Act Chapter X A. An equivalent general ban on discrimination has been proposed for the grounds of "ethnic and national origin, language, descent, skin colour, religion and creed".[1] It is anticipated that the law and a joint discrimination and equality commission will be in place on 1 January 2006.

In this report SMED takes as its basis the ban on discrimination laid down in ECHR Article 14, CCPR Articles 2 and 26 and ESCR Articles 2 and 13. In addition, on 15 January 2003 (subject to ratification) Norway signed supplementary Protocol 12 of the ECHR on non-discrimination. In the same way as CCPR Article 26, Protocol 12 places a ban on discrimination beyond the rights that are covered by the convention. The ban on discrimination laid down in ECHR, CCPR and ESCR are incorporated into Norwegian law through the Human Rights Act of 1999.

In order for discrimination to exist under ECHR, CCPR and ESCR, it is not necessary to establish that such discrimination refers to one or more of the pre-defined grounds for discrimination. It is sufficient that a particular group is affected, see ECHR Article 14 and Protocol 12 Article 1 no. 1 "other status", CCPR Article 2 and 26 "other status". The discrimination of citizens and non-citizens, and between foreign citizens, is covered under safe practice by the convention.[2] The question is whether a group is treated worse because of its status, and whether this discrimination is impartial or legal because the means are justified in achieving a legitimate purpose.

The protection against discrimination provided by the convention constitutes a *restriction on the competence* of both the legislator and the administration in making decisions. To put it another way, the administration does not have the authority to make decisions that involve discrimination in breach of the convention. This applies to a general and statutory requirement for relativity and proportionality from the administration with regard to discrimination in respect of rights provided by the convention. Thus protection against discrimination forms part of Norwegian administrative law as a non-statutory restriction on the competence of the administration.[3] Even if all the grounds for discrimination are covered by the protection provided by the convention, it is clear that in some situations the grounds for discrimination can have major significance with regard to assessments of legitimacy and proportionality.

When a general law covering a ban on discrimination on grounds of ethnic and national origins etc. is passed, as well as the establishment of an enforcement body to enforce the law, the grounds for discrimination will gain more significance.[4] This is connected with the fact that the enforcement apparatus will receive positively-defined powers to handle cases that are only concerned with the grounds for discrimination prevented on the basis of formal law.

1.4 NOT JUST A QUESTION OF LAW…

Jamshed's story gives cause to reflect on different aspects of the topic *use of access to social benefits and health services* as a political instrument to increase the efficiency of the government's general immigration policy and particularly the principle of voluntary return. The questions lie in the area of intersection between policy, ethics, human rights and legal protection.

The instruments that the authorities made use of in 2004, particularly the repeal of the offer of housing in reception centres and the tightening-up of rights to social benefits, placed people without legal residence who did not cooperate on return in a difficult situation – socially, financially and personally. People without a private network, as opposed to Jamshed, have at times lacked food, shelter and access to emergency medical assistance. The fact that a measure can deter asylum seekers without a sufficient need of protection, as well as the fact that it results in more people cooperating on return, cannot *by itself* justify putting an individual into an emergency situation. Such a measure must be legitimate based on the circumstances of the individual in question. To put it another way; the measure must be reasonable for Jamshed.

The ideal of justice is firmly anchored in the concept of and the shaping of the modern welfare state. The Scandinavian model is focussed on including all of the different welfare schemes. In addition to implementing the working curve, compensating for the loss of employment income, the model is designed to prevent poverty and social marginalisation as well as to even out living standards. The fact that the person is himself to blame for a difficult situation, is irrelevant in principle. Access to subsistence benefits and necessary medical assistance makes up *the lower safety net of the welfare state*. The benefits that this group will no longer have access to, are benefits designed to prevent acute poverty and serious health problems.

The ideal of an inclusive welfare state is at odds with the need to ensure the financial foundation for generous - and expensive – schemes, and the need to protect the national state from uncontrolled immigration. Against this background, a basic ethic and moral question arises

concerning the point at which it is *reasonable,* with regard to *the individual* , to exclude this individual from the welfare state's *lower safety net*. Is it sufficient that the person has had his residence permit application rejected, and has failed to comply with the departure deadline set by the authorities? Should the individual alone carry the responsibility for a difficult situation because the person chose to be in a situation which he can freely bring to an end? Are there reasons for a person not returning – even if these reasons do not provide grounds for residency in the country – that make it an ethical problem to use such instruments as access to subsistence benefits? Finally, is the exclusion of a person from the welfare state's lower safety net *in itself* unreasonable because the individual is exposed to a disproportionately stressful situation that is indefensible even if the purpose is legitimate?

The repeal of subsistence benefits and medical assistance must be discussed from the perspective of legal protection. If we take the basis that the government is obliged – within certain limits – to ensure that an individual receives food, shelter and medical assistance in an acute emergency – *a system and a set of procedural regulations* must exist that are arranged in such a way that individuals actually receive the rights that are due to them in an emergency situation. This is a question of procedural legal protection. Access to food, shelter and medical assistance in an acute emergency can also be discussed as a question of *material legal protection.*[5] In its broadest terms this means that the government must ensure that people receive the material rights that they are due, and this demands a formulation of procedural law.

When the rights of a vulnerable and socially deprived group are restricted, the process must safeguard both procedural and material legal protection, and this is what is being discussed in this report. However, the topic of this report also touches on the aforementioned question of values - both directly and indirectly - because a society's legal system is an expression of a set of values and considerations of opposing interests. This is particularly prominent when questions that are discussed apply to human rights and protection against discrimination.

1.5 SMED'S MANDATE AND PURPOSE OF THE REPORT

SMED is a public competence and legal protection office and our mandate is set by the government.[6] The purpose of our activities is to "assure protection against discrimination" on grounds of "creed, race, skin colour or national or ethnic origin". Such assurance entails both measures designed to remedy injustice and also to prevent injustice. The instruments available to the SMED are firstly a) our legal aid activities inn accordance with the Act pertaining to the Courts of Justice § 218 seventh paragraph, and secondly b) documentation and external activities. Documentation activities shall, according to our mandate, be based on various instruments: the recording and follow-up of legal aid enquiries, collecting documentation and preparing reports, external contact as well as the proposal of preventative measures. SMED's legal documentation work and initiatives are mainly - but not exclusively - built on our work with individual applications for legal aid.

Jamshed's enquiry to SMED is the basis for this report, but our professional assessments are – as described in more detail in points 2.2 and 2.3 below - not based on Jamshed's case. Jamshed needed legal aid, and SMED assisted him as his *representative*. The role of representative means that SMED presents arguments to support a particular solution to a specific case, within the limits of that which is ethically and professionally defensible. In connection with the fact that we assisted Jamshed, we obtained unique experience of how the court, the immigration authorities, social services and primary and specialist health services apply the law and use judgement in cases that affect a person who has received a final rejection in response to their application for asylum.

Jamshed's case, combined with many different procedures in the field, resulted in SMED *questioning whether* the treatment of people who have received a final rejection in response to their application for asylum entails discrimination or a breach of other laws. The problem in Jamshed's case was firstly the circular arguments that we uncovered, and then we looked in more detail at

the immigration authority's and the court's arguments. In Jamshed's disfavour the court emphasised the fact that he had no valid residence permit, and awarded him limited access. In Jamshed's disfavour the immigration authorities emphasised the fact that he did not have sufficient access to be granted family reunification rights. After some time the need for legal aid came up in connection with the withdrawal of the offer of housing at a reception centre and the rejection of his application for subsistence benefits and health services, which resulted in SMEDs decision to focus on the situation of people who have received a final rejection in response to their application for asylum.

SMED's role as representative is unrelated to the role of an ombudsman. SMED has no formal decision-making authority, nor does its mandate give SMED the competence to make statements in appeal cases regarding discrimination. The role of representative is not neutral, but as our role is limited to working with questions of discrimination, we assess our mandate from case to case. SMED rejects cases if, after specific evaluation, we can see that the case *cannot be* seen as a discrimination case, and assist in cases that *can be* seen as discrimination cases. In the spring of 2004, SMED's approach to this project was that Jamshed's case and other applications for legal aid that we received, could, after professional assessment, raise questions of discrimination.

In order to establish discrimination, particularly when it concerns administrative practices, it is essential to gain access to basic facts that are adequate and comprehensive. With regard to SMED's legal aid and the application of our mandate in individual cases, it was not a problem to assist individuals, but with regard to providing a more qualified assessment of whether discrimination against people with a final rejection in response to their application for asylum existed, SMED had to undertake the systematic collection of documentation. This was the justification for the fact that in 2004 and 2005 SMED, through its legal aid activities, systematically assisted individuals with a final rejection in response to their application for asylum. In parallel with this we obtained information from other operators in this field, we made application to public authorities as well as brought or assisted in bringing principle complaints before the ombudsman as well as the regular courts.

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Our experience and assessments of this, based on the documentation collected, are now available in report form. Since SMED does not have the mandate to decide whether something does or does not constitute discrimination, we have to confine ourselves to making specific professional assessments based on the material collected. We make assessments of whether illegal treatment of this group has taken place and whether the group has been discriminated against – and in which case on what grounds. However it must be emphasised that these assessments are exclusively without liability and we leave other operators with decision-making authority to draw conclusions.

2 METHOD

2.1 GENERAL INFORMATION ON THE CHOICE OF METHOD

SMED's mandate is described above, and it is within our mandate both to put forward proposals for measures to prevent discrimination, and to undertake investigations to identify discrimination. Even if the mandate designates two main groups of policy instruments - legal aid and documentation, the mandate does not give any specific guidance with regard to the choice of method.

The basis for this report is a type of work that builds upon the unique aspects of SMED's mandate, namely the possibility to use legal aid, in the form of representation, to identify and collect information about discrimination and discriminatory procedures. As a representative SMED acquires direct knowledge of various decision-making procedures. In this case the role of representative is utilised to collect details about and identify administrative practice.

SMED's expertise in the field of discrimination law is made up of a thorough knowledge of various aspects of applicable law, including international human rights, case law, statutory rules and administrative law. A project that aims to discuss the legal question initially drafted in point 1.2 must contain a description of the applicable law. SMED has therefore found it necessary to present a description of the legal regulations that are relevant with regard to the assessments and questions we wish to highlight in the report. The goal of this description is not to state a legal opinion with regard to all the legal questions that may be highlighted in connection with people without legal residence. Applicable law is described based on general legal methods.

The way in which an individual's legal protection is safeguarded is closely connected with the limits of the administration's exercise of authority. The administration's competence and legal limits are central, as well as the instructions that the authorities have given the administration on the use of law and use of assessments. In the case of people without legal residence, clear signals have been given by the authorities as to how they are to be safeguarded when they reside in a reception centre, and also with regard to the access they have to social benefits and health services when they have lost the right of residence in the reception centre. By collecting information on how the situation was before the measures were implemented, uncovering which assessments and evaluations were made in connection with the decision being taken, and thereafter comparing this with the information on the challenges that were faced during the implementation phase, we are able to comment on whether the policy has been used in such a way that the individual's or a group's legal protection has been safeguarded. Chapter 3 contains a description of the situation before the measures were taken, and the objectives of the measures and instruments that were used.

2.2 FIRST PHASE: IDENTIFY THE PROBLEMS AND THE FACTUAL BASIS

As mentioned in the introduction, this report began with an enquiry from Jamshed which initiated further investigations by SMED. In the first phase of this project SMED obtained information on which legal and practical problems were experienced by a person without legal residence. This phase of the collection of information was open; our goal was to identify a broad spectrum of problems and thereafter assess whether discrimination existed. This approach runs parallel with SMED's normal legal aid activities; we constantly receive a broad spectrum of cases and problems that raise both the question of discrimination and other legal problems.

As opposed to the ordinary – non project-related – legal aid activities of SMED that take their basis in the fact that a person in need of legal aid contacts SMED on their own initiative, this project entailed SMED carrying out investigative legal aid activities during the first phase. This

built upon acknowledgement of the fact that there was no other way to come into contact with people who had received a final rejection in response to their application for asylum. [7] This is mainly because these people have few financial resources, poor language abilities and limited knowledge of the Norwegian system and of SMED.

SMED made contact with and held meetings with Astri Råbu of the Arendal Advice Group who had been working with these people for some time, and we were later contacted by Bernt Hauge of the Advice Group in Trondheim. Both of these organisations have assisted people without legal residence, particularly in connection with producing an application for recommendations for reversals to and appeals for postponements of measures to be taken following a rejected application for residence permit/asylum. The leader of the Arendal Advice Group put SMED in touch with the leader of the "Unreturnables Organisation". This contact led to SMED assessing legal aid for 33 people who had received a final rejection in response to their application for asylum, and who opposed being returned to their home countries.

SMED's assistance was based on the fact that we evaluated a) whether the individual had problems that could be solved using legal instruments, b) which body the respective person would thus have to apply to, and c) whether SMED could assist the person because the case raised legal questions of discrimination. [8] Our review of the need for legal aid for these 33 people disclosed that the group's need for legal aid was substantial and varied. Nevertheless it was clear that in general the need for legal aid was divided into two areas: a) access to subsistence benefits and health services for people residing both in and outside of reception centres, and b) the need for assistance in connection with applications for temporary work permits, residence permits, reversal of previous rejections as well as applications for the postponement of the implementation of negative measures. In chapter 3 below some of these cases are used to illustrate the situation during the transition from 2003-2004.

The first phase of information collection helped SMED define some problems that could raise the question of discrimination. One of these problems, which became even more relevant during 2004, was the question of the right to food, shelter and health services for people without legal residence. During the first phase SMED discovered significant differences with regard to how individuals in this group were safeguarded; both whilst these people were resident in a reception centre and when these people were no longer under the care of the reception centre system. Furthermore SMED gave assistance in two principle cases which were dealt with by the High Court and the Civil Ombudsman respectively.

2.3 SECOND PHASE: DOCUMENTATION OF ADMINISTRATIVE PRACTICE

The second phase of the project consisted of SMED collecting and systemising documentation on administrative practice. This was undertaken by SMED as representative, assisting individuals who, for different reasons, did not have access to food, shelter or health services. These people found themselves in an acutely difficult situation.

The individual cases that create the basis for our presentation of administrative practice in chapter 5 are collected from two phases of the project. Firstly, documentation was collected from the 33 people we assisted with legal aid and advice in the first phase of the project, cf point 2.2, and secondly, documentation was collected from the second phase of the project which applies to the period from July 2004 to March 2005. During this period SMED assisted individuals in their meetings with social services, the reception apparatus, or primary or specialist health services.

In the second phase SMED did not pursue investigative legal aid activities to gain access to administrative practice. This was partly due to the fact that SMED already had access to documentation on administrative practice, and partly due to the fact that many parties that had dealings with this group were familiar with SMED's legal aid activities and which cases SMED

could assist with, and directed people to SMED on their own initiative. Due to the fact that individuals came into acutely difficult situations, for example because they received a rejection in response to their application for emergency help, many made contact with SMED on their own initiative.

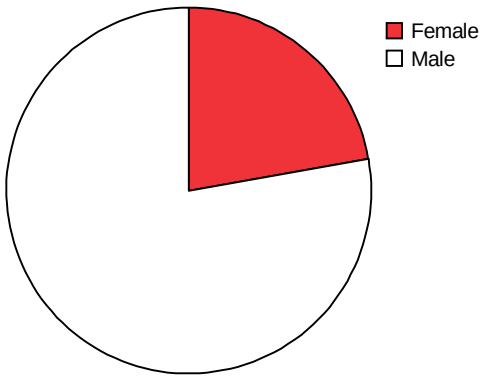
In order to document administrative practice and how the administration arranges its form of procedure in dealings with people without legal residence, SMED chose a strategic and uniform approach to these enquiries. SMED did not assist as a representative against the administration before it was clear that the person had first attempted to safeguard his own interests. This technique resulted in the fact that we gained knowledge of the administration's form of procedure and administrative practice that was not affected by the fact that the person was assisted by a professional party such as SMED. Any disadvantage this inflicted upon the individual was no greater than that which is defensible by the fact that the administration, under the provisions of the Administrative Act § 11, is obliged to give guidance to all those who apply to the administrative body, and that SMED as an institution should first assist individuals when it is documented that the administration is not safeguarding its own obligations according to the Administrative Act or other public law legislation.

2.4 SOME STATISTICS

The basis for our analyses is to show how legislators, the authorities and the administration have treated a group of people that have nothing in common apart from the fact that they have received a final rejection in response to their application for asylum and will not return voluntarily. Nevertheless it may be of interest to show who lies behind the figures in the 33 cases where we assisted in the first phase of the project and the 30 cases where we assisted people who applied for assistance from the council social services.

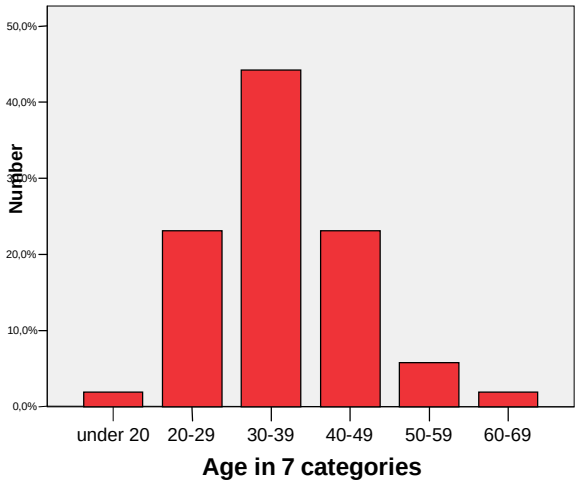
Firstly, the majority were male, but it is important to note that not all were male. All of the women were either from Ethiopia or Eritrea.

Gender		
	Number	Percent
Female	14	22
Male	49	78
In total	63	100



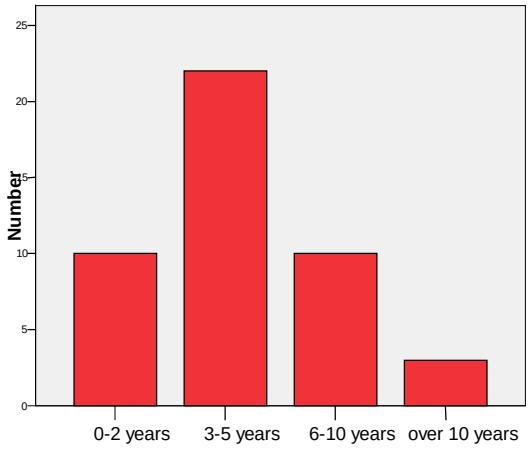
The difference in ages is interesting, and even if people between 20 and 50 years of age are over-represented, it is notable that 1 person was under 20 years of age and 4 people were over 50 years of age.

Age in 7 categories		
	Number	Percent
Under 20	1	2
20-29	12	23
30-39	23	44
40-49	12	23
50-59	3	6
60-69	1	2
In total	52	100
Missing	11	
In total	63	



The majority of the people we were in contact with had been in Norway for 5 years or less. However, there were big differences between the group of people we came into contact with in the first phase of the project, and in the second phase. The people who had been here longest were people we came into contact with through the Advisory Services in Arendal.

Length of time in Norway in 4 categories		
	Number	Percent
0-2 years	10	22
3-5 years	22	49
6-10 years	10	22
over 10 years	3	7
In total	45	100
Missing	18	
In total	63	

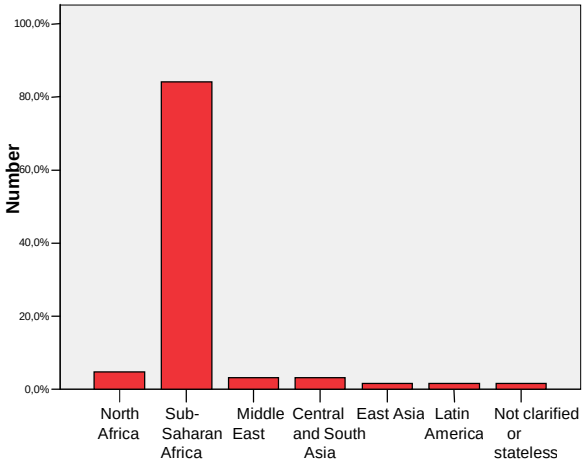


The information on national background is based on the information given to us by the client. In some cases we discovered that this information did not correspond with the national background that the immigration authorities were using. However this has little significance with regard to the fact that the goal here is to provide an overview of these people's countries of origin.

The statistics revealed that 89% of the clients come from Africa, and mainly from countries south of the Sahara. Clients from south of the Sahara were divided into the following country

backgrounds Ethiopia (with 26 people), Eritrea (8), Somalia (6), Africa unspecified (6), Chad (3), Liberia (1), Rwanda (1), Sudan and Uganda (1).

Continent		
	Number	Percent
North-Africa	3	5
Sub-Saharan Africa	53	84
Middle East	2	3
Central and Southern Asia	2	3
East Asia	1	2
Latin America	1	2
Not clarified or Stateless	1	2
In total	63	101



2.5 METHOD FOR THE ASSESSMENT OF ADMINISTRATIVE PRACTICE

Administrative practice is presented and assessed based on assessing the questions that affect both material and procedural legal protection. This entails that we firstly examine administrative practice with regard to people that reside in reception centres, the repeal of the offer of housing in reception centres and finally the form of procedure, application of the law and assessment measures.

SMED made a deliberate choice with regard to examining the administration's form of procedure and application of the law/assessment measures separately. Such a division is of course useful for the sake of the overview, but the choice of method is just as important to show the interaction between the administration's application of the law and the Government's obligation to provide protection in respect of for example Article 3 of the ECHR. To put it another way, if the procedural law that the administration is to base its assessments on is imprecise and unclear, the issue will be whether the legislator has granted precise provisions for the administration's exercise of its authority. The same applies with regard to the form of procedure. If important rules governing the form of procedure are disregarded by the administration, the issue will be whether the administration can be held responsible for this.

Along the way and to close each chapter we have attempted to sum up and bring together the other sections of the report. The goal is that it should be possible to follow a reasoning that leads to our recommendations and summary in chapter 6. In this way we hope to avoid that the report will only be accessible to people with legal expertise and education.

3 DESCRIPTION OF THE SITUATION

3.1 GENERAL

The questions discussed in this report are based on the fact that the welfare state's lower safety net was used to increase the efficiency of the Government's immigration control policies. This became significant with regard to access to food, shelter and health services for people without legal residence. The administration's implementation of the relevant restrictive measures began at the beginning of 2004.

As mentioned in chapter 2 above, by gathering information on the situation before the measures were initiated, it is possible to identify which assessments and considerations were made in connection with the initiation of the restrictive measures and which challenges were met in the implementation phase. It is thus possible to pass comment on whether the policies were arranged in such a way that the individual's legal protection was safeguarded. Chapter 3 contains a description of the situation before these measures were initiated, the objective of the measures, the administrative and legal instruments that were utilised and the consequences of the measures.

The description of the situation in chapter 3 must be seen as a backdrop to SMED's presentation of applicable law, see chapter 4; for our systemisation, presentation and assessment of administrative practice, see chapter 5. Chapter 3 is important for evaluating the degree to which the group's legal protection was defensibly ensured. However, the description of the situation can also be seen independently as an approach to viewing the consequences of practical policies.

3.2 A DUAL-TRACK SYSTEM FOR ENSURING SUBSISTENCE

To be able to discuss the Government's obligation to ensure subsistence benefits for people without legal residence, it is crucial to understand what we choose to characterise as *a dual-track system* to ensure subsistence benefits for asylum seekers on the one hand, and other people on the other. These systems touch each other, but do not overlap to any significant degree, and especially not if the person only has the status of asylum seeker or is in the first phase of establishing residency.

At the base of this dual-track system is the organisation of the administrative apparatus in the fields of immigration and integration. Firstly, a model for the reception of refugees and asylum seekers, based on the fact that the Government initially has the practical and financial responsibility for asylum seekers through the asylum reception centre scheme. Secondly, the town council's freedom with regard to entering into agreements on the settlement of asylum seekers or refusing to receive asylum seekers that have been granted asylum or a residence permit.

The Social Security Act and its stipulations, as well as administrative practice, are adapted to the basic condition that the Government must meet this group's requirements until the responsibility is transferred to a town council through an agreement on settlement. The dual-track system is clearly illustrated in the county administrator's administrative practice in cases of *self-settlement* and *secondary settlement*.[9] A complaint that the Health and Social Services Commission brought before the Oslo and Akershus county administrator illustrates that Social Services do not have a responsibility for self-settled asylum seekers, unless it is "clearly unreasonable to send the person back to the reception centre":

> *A refugee applied for assistance in an appeal. He had received a rejection in response to his application for social security and been referred back to a national reception centre. At the time of the rejection the man had been living in the council area for one year and seven months. He had a permanent place of abode and had been self-sufficient until his employment contract had ended. The county administrator reversed the decision on the ground of a clearly unreasonable assessment. To quote the county administrator's decision:*

"The county administrator emphasises that the plaintiff has been in Oslo for more than 1 1/2 years and that he has been employed during this period. It was reported that the plaintiff left his job due to the termination of his employment contract. He will receive unemployment benefit, and only needs supplementary benefit. It is further emphasised that the plaintiff has a place of abode in Oslo and that he is to begin a Norwegian language course. The county administrator finds that the time perspective is central to this case and that during the period of being in Oslo the plaintiff has built up such a connection that it would clearly be unreasonable to send him back to the reception centre."[10]

The dual-track system is only a reality when an asylum seeker is dependent on state benefits to ensure subsistence.[11] On this basis it is important to have an overview of how many asylum seekers are living in reception centres and how many are living outside of reception centres. The latest figures from the Norwegian Directorate of Immigration show that *12,178 people were living in reception centres as at* 31.12.2004. Their residency status was as follows:

People with permits:	2,153
Total number of people without a decision:	4,249
People having been rejected in the 1st instance:	3,778
Unknown, expired status/dismissed/withdrawn	242
People with a decision to be effected*	1,752 with a final rejection in response to their application for asylum.[12]

Asylum seekers that can support themselves through employment or a private network are free to finance their subsistence outside of the reception centre (self-settlement). Housing at a reception centre, and the financial benefits that accompany the award of a place at the reception centre, are benefits that the individual is generally free to accept or reject. SMED does not know how many asylum seekers take advantage of this opportunity at any given time. However, this group is almost certainly much smaller than the asylum seekers that live at a reception centre, because these people often find it difficult to get sufficient work that will allow them to finance private settlement.

The dual-track system is highly significant in the case of the subsequent safeguarding of *people rejected for asylum when these people were originally living outside of the reception centre.* Asylum seekers that are living privately within Norwegian councils are in a special situation if they receive a rejection in response to their application for asylum and the withdrawal of a temporary work permit, because the council where they are living does not have responsibility for them before or after the asylum application. In addition these people have often lost contact with the reception centre apparatus.

In the first phase of the collection of information SMED was in contact with both people at the reception centres and people living privately. In the case of individuals living outside the reception centre system, we found that the majority of these supported themselves – and also their families - through normal working income *many years* after they had received a final rejection to their application for asylum. *Lula, case no. 04/239*, has had temporary work permits in Norway over a long period of time. Lula came to Norway in 1998 and received a final rejection to her application for asylum in 2000. Lula lives privately and has supported herself, her husband and children by working in the health service. Her work permit expires in 2005, and if not renewed by the end of 2005, the family will be in an acutely difficult situation. *Fahrid, case no. 04/203*, came to Norway in 1993 and received a final rejection to his application for asylum in 1994. Fahrid was educated in Norway and for the last four years has been working in a professional position and supported himself and his wife. However, in 2005 Fahrid's work permit was not renewed, which is critical as Fahrid and his wife are now expecting a baby.

3.3 LONG TERM RESIDENCE IN RECEPTION CENTRES – REPORT FROM THE NDI

Based on an enquiry from the Norwegian Centre for Human Rights to the immigration authorities,a working group was established on 1 November 2002 to look at the situation of asylum seekers who had been living in reception centres for a long time. The tasks of the working group, and its findings, are summarised in the report "Long term residence in reception centres".[13] The working group's mandate was to look at various solutions for persons who had received a final rejection to their application for asylum, including recording the number of people, their national origin as well as the reason why they have not returned to their home country. Of special interest with regard to SMED's discussions the working group were to look at:

> *"… the overall situation for these people today, when conditions such as age, gender, health, other social factors, connection to Norway in the form of family (must) be emphasised. The working group has to create a picture of any long-term effects as a result of being housed in a reception centre."*[14]

The working group recorded both people living in and outside of reception centres, and found that there were 68 people that were still resident 48 months or more after receiving a final rejection in response to their application for asylum. The majority are single men, but there are also women and some with children. People of African origin were over-represented. The working group found that the reasons that these people had not left the country voluntarily, were complex, but health grounds and the fact that some people maintained that they needed protection, were deemed to be the main reasons.[15]

The working group also collected information on the living conditions of the respective people. Some had been granted work permits, were working and mostly self-supportive. However, in general the working group found that many of these long-term residents disliked living in reception centres. The working group also wrote:

> *"For the majority the biggest problem is being unable to make their own plans for the future and family life, particularly considering the fact that most of these people are at an age when it is natural to get a job and start a family. Some of the long term residents are depressed and may have other mental problems."*

In the case of people who have received a final rejection in response to their application for asylum, the NDI assumes that people without legal residence do not have the right to social security after the departure date has been passed. The working group writes:

> *"People that cannot take care of themselves are therefore in principle the responsibility of the Government and must be returned to the reception centre if they require subsistence help. At the reception centre they will receive the same rights as other asylum seekers who have received a final rejection in response to their application for asylum."*

SMED was informed that the recommendations in the report were discussed with political leaders, but that no basis was found to go ahead with the drafted measures.

3.4 WHAT LED TO THE MEASURES TAKEN AT THE BEGINNING OF 2004?

The situation up until the autumn of 2003 was characterised by a steady increase in the number of asylum applications, where 2002 stood out as a record year with *17,840 applicants*.[16] By the autumn of 2003 it was therefore vital for the Government to implement measures to reduce the number of unfounded asylum applications. In connection with the presentation of the "Coalition Government's refugee and immigration policy", the Government referred to the fact that 80% of applications were rejected in 2002. [17] The plan of action consisted of various measures, some of which had already been implemented, and for example reduced cash support for those who had received a final rejection in response to their application for asylum, and the establishment of

separate reception centres for people with applications deemed to be unfounded, whilst new measures were to be implemented at the beginning of 2004.

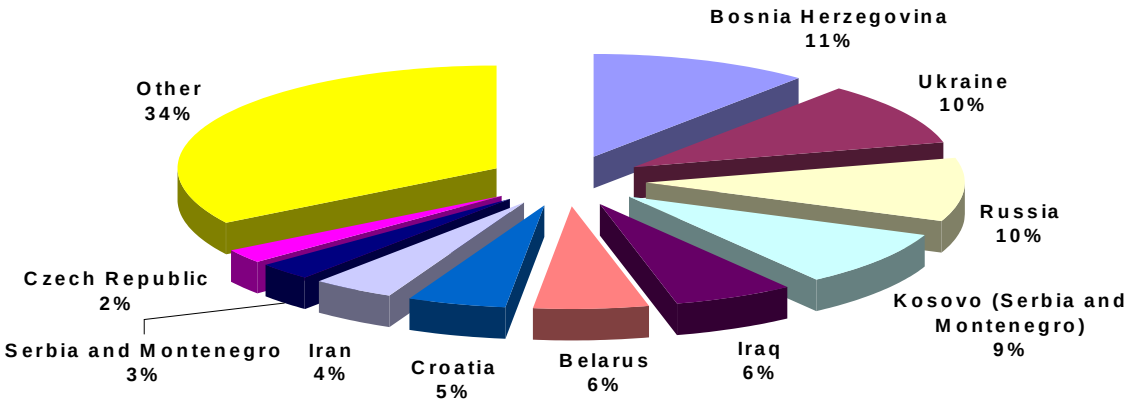
Another problem was that people who had received a final rejection in response to their application for asylum *seldom voluntarily returned to their home country*. SMED does not have access to the exact figures for how many people this applies to, but according to the Ministry of Local Government and Regional Development's own figures, *700 people* who had received a final rejection in response to their application for asylum were residing in reception centres at the beginning of 2004.[18] The number of people that left the reception centre on receiving a final rejection, but were nevertheless residing in Norway, is uncertain. The police have provided an estimate that was found to be uncertain and was disputed.[19]

The problem of returning people who have received a final rejection to their application for asylum was not new, and had already led to the establishment of cooperation with the International Organisation for Migration (IOM) in 2002 regarding voluntary return (cf point 3.4 below). The problem was that the programme did not result in the number of voluntary returns that was needed. This was particularly clear with regard to people who cannot be forcibly returned to their home country. There is no doubt that the risk of deportation acts as an incitement to enter into cooperation on voluntary return through IOM. Many of the tightening-up measures that were initiated in 2004, were therefore *implemented* so that they were not applied to people who cooperated on return through IOM.

3.5 VOLUNTARY RETURN THROUGH IOM

On 2 May 2002 Norway established a programme that had the purpose of assisting asylum seekers that wished to return voluntarily to their home country. The programme was originally in collaboration between IOM, Norwegian People's Aid and the Norwegian Directorate of Immigration. Voluntary return was meant to be an economical, practical and attractive alternative to deportation. Return through IOM takes place free of charge for those who return.

According to IOM's own statistics, 954 people returned in 2002, 1,458 people in 2003, 1,072 people in 2004 and 58 in January 2005. By way of comparison 6,945 people were forcibly deported in 2004. [20] According to IOM's own statistics, taken from their internet website, the returns carried out through The Voluntary Return Programme ("VARP") were divided by nationality as follows[21]:



Originally the alternative to voluntary return through IOM was either forced return (deportation) or continued residence in the reception centre, but with reduced benefits. There is reason to assume that for many of the people originally from the respective countries shown in the statistics, the alternative – a life in a Norwegian reception centre with reduced benefits – is less attractive than return. However, in the case of people coming from African countries, the return programme of IOM has had less significance. The proportion of African embassies and consulates was very low in IOM's country statistics on issued travel documents; important countries such as Ethiopia, Eritrea, Somalia and Chad were practically absent from the statistics.

An important question with regard to the return programme is the extent to which the measures have had the desired effect. The figures available for 2005 are also based on the fact that the restrictive measures in the form of the withdrawal of the offer of housing in reception centres as well as the tightening up of rights to social benefits are implemented. SMED has no basis to draw any conclusions, but the figures that the NDI itself has made public, can indicate the effect of the measures:

> **As of 28 February 2005 there were 1,438** people who had received a final rejection in response to their application for asylum that were living in reception centres (including those who were allowed to live in reception centres, i.e. families with children and single minors, and those who had applied for return through IOM).
>
> **Statistics as of 15 March 2005**
>
> There were 592 people who received notification of the withdrawal of their housing offer in 2004, and their status as of 15. March 2005 was:
>
> 46% had left the reception centre
> 18% were still living in the reception centre
> 18% were exempted (those who were ill, people who had received postponed implementation, etc.)
> 10% had applied for IOM's return programme (approximately 7% of these had left)
> 8% were deported by the police (according to written notice received)
> *In addition initial notice had been sent to 188 people for whom a resolution by the district offices has been made/will be made regarding a repeal of their housing offer.*[22]

3.6 REPEAL OF THE OFFER OF HOUSING IN RECEPTION CENTRES AND SUBSISTENCE BENEFITS

Subsistence benefits for *asylum seekers* in the form of food, shelter and health services are mostly assured through the national, or nationally-funded, reception apparatus. The Government passed a resolution with effect from 1 January 2004 for restrictions to *subsistence benefits* and the repeal of the *offer of housing* in national reception centres for people who had received a final rejection to their application for asylum.

Point 2.3 of the regulations for financial assistance for people in national reception centres was formally amended on 1 June 2002, but the changes in practice that the regulations indicated were implemented in two stages; firstly the current financial benefits were reduced so that people only received subsistence benefits and not pocket money, and thereafter, with effect from 1 January 2004, subsistence benefits were also withdrawn. Nor do such people receive provisions in the form of food or other essential items, for example for personal hygiene.[23]

In parallel with these restrictions the Government decided that from 1 January 2004 the right to a place in a reception centre would be withdrawn for individuals who had received a final

rejection to their application for asylum when the departure date was exceeded. The NDI and the Social Services and Health Directorate informed the councils and the reception centres about these measures. Individuals exempted from this arrangement were single asylum seekers below the age of majority and families with children, as well as individuals who applied to travel home voluntarily through IOM and who helped to obtain travel documents. As mentioned above the authorities estimated that approximately 700 people, who had received a final rejection in response to their application for asylum, were living in reception centres.

SMED does not know how many people received a letter with the notification of "Withdrawal of offer of housing in reception centre" in the first quarter of 2004. For the whole of 2004 the NDI reported (cf the statistics above), that 592 people received notification of the withdrawal of their housing offer, and that 46% of these left the reception centres. A significant reason for many leaving voluntarily was probably partly due to the fact that their financial benefits were stopped (cf changes in the Cash regulations), and notification that the police would evict persons who did not leave. SMED was in touch with many people who had received such notification. One of these was Yohannes, case no. 04/264, who is discussed in more detail in chapter 4. Very few people whom SMED was in touch with were willing to apply for participation in IOM's return programme, even though SMED told them about the programme and of the positive consequences with regard to subsistence benefits etc. Our experience thus agrees with the NDI's statistics where only 10% applied to take part in the return programme.

Since many people who received a final rejection to their application for asylum refused to leave the reception centres voluntarily, the Government took individuals to court and demanded enforced eviction (cf the Enforcement Act § 13-2 third paragraph letter e)). The basis for this action was that the Government alleged that people who had received a final rejection in response to their application for asylum clearly did not have the right to stay in premises administered by the Government. One of these cases, the Svolvær case, was dealt with in three legal instances, and involves important principle aspects of the Government's obligations towards this group, see chapter 4 below. The Government won the case that the defendant did not have the right to keep her place in the reception centre. Despite this decision, and as far as SMED is aware, the Government has not yet demanded enforced evictions in further cases. gått videre med flere saker om tvangsfravikelse

3.7 TEMPORARY WORK PERMITS FOLLOWING FINAL REJECTION

§ 17 (6) of the Immigration Act second point)cf § 61 (3) Immigration Regulation and (4)) allows the possibility of temporary work permits for people who have received a final rejection to their application for asylum. SMED discovered that many of the individuals with whom SMED was in touch in the first phase of information collection, had temporary work permits under the provisions of the Immigration Regulations § 61 (3).

In parallel with the restrictions with regard to the offer of housing and subsistence benefits (see below), a change in practice was implemented with respect to the issuance of temporary work permits see the NDI Circular 2003-021 ASA dated 19 June 2003. The reason for this is specifically stated in the Circular:

> *"Previously there has been a practice of issuing a temporary work permit, even if the foreigner could leave the country voluntarily when conditions do not allow enforced return.*
>
> *It has now been decided that the duty of return shall be supported by the use of various measures; allowing for voluntary return through the International Organisation for Migration, as well as the tightening up of the rights of housing in reception centres and by the tightening up of the practice of the issue of a temporary work permit."*

The Circular states in point III that a first time temporary work permit shall not be issued "when the immigrant has the possibility of returning voluntarily, even if there is no opportunity for

enforced return". This also applies to foreigners that have a valid work permit at the time of the rejection because "the person in question is deemed to be responsible for the rejection when the person has a possibility to return of his own accord but fails to do so." The Circular states in point IV regarding the renewal of a temporary work permit, that "applicants that have already been granted a temporary work permit after a final rejection and that are employed can apply for the renewal of the permit." But "the permit [will] be given once for one year with the restriction that the permit cannot be renewed."

As already mentioned in the introduction to point 3.2, many individuals who have received a final rejection to their application for asylum have secured their subsistence through temporary work permits that have been continually renewed, or based on other circumstances. An example of the latter situation is *Abraham, case no. 04/233*. Abraham came to Norway in 2000, received a final rejection to his application for asylum in 2001, but has since supported himself through employment. This has been possible because his registration documents have been regularly renewed despite the final rejection. Abraham applied for the renewal of his temporary work permit in 2004, and the latter was renewed with reference to the Immigration Act § 17, sixth paragraph (cf Immigration Regulations § 61 third paragraph). The reason for this decision was stated as follows:

> *"It has now been decided that in cases where the person in question can voluntarily leave the country when conditions do not allow enforced return, a temporary work permit shall no longer be issued. Transitional arrangements have been laid down for applicants who have previously been issued a temporary work permit after a final rejection, but … has had his registration documents renewed several times since the final rejection. In accordance with the Immigration Act § 57, 3rd paragraph, 2nd point (cf the Immigration Act § 59), the police should have withdrawn the applicant's registration documents when the applicant received the final rejection in response to his application for asylum. The fact that the registration documents were not withdrawn has created uncertainties regarding the permit's validity for both the applicant and the employer. On this basis the permit is being renewed.*
>
> *The renewed permit applies from the date of issue and is valid for one year. The permit may not be further renewed."*

3.8 PROPOSED AMENDMENTS TO THE REGULATIONS OF THE SOCIAL SERVICES ACT OR A CHANGE OF PRACTICE WITHOUT AMENDMENTS TO THE REGULATIONS?

In parallel with the implementation of the scheme for the repeal of the offer of housing in a reception centre, the Ministry of Labour and Social Affairs submitted a proposal for amendments to chapter 1 Foreign citizens' rights to social security (cf the regulations of 4 December 1992 no. 915). The central points of the proposal were as follows:

> *"It is proposed that the current stipulation on legal residence as a condition for the right to financial support according to chapter 5 be extended to also apply to the right to services according to chapter 4. The regulation of the demand for documentation of legal residence shall be further specified. The Ministry proposes further changes to the rules regarding the right to financial support and social services with regard to so-called self-settlement and secondary relocation."*

On page 6 of the Consultation paper it is proposed that a purpose of the proposed law is that the requirement of legal residence *be extended* to also apply to services according to the Social Services Act chapter 4.[24] The reason is that the granting of social services and financial benefits to people who are illegally resident in the country can undermine the legitimacy of both the social services and the immigration authorities The goal was that the social services should not undermine the immigration authorities' decision so that people with a final rejection in response to their

application for asylum could receive "financial assistance to continue their residence, or practical assistance for the duration of their illegal residence".

No analysis of the consequences with regard to how the measures would affect the respective group was carried out in the consultation paper, there was no estimate as to how many individuals would be affected, nor was any mention made of how this measure would work in parallel with the scheme for the repeal of the offer of housing – and subsistence benefits – in reception centres for people with a final rejection in response to their application for asylum.

However, the Ministry did express the opinion that the proposal would have consequences, and stated that the right to "acute emergency assistance remained, irrespective of the legality of residence. This is a consequence of the consideration of common law governing the principle of necessity". [25] On page 7 of the consultation paper it is further stated that:

> *"The right to acute, emergency assistance will thus remain, regardless of the legality of residence. This is due to the consideration of common law principles governing the principle of acute necessity, and will apply for example to food, shelter and care in an emergency situation."*

At the beginning of 2004, in connection with the changes of practice with regard to the repeal of the housing offer in reception centres, both the NDI and the Social and Health Directorate provided information on the consequences of the restrictive measures. On 19 December 2003 the Social and Health Directorate informed the county administrator and the social services office of the consequences of the repeal of the housing offer in reception centres. In the guidelines it states that:

> *Asylum seekers who have received a final rejection in response to their application for asylum or who have been granted postponed implementation are illegally resident in the country, and therefore have no right to financial benefits. The offer of housing at a national reception centre is withdrawn at the time that the departure deadline is exceeded. The person in question thus has a duty to leave the country and will also therefore <u>have no right to other benefits according to the law</u>." (Our emphasis)*
>
> …
>
> *When a person does not leave the country voluntarily within the deadline, there is in reality no Norwegian authority under obligation to ensure that person's subsistence. <u>Society as such</u> does, however, have a general responsibility to give acute, emergency help in an emergency situation. This is a consequence of the application of common law principles on the principle of necessity. This entails that a person may have <u>a right to assistance in the form of social services</u> in specific acute situations regardless of the legality of residence."*

We will return to the information that was provided by the authorities to the reception centres and social service offices in more detail in chapter 5. However, what is clear is that there is a difference between the information that was given on applicable law from the Social and Health Department in connection with the repeal of the housing offer in reception centres, and the information on applicable law that the Ministry of Labour and Social Affairs gave on the details of applicable law in connection with the proposed changes to the regulations of the Social Services Act. In a letter to SMED dated 9 December 2004 the Ministry of Labour and Social Affairs defined the details of applicable law as:

> *"Applications for financial benefits in accordance with chapter 5 can be rejected without further investigation according to applicable law, if the applicant provides information showing that they do not have legal residence in Norway. Applications for services with regard to chapter 4 should be treated in the standard manner. In the case of enquiries from people who ask for financial help in an emergency situation, the Social Services Act does not apply, and social services are thus formally <u>in the same situation as others</u> faced with people in an emergency." (our emphasis)*

What significance do these statements have on the interpretation of applicable law? Did they result in changes in practice, and in such case how were the regulations practiced? This is the topic for chapter 5 of the report, which deals with a review and analysis of the Social Service's application of the law and administrative practice.

It is also worth noting that the proposal for changes to the regulations for the Administration Act has still to be passed. Additionally no new circular has been prepared for the implementation of the Social Services Act and the provisions of the regulations. An important question is therefore whether the administrative practice that has developed, is exclusively a result of political signals and instructions as to how the regulations should be interpreted.

3.9 TEMPORARY REGULATIONS ON RESIDENCE PERMITS FOR FAMILIES WITH CHILDREN WITHOUT RESIDENCE PERMITS

Among the people that SMED assisted in the first phase of the project there were many that had children. Some of these people had children with another person without legal residence, whilst others had children with a person with a residency permit or who were Norwegian citizen. Some were expecting children. Some of the people we assisted had children in their home country. A total of 7 of the 33 people we assisted had children in Norway, whilst 5 persons stated that they had children in their home country. Children in a home country raises legal questions primarily when a person is granted a residence permit or asylum; these problems are beyond the scope of this project.

In the case of individuals without legal residence with children in Norway, their situation mainly presents two problems connected with the residency case: firstly regarding the right to apply for family reunification from Norway if the other parent or the child has a residence permit, and how such applications are being assessed, and secondly if families with children should be treated in a different way compared with other people without legal residence.

The latter of these problems, the different treatment of families with children who have received a final rejection in response to their application for asylum, surfaced in connection with Document 8:50 (2003-2004) private proposal from the Socialist Party *on measures for children who had been residents at a reception centre for a long time*. The proposal was that the rules should be changed so that long-term residents at a reception centre must have the opportunity to have their applications re-assessed, "based on the fact that strong humane consideration will in many cases suggest that children and their families should be granted residency on humanitarian grounds if they have been living as asylum seekers in Norway for over three years".[26] Particular reference was made to the NDI's report on long-term residents in reception centres (cf in point 3.3 above), as well as the aim of ensuring that Norwegian law be in accordance with the ECHR Article 3 and Article 8. The majority of the council committee approved the proposal in Document 8:50 for a renewed case treatment by the NDI and UNE for children and families with children who had been in Norway for three years or longer. It was also assumed that a new assessment would be based upon:

> *"generous assessment based on the child's specific situation, humane considerations and the nature of the UN's Convention on the Rights of the Child, Article 3 where it is states that 'the child's best interests shall be a fundamental consideration'."*[27]

On this basis a regulation under the provisions of the Immigration Act's §§ 8, second paragraph and § 38 b was passed. SMED does not know which means of information were used by the Ministry towards the reception centres etc., for ensuring the timely appeal for a reversal by the deadline of 1 August 2004, however SMED did inform persons whom we knew would be targeted by the regulation, thereby enabling them to apply by the deadline.

Case 04/193 Carmen. Carmen applied for asylum in 1998 and received a final rejection in response to her application for asylum in 1999. Carmen received a rejection in response to her application for asylum due to the fact that she had provided a false identity, and was ordered expelled for serious breach of the Immigration Act. Carmen admitted that she had given a false identity, and appealed for a reversal using her real identity. The appeal was rejected for both Carmen and her daughter. The authorities' comment on the child's interest is as follows: "There is no information in the case that shows that consideration for the child's situation implies that the family should be granted a residence permit". Carmen and her daughter lived at a reception centre the whole time, and at the time an application was made for a residence permit (cf the temporary regulations), her daughter was 13 years old.

In its decision the UNE based the issue of a residence permit on humanitarian grounds. It is important to note that the UNE explicitly stated that:

> *"there has [not] been any new information submitted in the application for the reversal of the decision of […]2004 that would give reason to apply the Immigration Act's § 8 second paragraph as it is understood in general and in practice."*

The regulations state the conditions that the child must be under 18 years of age, must have applied for asylum by 1 July 2001 at the latest, and have been residing in the country for three years after receiving a final rejection to their application for asylum by 1 July 2003 at the latest. It was subsequently found that Carmen's daughter met the conditions, and that this also applied to Carmen. In its decision UNE also specified that people in Carmen and her daughter's situation did not have an immediate right to a permit but that such permits should be given after an individual assessment pursuant to the assessment criteria as defined in § 2 second paragraph:

> *"In the assessment of whether such a permit should be granted, the child's best interests shall be a fundamental consideration. In addition, emphasis should be placed on the child's total length of domicile outside of its home country and the parents' ability to support the child on return to their home country. Immigration policy considerations are not deemed to count against the issuance of permits to individuals who are covered by this regulation."*

SMED is of the opinion that the regulation contains an important step towards the implementation of obligations in accordance with the ECHR and the UN's Convention on the Rights of the Child. On the other hand it is also clear that UNE *explicitly* presupposes that the regulation establishes a more generous treatment of this group than the Government is obligated to provide for (cf ECHR Articles 3 and 8, as well as the child convention). SMED would like to point out that the assessment of the government's obligation to grant residency for humanitarian reasons to safeguard the duties set by the convention towards children and families with children as stated above, must continually be ensured.

Another aspect of how the principle of consideration of the child's best interests (cf the Convention on the Rights of the Child) is assured, is exemplified in relation to people without legal residency who apply for family reunification with their common-law partner/spouse and child(ren) in Norway.

Case 04/14 Sadiq. Sadiq came to Norway as an asylum seeker in 1994 and in the same year he received a final rejection of his application for asylum. The authorities did not find his given identity or nationality to be credible. For several years Sadiq refused to present himself at the embassy of the country purported as his land of origin. In 2000 he decided to do this in the hope that it might help bring about a new assessment of his identity, and he sent a letter to the relevant embassy and consulate. He did not receive any reply. Sadiq became a father for the first time in 2003, and his desire to remain in Norway with a residence permit became stronger. On Sadiq's behalf SMED reiterated an official request to the embassy in February 2004, and assisted Sadiq with his application for family reunification with the child. In August 2004 he received a rejection

for this application for family reunification; SMED sent its written comments on the rejection in August 2004, but the decision was upheld by the NDI and sent to UNE in February 2005.

There is no doubt that Sadiq has been residing in Norway without a permit since 1996, and the NDI maintained in its dispatch to UNE that "Due to the complainant's serious breach of the Immigration Act and the timing of family reunification we believe that the Immigration authorities must react with an order for expulsion in this case". The fact that Sadiq attempted to assist clarifying his identity, in accordance with the authorities' explicit request, is commented by the NDI as follows:

> *"With regard to the submission that the complainant had attempted to assist in the clarification of his identity the Directorate draws attention to the fact that SMED's enquiry to the […] embassy first took place on […]. Therefore the enquiry was made a long time after the person in question was first requested to make contact with the […] embassy for a possible clarification of his identity and after the complainant had received advance warning of deportation. The complainant has clearly been requested to do this at an earlier time. The fact that SMED sent a letter to the embassy is not itself evidence in this regard."*

In the case of the assessment of consideration of the child's best interests the NDI maintains that:

> *"The consideration of the child's best interests, cf Article 3 of the Convention on the Rights of the Child, is ensured and covered by the assessment of respect for family life according to the ECHR Article 8. This is in accordance with the High Court´s basic assumption, cf Rt 1996 page 1510."*
>
> *"In its proportionality assessment the Directorate of Immigration has emphasised that the applicant's connection with the country had first arisen after the foreigner had been living illegally in the country for over 7 years. The foreigner was already under the duty to leave the country voluntarily according to the Ministry of Justice's decision of […] 1996. He cannot thus have had any legitimate expectation of being in a position to exercise his family life in Norway."*

The decision by the NDI in August 2003 and its relative assessment are discussed thus:

> *"The Directorate of Immigration has paid particular attention to the fact that the foreigner's connection to the kingdom of Norway by observing his relationship with a Norwegian citizen and the fact that he has a child in the kingdom of Norway, born on […] 2003. However, the fact that this connection was built up after the complainant understood or should have understood that he could be expelled* ***should not be given particular emphasis*** *when making a proportionality assessment." (our emphasis)*

The case illustrates two sides of Norwegian administrative practice that SMED believes to constitute the basis for several problems. Firstly the fact that the authorities indicate that individuals who have been living in reception centres for a long time and other persons who have received a final rejection to their application for asylum, should assist in clarifying their identity. After a person implements such a measure, as requested by the authorities, it is then emphasised to his detriment that he has not made such a move at an earlier stage. This is hardly practical for building up the institution of asylum or a scheme whereby it is worthwhile assisting in clarifying one's identity.

Secondly the fact that in decisions where an application for family reunification is rejected the authorities do not undertake a sufficiently open relative assessment with a balanced appraisal of *the consideration to the child's best interest* and considerations of immigration policy. In this case the immigration authorities believed that the consideration of the child's best interest was assessed, through an assessment of the applicant's connection with the realm. The only assessment that is presented in the rejection and presented to UNE is whether the applicant has a legitimate expectation of being able to exercise his family life in Norway, and here the authorities state that this connection cannot be seen as strong. SMED cannot find in this the making of any real assessments of the *consideration to the child's best interest*.

3.10 SUMMARY

The description of the situation in chapter 3 shows, in SMED's opinion, that a broad spectrum of administrative and political measures were used to try to reduce the number of asylum seekers with unfounded applications and make the return process more efficient. The social services legislation, the organisation of the reception centre system and the issuance of temporary work permits were all arranged to create support for the voluntary return scheme. Individuals who cooperated on return, kept their place in a reception centre and their financial subsistence benefits. Some particularly vulnerable groups were exempted from the restrictive measures, this applied particularly to families with children who were offered the chance to continue living in a reception centre.

The effect of the measures that were implemented is not disputed; people left the reception centres and more people lost their fixed system that ensured subsistence benefits. The number of asylum seekers coming to Norway has fallen significantly; is this a result of these restrictive measures or a result of international cooperation? The tendency is the same all over Europe. Only 10% of the people who received notification of the repeal of housing rights in reception centres registered for participation in IOM's return programme. SMED believes that the authorities should make an evaluation of the statistical material. The consequences that have yet to be directly highlighted, are consequences for the individual; this will be the topic for the rest of our report.

4 APPLICABLE LAW

4.1 INTRODUCTION

In this chapter SMED will give a presentation of statutory and non-statutory rights that are relevant for our review of administrative practice in chapter 5, and which are furthermore of significance with regard to our assessments in chapter 6.

This presentation is not meant to be exhaustive or to be presented as an investigation of applicable law that covers all of the legal issues that can arise in connection with questions of the right to food, shelter and health services for people without legal residence. It is not SMED's role to make authoritative statements on how applicable law should be interpreted, in the way that an ombudsman can. Nevertheless, SMED naturally strives to present applicable law from the court's perspective - neutral and descriptive. To the extent that SMED makes critical comments about the regulations or the Government's implementation of international conventions, these must be understood as our assessments. For details about our mandate, see point 1.5

There is reason to note that this presentation does not refer specifically to children's rights, despite the fact that this is a highly relevant topic, see point 3.9. This presentation does not refer to the immigration legislation or the right to asylum either. We have based the report on the fact that the people we have assisted do not initially meet the requirements for protection according to the law or have the right to residence due to humanitarian grounds. An assessment of the right to protection is outside the scope of our mandate.

In point 4.2 we will give an overview of the relevant convention provisions, and discuss their relevance with regard to the authorities' obligations to this group. In point 4.3 we give an account of the national legislation that applies to medical treatment, as well as Social Security legislation, whilst in point 4.4 we refer to unwritten/common law on the principle of necessity. In point 4.5 we refer to the administration's restrictions on competence, the requirement of relativity and protection against discrimination in connection with the exercise of authority. To finish we provide a summary in point 4.6.

4.2 INTERNATIONAL HUMAN RIGHTS

4.2.1 Introduction

§ 110 c of the constitution states that the Government has the responsibility to "respect and ensure Human Rights". The Act governing the strengthening of human rights position within Norwegian law ("The Human Rights Act") of 25 May 1999 incorporates in § 2 the European Convention on Human Rights ("ECHR"), the UN's Convention on Civil and Political Rights ("CCPR") and the UN's Convention on Economic, Social and Cultural Rights ("CESR") as well as the Convention on the Rights of the Child, as Norwegian law. In the case of a conflict with Norwegian law, the Conventions are given precedence (cf § 3).

Through the Human Rights Act, the ban on discrimination as a result of ECHR Article 14, CCPR Articles 2 and 26, and CESR Articles 2 and 13, is incorporated into Norwegian law. On 15 January 2003 (subject to ratification) Norway signed supplementary Protocol 12 of the ECHR on non-discrimination. In the same way as CCPR Article 26, Protocol 12 places a ban on discrimination beyond the rights that are covered by the convention. The Government's obligation to ensure that Norwegian law complies with international human rights is explicitly expressed in ECHR Article 1 and CCPR Article 2. This obligation is also expressed in § 110 c of the Constitution.

In the case of relevant provisions with regard to the discussions in this report we make particular reference to ECHR Article 3 and Article 8, the parallel provisions in CCPR Article 7 and Article 17, as well as CESR Article 11. Even if there is no individual right to appeal in connection with the CESR the provision is of great significance in connection with the Government's obligation to ensure the individual's right to food.

4.2.2 The Government's obligation, particularly CCPR Article 2

The Government's obligation covers *everyone* according to the Norwegian exercise of authority. This is stated in ECHR Article 1 where in the text reference is made to "*everyone within [the Government's] area of authority*"" The obligations according to the CSFR are stated in Article 2. We emphasise here that the CESR states that rights must be ensured "*especially in legislative measures*". A more detailed description of what this duty entails in terms of obligations for the Government is detailed in CCPR Article 2:

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*
    a) *To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
    b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
    c) *To ensure that the competent authorities shall enforce such remedies when granted".*

In other words the obligation consists of both *respecting* rights and freedoms through the Convention, as well as a duty to *ensure* them. The Government's obligation is characterised as a double duty of implementation, and consists of both avoiding behaviour that conflicts with the Convention, and taking positive measures to implement the rights and freedoms of the Convention. It is also worth noting that CCPR Article 2 no. 2 refers to the fact that the Government's measures can be "legislative or other measures".

An important problem in connection with foreign citizens is to what extent this obligation covers foreign citizens. The UN's Human Rights Committee published General Commentary no. 15 on how the Government's obligations to foreign citizens should be interpreted.[28] Point 2 states:

> *"Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in Article 2 thereof. This guarantee applies to aliens and citizens alike.*

In the case of foreign citizens who are in the country without legal residence, it is conditional that the Government itself determines who shall be given access to the Government's territory, but point 5 also states that:

> *However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*

Point 5, translated into Norwegian, is thus:

> *"The Covenant does not recognise the right of aliens to enter or reside in the territory of a State party. In principle it is the Government that determines who shall be granted access to the territory. However, in*

certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise".

SMED therefore acts in accordance with the fact that the Government's obligation towards people without legal residence will primarily result in the fact that the Government must ensure that ECHR Articles 3 and 8, as well as the parallel provisions in CCPR Articles 7 and 17 are respected and safeguarded. Furthermore as mentioned above CESR Article 11 will be discussed.

4.2.3 ECHR Article 3 and CCPR Article 7

Since ECHR Article 3 and CCPR Article 7 are parallel with regard to the relevant problems in this case, we will only refer to ECHR Article 3 in the following section. There are also many decisions where ECHR Article 3 is invoked, also in Norwegian law. Many cases where ECHR Article 3 has been assessed have been cases regarding the deportation of people without legal residence. People without legal residence are protected through ECHR Article 3 which states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

Legal practice designates that there are different degrees of these terms in the area of application. The provision can be relevant for many types of situation that affect people without legal residence:

- The Government has a duty to ensure that people who are forcibly returned do not risk being subjected to situations that would entail a violation of ECHR Article 3, i.e. the risk of attack and pursuit,
- The Government has a duty to ensure that deportation is carried out in a manner that will not constitute a violation, i.e. that humane consideration is taken during the journey, and that the people do not become balls tossed between different responsible authorities,
- The Government has a duty to ensure that people without legal residence are not exposed to such a standard of living that would be characterised as inhumane or degrading until the time of departure.

Legal practice has been based on the fact that ECHR Article 3 stipulates a qualified violation, and the threshold is high. In the case of *inhumane treatment*, there has to be a specific assessment of the type of treatment, the duration of the situation, the physical and mental effects, which are also seen in relation to the victim's age, health, gender etc. Norwegian legal practice has referred here to case 2346/02 *Pretty vs. UK* which was used as the basis for the conclusion that the treatment must be connected with physical harm or intense physical or mental suffering. In the case of *degrading treatment* there has to be humiliation that is designed to break down the individual's moral and physical resistance.

Legal practice from the European Court Of Human Rights (ECOHR) has been based on the fact that the individual's opportunity to end any violating situation can have significance. For example, reference is made here to **ECOHR** case **39022/97** O'Rourke vs UK where the plaintiff claimed that eviction from temporary shelter was a violation because he then had to sleep on the streets even though he was ill. However the court laid emphasis on the fact that the plaintiff himself had contributed to a worsening of his situation by refusing to accept an alternative housing offer that he had previously been given. However the authorities cannot still dismiss all responsibility with reference to the fact that the individual himself has control over the violation.

Legal practice has shown that the individual's influence over the situation will be a relevant factor in the assessment of whether a violation exists. At the same time the Government has, due to its obligation, a responsibility to substantiate the claim that the person could end the violation situation himself. This question was addressed in a deportation case before the High Court, see Rt 2003 page 375. The person the case concerned was granted little credibility due to extensive

evidence material. The court found it proven that the man could obtain information that made it possible to establish his identity so that his return could be implemented. The High Court did not undertake a detailed discussion of whether the man's situation in Norway as a result of the deportation order could be seen as a violation of ECHR Article 3. The reason was partly that the Government had ensured the person's subsistence with social benefits, and partly that the person could have ended the situation himself. The same was the case when the High Court Appeal Committee (case no. 2004/1859, see reference in separate point) assessed the possible violation of ECHR Article 3 in connection with a case concerning the enforced withdrawal of a place in a reception centre, and to which degree a place at the reception centre must be deemed as a necessary measure to prevent a violation of ECHR Article 3: The Appeal Committee stated points which included:

> *"But if the conditions are exceptionally so special that it has already become clear that every alternative for (X) would entail a violation of ECHR Article 3, an eviction from the asylum reception centre would be such a violation."*

In both these decisions by the High Court, national law, and particularly the right to benefits according to the Social Services Act was assessed and found to be sufficient to prevent a situation violating the Convention. The High Court found that people without legal residence *had the right* to such benefits.

4.2.4 ECHR Article 8 – CCPR Article 17

In the same way as with regard to ECHR Article 3 and CCPR Article 7, there are parallel provisions that protect private life and family life in ECHR Article 8 and CCPR Article 17. Reference is only made here to Article 8. In its wording ECHR Article 8 has a lower threshold than ECHR Article 3 to establish a breach. The central question in relation to ECHR Article 8 is whether intervention is necessary because of the reasons mentioned in no. 2.

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*

The state has an obligation to ensure that the right to a private life is respected. People who are not assured food, shelter or health services, would, for example, have to live on the streets. Having access to shelter, a toilet, or the possibility to safeguard basic personal hygiene needs, will probably constitute intervention according to ECHR Article 8 no. 1[29]. In these cases the State could substantiate that the exception in point 2 makes intervention both proportional and necessary in each case.

Until now this provision has only been assessed to a small degree or invoked in relation to people without legal residence.

4.2.5 CESR Article 11

With regard to access to food, clothing and accommodation, CESR Article 11 no. 1 contains an explicit reference to such provisions:

> *"The parties to the Convention recognise each individual's right for a satisfactory standard of living himself and their family, including sufficient food, clothing and accommodation, as well as continuous improvement of their living conditions. "*

The provision gives the State's obligation to ensure access to a satisfactory standard of living. In its General Commentary no. 12 the UN's Committee for Economic, Social and Cultural rights

has provided specific guidelines for how the State can respect and ensure "The right to adequate food". This is emphasised in point 14:

> *"Every state is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."*

It is explicitly stated in point 17 of the guidelines that there must be no form of discrimination with regard to the CESR. There is no opportunity for presenting individual complaints within the CESR system, but the provision is still relevant with regard to the State's practice. SMED is not aware of how the Convention is being practiced regarding this question.

4.2.6 The ban on discrimination in the ECHR, CCPR and CESR

In the introduction to point 1.3 of the report we gave an account of the ban on discrimination according to the Convention, but will repeat parts of the argument here for the sake of summary. The ECHR, CCPR and CESR have an expressed definition of grounds for discrimination. ECHR Article 14 operates with the following definition of discrimination:

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

In order that *discrimination* shall exist according to the ECHR, CCPR or CESR it is not of decisive significance to determine that discrimination can be assigned to a specific discrimination ground; it is sufficient that a group or a person is affected due to their "status", see ECHR Article 14 and Protocol 12 Article 1 no. 1 "other status", CCPR Article 2 and 26 "other status" and CESR Article 2 no. 2. This is certain Convention practice and is also stated in various recommendations from the UN's Human Rights Committee.[30] Point 1 of the Recommendation emphasises the significance of the ban on discrimination:

> *Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.[…] Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

In addition it is provided in the preparatory work for the White Paper no. 33 point 10.1.8.3 where the department states that there is no opportunity for "discrimination between different foreign citizens". The fact that all of the conventions mentioned above also ban discrimination between citizens and foreign citizens (cf the reference to "other status"), is certain convention practice. The decisive question with regard to the ECHR and CCPR is whether a particular group of individuals are directly or indirectly treated worse than others, and if this discrimination is objective or legal because the means are used to achieve a legitimate purpose and there is proportionality between the means and the goal (objectivity and proportionality requirements).

The group discussed here are a group of foreign citizens who do not have legal residence. This group is further limited by the fact that it primarily consists of people that cannot be forcibly deported, and that the people in question are not willing to enter into a binding cooperation on return. Their status can briefly be characterised as "non-deportable people without legal residence". There is no doubt that this group utilises a *limited protection against discrimination* cf point 4.2.2 above on protection under the rights catalogue of the CCPR for people without legal residence (cf General Comment No 15 The position of aliens under the Covenant: point 5). Point 5 specifically mentions the principle of non-discrimination. The question in this regard is whether discrimination is necessary to achieve legitimate purposes according to the convention.

We will return to the question of whether the grounds for discrimination in this case can also be seen as being discrimination on the grounds of "ethnic or national origin" in chapter 6.

If it can be determined that discrimination on one of the named grounds or on the grounds of "other status" exists, the question will then be whether this discrimination is nevertheless legal. In General Comment No 18 point 13:

> *Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*

Another aspect of the ban on discrimination in ECHR Article 14 and CCPR Article 2 is that the ban must initially be connected with rights and freedoms that enjoy protection by the convention. Practice from the ECOHR amongst others has interpreted the ban on discrimination more widely so that it is sufficient to relate facts in the case to a relevant provision of the convention. It is not necessary to establish a breach. The term discrimination in Protocol 12 reaches further than ECHR Article 14 and is also applied for internal legislation and the authorities' treatment of people under the jurisdiction of the State. The ban on discrimination in CCPR Article 26 is not limited to rights determined by convention either, but states that:

> *Everyone is equal under the law and has the right to equal protection by the law without discrimination.*

In chapter 6 of NOU 2002:12 Legal protection against ethnic discrimination, a thorough presentation of international protection is given, and we refer to this presentation for an overview of international protection. The important point in this regard is that the ban on discrimination according to the conventions, must be broadly seen to be identical with the ban on discrimination that the legal committee proposed in NOU 2002:12. According to the law discrimination would be legal:

> *… when the treatment or omission has a justifiable purpose, is not disproportionately imposing and the purpose of the treatment or omission makes it necessary.*

4.3 MINIMUM STANDARD FOR SOCIAL CARE FOR PEOPLE WITHOUT LEGAL RESIDENCE?

Based on the State's obligation to ensure security as described above in point 4.2, it is correct to assume that the State has a responsibility to ensure that people without legal residence are not exposed to a situation that must be deemed to create a violation of the State's obligations to the individual according to the ECHR, CCPR and CESR. A violation will most probably exist if a person is not ensured a minimum of subsistence benefits over a period of time and is almost consistently in genuine danger of dying due to lack of food or other related health problems.

On 10 January 2005 (case no. 2004/1859) the High Court Appeals Committee approached the question of whether further residence at a reception centre should be seen as a necessary measure to prevent that a person without legal residence be in a situation that would constitute a violation of ECHR Article 3. In its decision the High Court Appeals Committee also dealt with the question of a minimum standard for people without legal residence, and the decision gives some guidance with regard to what is applicable law.

The female party in the case was registered as an asylum seeker in 2001 and was given a place at a national reception centre whilst her application for a work and residence permit was processed. The application was finally rejected in 2002, but the woman kept her shelter offer at the reception centre. It was only in 2004 that the woman was notified that the place had to be given up. When this did not take place, a demand for such departure was submitted with reference to the fact that she no longer had the right to occupy the place.

The woman claimed that it was not clear that she did not have the right to stay in the place she had in the national reception centre (cf. the Eviction Act § 13-2 third paragraph letter e). The basis for this was *the situation* she would be put in if the forced eviction was carried out, - on the streets, without shelter, food, financial support or the right to work, and that this would entail a violation of ECHR Article 3. It was also pointed out that she would undeservedly end up in this situation, since she had no genuine possibility to cooperate on her return. She claimed that a return to her home country of Ethiopia would put her in danger of persecution or abuse.

The State, through the Government lawyer, maintained that the situation was self-induced. She could not invoke ECHR Article 3 in the same way as those who had an asylum application pending. The woman resided illegally in the country after she had failed to comply with the departure deadline. The intention of the demand for withdrawal was precisely to make sure that the woman left the country and found a place to live in her home country. The State claimed that instead she tried to force the State to give her free residence in Norway. In any case the State believed that a violation of ECHR Article 3 would first be relevant *after* the withdrawal, when it was clear which benefits the State would then offer her.

The court found that ECHR Article 3 was not a hindrance to the implementation of the eviction from the asylum reception centre because none of the criteria in Article 3 were deemed to be fulfilled.[31] Nor did the court believe that the defendant had proved that a return to her home country would result in a violation of the ECHR. The court made a statement in this regard:

> *"It is therefore the defendant herself that has created and has control over the situation that is seen to be contrary to the ECHR. This must be totally central to the decision of whether the provision would be a violation in the case of eviction from the asylum reception centre."*

Reference was made to Rt. 2003 page 375 which is briefly repeated in point 4.2.3 above, where the High Court placed decisive emphasis on the fact that she herself could end the incriminatory situation she had been put in by helping to clarify her identity. With respect to the issue of errors in case handling, the court did not find that this would be of significance for the decision and did not therefore consider the question.

The Court of Appeal came to the same conclusion but for a different reason.[32] With respect to the question of to what degree the enforced withdrawal in itself could entail a violation of the ECHR Article, the Court of Appeal stated the following:

> *"Since residence at the asylum reception centre must be deemed to be a necessary measure to ensure that [The woman] would not be exposed to inhumane or degrading treatment, it is not clear if she did not have the right to occupy her property,* ***which would prevent enforced withdrawal"*** *(Our emphasis).*

The court also stated that the State had an obligation to ensure that people without legal residence did not end up in situations that were contrary to the convention, but that convention practice did not provide the basis for knowing which minimum requirements should be satisfied. It was established that supplementary benefit should be given to people without legal residence in acute emergency situations, and that this was sufficient for the State to meet its obligations in this area according to ECHR Article 3.

The High Court Appeals Committee endorsed the Court of Appeals application of the law. During the appeal the State had pointed out that the Court of Appeal had *mistakenly* discussed the question of the situation after the enforced repeal as relevant for the deportation, and that instead it would have been correct to raise this question at a later time if the situation developed into one contrary to the convention. The Appeals Committee was partly in agreement, but specified the following:

"But since the conditions as far as one knows were so exceptionally special that it was already clear that every alternative for (X) would entail a violation of ECHR Article 3, ***eviction from the asylum reception centre would also be a violation.***"(Our emphasis)

The High Court Appeals Committee based its terms for its ruling on the fact that "the Norwegian authorities have a general responsibility to give help in an emergency situation, also for foreigners with illegal residence in Norway." Therefore the High Court endorsed the Court of Appeal's terms that the court "does not know the scope of the supplementary benefits that should be granted to individuals in acute emergency situations according to Norwegian guidelines, but finds that such help should also be granted to foreigners without legal residence in the country". In other words both the High Court and the Court of Appeal deemed that such rights exist regardless of the legality of the residence and cooperation on return.

4.4 HEALTH SERVICES, ACUTE MEDICAL TREATMENT AND SOCIAL BENEFITS

4.4.1 Right to health services and medical treatment

Patients without legal residence have the right to *acute* medical treatment. This is according to the Patient Rights Act § 2-1. Health service employees and specialist health service employees have an equivalent *obligation* to offer such acute medical help (cf the Health Service Employees Act § 7 and the Specialist Health Service Employees Act § 3-1).

People without legal residence also have the right to *emergency* health services according to the Municipal Health Services Act § 2-1 where it is stated that *"everyone*" has the right to emergency health services in the council where they live or are temporarily resident. According to the Municipal Health Services Act, emergency medical help entails more than acute medical treatment. The Act itself gives no guidance with regard to how the emergency criteria should be interpreted beyond the test itself, in practice a strict assessment of necessity is applied.

By acute medical help is meant situations where the patients requirements for care either:

- are of pressing necessity to restore or maintain vital bodily functions, and/or,
- are of pressing necessity to prevent/limit significant loss of function

The need for treatment is determined by a professional medical assessment of the patient. The obligation for health service employment/specialist health service employees to examine and if necessary treat patients in acute need, continues until the danger is over. The provision is subject to penalty sanctions and this means that health service employees can be prosecuted for failing to comply with this obligation. Furthermore, health service employees cannot be instructed by their employer or others to carry out actions that are deemed to be in breach of the requirement for safety or other legally-imposed obligations. The obligation to carry out emergency treatment reflects a principle understanding of the fact that an absolute responsibility exists to help people with acute medical conditions.

People without legal residence *do not have* the right to medical help that cannot be seen as acute (cf the regulations for the Patient Rights Act § 2-1). The Patient Rights Act Regulations § 1 establishes which people have the right to medical help according to chapter 2 of the Act:

"the Patient Rights Act Regulations with the exception of § 2-1 first paragraph, only applies to people that either have their fixed abode or place of residence in the realm, are members of the National Insurance scheme with the right to benefits for medical help in accordance with a mutual agreement with another State (Convention patients)."

This limitation results in the fact that patients without legal residence will not have the right to further medical help or follow-up after the acute medical condition has been treated. In addition they can have problems with fulfilling the medicinal treatment that has been started because they lack the financial prerequisites to cover the costs of treatment.

Some medical conditions can develop into serious conditions over time if they are not treated or followed up. The boundary between acute and non-acute conditions and the question of whether a patient is in such a situation and has the right to medical help, is not always easy to determine. In some cases, socially-difficult life situations may have a negative effect on health. SMED will illustrate this with an example that was presented to us in connection with our collection of information:

SMED was contacted by a health institution that wanted to make us aware of a case which they believed illustrated the problem of the resulting limitations of access to health services for this group. The patient was from a Middle Eastern country and had received a final rejection to his applications for asylum two years before, and refused to cooperate on return out of fear for his life and health. For some time he had attempted to survive on a subsistence level by returning bottles for their deposits and selling flowers. He was rushed in to the specialist health services when he collapsed on the street. Examinations showed that the patient had significant health problems, including malnutrition, and that he had developed diabetes and needed insulin. The patient was discharged after several weeks as an inpatient, with no follow-up apart from a free prescription for three months' supply of insulin. Without the income that he had had previously, he was unable to ensure adequate nutrition and after a while he began to ration his insulin dose from two to one dose per day. Once again he was acutely ill, but not seriously enough for acute admission as before. Out of compassion a doctor wrote another free prescription for several months' supply of insulin.

This example illustrates that health cannot be safeguarded in a defensible manner without the patient also being financially secure in a way that makes him able to ensure his basic needs in the form of food and shelter.

4.4.2 Benefits and services according to the Social Services Act

'Social Services Act' (SSA) December 1991 no. 81 ("Social Services Act") represents the lower safety net for people who lack the ability to take care of their own welfare. The Social Services Act regulates the right to benefits such as food, shelter and the right to have benefits paid for such as medicines. The Act's § 1-1 states the purpose of the professional judgement and the conditions that Social Services have the ability to demand are fulfilled during the application of the social-professional work:

> *"The purpose of this Act is*
>
> *a) to promote financial and social security, to improve the living conditions of disadvantaged persons, to contribute to greater equality of human worth and social status and to prevent social problems,*
>
> *b) to contribute to giving individual opportunities to live and reside independently and to achieve an active and meaningful existence in community with others".*

In Welfare Rights II by Syse and Kjønstad page 304 Alice Kjellevold writes:

> *"Based on an analysis of the Act, its preparatory work and other relevant legal source material it can be determined that safety for the individual is the fundamental value of Social Services".*

Safety as discussed here is in addition to financial security; a social security, as well as protection of the individual's personal and physical integrity. Kjellevold elaborated on this as follows:

> *"Those who apply to Social Services feel secure that he or she will not be exposed to injustice or unnecessary interference in personal situations. In preliminary work for the Social Services Act this dimension is*

examined and encompassed in the term 'safety' in the purpose provision. ***Such protection of personal integrity is an important constitutional value."*** *(our emphasis)*

The purpose provision will, to a limited degree, have direct significance for benefits that are granted to the individual. In this case the legislation and the procedural provisions will be central. At the same time the purpose provision designated that which should be the highest professional goal in work undertaken by the first line services with regard to people in an emergency.

The Social Services Act gives the right to services for people that are resident in the realm (cf the Act's § 1-2). Initially, people will have the right to social benefits in the council where they reside at any given time (cf the Act's § 10-1). Under the provisions of the Social Services Act § 1-2 the rights accorded to people without legal residence are restricted -cf Regulations for the Social Services Act of 13 December 1992 ("Social Services Regulations"), in which, in § 1-1, which deals with people without legal residence, it states:

People that do not have legal residence in the realm do not have the right to financial support according to the Social Services Act chapter 5.

If the respective person cannot receive care then he or she has only the right to ***emergency care*** *until such time as the respective person is obliged to leave the country according to the Immigration Act and Regulations. (our emphasis)*

The limitation to the people with the right to financial benefits according to chapter 5 of the Act was introduced in 1992. The background for the change was that the authorities found it unreasonable that individuals who have received a final rejection for residence from an administrative body should still have the right to financial support from another administrative body. People without legal residence will still have the right to financial benefits on other grounds for example common law principles on necessity etc. Refer to point 4.4 below. Other provisions and chapters of the Act do not exempt people without legal residence. At this point we would like to emphasise the right to temporary housing according to the Social Services Act § 4-5. Social Services have a *duty* to ensure provision for shelter for individuals who are unable organise it themselves. At the same time the Act's subsidiary character may be of significance for the assistance given, see the separate point below in point 4.5.

There are particular reasons to stress that there are no exemptions to the procedural requirements that are made of the Social Services' case treatment and access to appeals according to chapter 8. The provisions of the Public Administrative Act are directly applied to the case treatment using the special regulations according to the Social Services Act. According to the Act's § 8-4 the obligation to consult with the client is regulated as follows:

"The service to be offered shall as far as possible be planned in cooperation with the client. Great importance shall be attached to the client's opinions."

This provision illustrates the importance of the fact that the Social Services' calculation of service priorities is conditional on sufficient knowledge of the individual situation and that this knowledge is emphasised in the shaping of the services. In many cases special language help will be necessary for such dialogue for people from other ethnic backgrounds. This may also result in both qualitative and quantitative adjustment of the client situation for people who lack knowledge of their rights.

4.4.3 Social legislation's subsidiary character

Benefits according to the Social Services Act are the lowest safety net of the welfare state for people who are unable to find other solutions for their subsistence. People who have other alternatives for safeguarding their subsistence, are to make use of these *before* they are entitled to financial services according to the Act. This principle is directly stated in the text of the Act in § 5-1 where the Act is conditional upon the person being unable to support himself/herself. This

principle is also reflected by the fact that in the case of other financial rights, for example social security entitlement or financial support by a spouse or parents, the use of any saved funds or realisation of capital items may be demanded before a right to financial assistance exists. In the Regulation to the Act § 1-2 an exception is made for benefits to asylum seekers that have been offered housing at a national reception centre.

Social Services may not reject the granting of assistance by referring to the fact that the applicant must make use of alternatives which may be deemed as clearly unreasonable to demand from the applicant. This is according to the common law principle on the abuse of authority. According to the Social Services Act § 8-7 the county administrator can reverse a rejection decision deemed to be manifestly unreasonable. The subsidiary character of supplementary benefit, and what must be deemed to be the restrictions on the authority of the Social Service's to reject the granting of assistance on these grounds, is also reflected in the Act's § 5-3 which regulates the use of conditions:

> *"Conditions can be stipulated for the granting of financial support, see also § 5-4 third paragraph and § 5-8. The conditions must be closely related to the decision, and must not unreasonably restrict the freedom of action or choice of the recipient of the support. Nor must the conditions be contrary to other provisions in the present Act or other Acts.*
>
> *It can be stipulated that the recipient must be employed in suitable tasks in his or her municipality of residence for as long as the financial support is received."*

This provision is applied to benefits according to chapter 5 of the Act, whilst benefits according to unwritten law are therefore not directly covered. At the same time the provision's indication of what is deemed to entail restrictions on the competence of the administration's judgement on benefits according to the Act, created a relevant interpretation issue with regard to what is manifestly unreasonable in the case of benefits on the basis of common law principles. In rejections of emergency help the Social Services have based the rejection on the fact that people without legal residence have an offer of food and shelter at reception centres if they cooperate on return. An important question is whether such a condition is permissible, in general or in individual cases. We will return to this in more detail in chapter 5.

4.5 COMMON LAW PRINCIPLE OF NECESSITY – INTRODUCTION OF A NEW LEGAL INSTITUTION?

4.5.1 A precisely defined right?

A condition for people to exercise the rights that they are entitled to under the law, is that those who administer the law, make a correct implementation thereof. When an individual is unable to use his right this can be due to the fact that some users do not know their rights and therefore make no claim. But as important as ensuring that the people be granted their right is that the material rules that regulate such rights be clear, that the case treatment be adequate, that those who make the decisions be competent and that there be sufficient procedures to check the process[33]

As an introduction the use of terminology and the indication of which rights are concerned must be illustrated. The Ministry of Local Government and Regional Development, Directorate of Immigration, Ministry of Labour and Social Affairs as well as the Ministry of Health and Care Services, have repeatedly stated that help can be granted on the basis of common law. The term that has been used to describe this right, has not been clear: - *emergency help* according to "common law principles on the matter of necessity", "general principles of necessity", "an obligation to help people in need" and that "no-one shall starve or freeze to death in Norway"

With regard to the topic of this report, the question of which rights people have in respect of financial support when chapter 5 is not applied has created considerable confusion.

4.5.2 What is necessity or principles of necessity

The terms that have been used to describe the legal concept that forms the basis of a law are not insignificant and can give different results. A right that is based on an *obligation provision* (cf the obligation to help in an emergency), can make it punishable to neglect to provide care, whilst *an act of necessity* only legitimises other treatment alternatives if a danger situation is sufficiently serious.

In order to understand what is included in the legal concept of necessity the expression "*necessity breaks all laws*" constitutes, pursuant to legal theory, the basic assumption.[34] Accordingly, people who find themselves in an emergency situation are given the right, under certain conditions, to act in a different and divergent manner than the norms for a normal situation would allow. One refers to a *criminal necessity* that makes it unpunishable to act in a manner that would otherwise be subject to prosecution - if the emergency situation is sufficiently dangerous. In some cases one can also find special rules that provide for a *civil necessity* that constitute rather a question of the degree to which action is legal or not. Andorsen refers to The old shipping Act of 20 July 1893 no. 1 that had a separate provision on joint shipping, i.e. rules governing how one should act when a joint danger threatened ships, freight or cargo, but which is now replaced by international provisions. Criminal necessity deals with the criminal responsibility for people, whilst civil necessity is a question of financial loss alone. In both cases it is a matter of a state of emergency.

SMED cannot in any way see that the manner in which a *civil necessity principle institution* is to be applied with regard to social benefits or health services, is clear. A civil necessity principle argument will normally entail that a person who is in sufficiently serious danger, will save him/herself at the expense of another person. In this case it will be the alternative actions of *the person* who is subject to danger that are extended as a result of the danger he is in. The authorities have stated that the obligation to help people without legal residence is a consequence of general principles of necessity. On this basis one may infer that the emergency measure that one would envisage in these cases would be to decide for the granting ofemergency to a group of people that one would otherwise not be obligated to protect, because these people find themselves in an acutely dangerous situation. One can mention that the alternative actions open to the person dealing with the case are extended as a result of the fact that the person looking for help is in acute danger. Through legal aid, SMED has seen that this has not been a simple matter to understand or apply. Social Services' employees have limited legal competence and have themselves been despairing over the fact that they have to administer such "delicate law".

4.5.3 Benefits and the scope of benefits

With regard to the question of *which benefits and the scope of such benefits,* such a right can give, the authorities have emphasised that Social Services have wide experience of treating applications for emergency help and will therefore be able to carry out an adequate professional judgement in these cases. There is little doubt that Social Services have the professional qualifications to assist people in need, but it must be made clear that this type of emergency help is different from the benefits that Social Services normally assist with. According to the Social Services Act, financial support shall ensure that everyone has sufficient funds for subsistence. People who initially have sufficient funds for their subsistence, but nevertheless end up in an unexpected and acute situation, may have a right to emergency help in addition. Circular 1-34/2001 describes the obligation to help as follows:

> *5.1.4.4.1 Acute help and the principle of necessity*
>
> *If the situation is acute, and at the same time there is reason to assume that within a short period of time the applicant will receive funds to take care of himself, the support can be kept to a minimum. This entails that*

support is given for necessities such as food and essential items for personal use, and for bills that must be paid to prevent the shutting off of necessary services such as electricity and so on.

An application for acute help must be assessed quickly, often on the same day that it is received. This entails that Social Services cannot investigate the case as thoroughly as in the case of ordinary applications. For example, if the application is received right before the weekend, and the applicant claims to be completely without funds for food, or has no place to sleep, then the application must be assessed on this basis. Applications that are received in connection with acute situations cannot be rejected, or refused treatment based on the fact that the applicant can, for example, take advantage of charity help or similar.

General principles of necessity *(our emphasis) also suggest that a person can have the right to help to cover costs in special, acute situations regardless of whether the person in question has the right to help according to § 5-1. Very limited help is referred to here, for example as a result of the fact that the person is away from home and cannot make use of the possibilities he would otherwise have. This right applies to everyone, regardless of their place of abode and financial situation such as income and savings.*

The group referred to here is basically well safeguarded by other means, but should additionally be safeguarded if unexpected and acute situations occur.

As mentioned above, the Regulations for the Social Security Act § 1-1 exempts people without legal residence from chapter 5 of the law. The regulations must be understood to mean that individuals who have failed to comply with the departure deadline, after having received a final rejection to their application for asylum, do not have the right to emergency care either. Social Services have no experience with assessing emergency help for people that completely lack other alternatives. The assessments must be different in both qualitative and quantitative terms from other emergency help in order to be adequate. No guidelines have yet been provided that state in which manner individuals in *this kind of* a situation shall be safeguarded.

4.5.4 A need for clarification?

SMED's experiences in connection with the Social Services' and county administrator's application of the law in these cases, led to the fact that on 1 December 2004 SMED sent a request to the Ministry of Labour and Social Affairs and asked for guidelines for the application of so-called "common law principles of necessity".

The Ministry replied to SMED's request in a letter dated 9 December 2004 and expressed the following points about the need for definitions in the form of guidelines:

"The Ministry fully understands the request for more clear guidelines in this area. At the same time it is ***impossible to provide guidelines*** *to those who have the responsibility for providing acute help in an emergency situation, as the responsibility to help other people in need* ***lies with all of us****. This also makes it difficult to provide guidelines for what kind of help* ***the town councils*** *shall provide when faced with such cases."* (our emphasis).

In parallel with our request to the ministry SMED brought a final rejection in response to an application for emergency help before the Parliamentary Ombudsman for Public Administration. The Parliamentary Ombudsman for Public Administration did not consider the individual case, but found reason to contact the ministry on 6 January 2005.[35] The Parliamentary Ombudsman for Public Administration pointed out that there were legal uncertainties connected with the application of the law with regard to the common law principles of necessity and that the ministry would have to assess the provision of guidelines to clarify various aspects connected to the protection of people in an emergency situation. The Parliamentary Ombudsman for Public Administration emphasised that the assistance in question could be "food, shelter and care in an

emergency situation". The Parliamentary Ombudsman for Public Administration requested the following:

- The substance of "unwritten principles of necessity"
- Is one in need if man does not cooperate on voluntary return?
- How long does one have the right to such help?
- Can an appeal be made against a rejection for such emergency help and if so, to which appeal body?
- How should such emergency help be funded?

5 ANALYSIS OF ADMINISTRATIVE PRACTICE

5.1 INTRODUCTION

Persons without legal residence had, as mentioned in chapter 3 above, three alternative legal means of ensuring food, shelter and health services – through work, through the offer of housing and subsistence benefits in a reception centre or through the benefits granted by the council for Social Services.

The previously-available option of self support through temporary work permits, as referred to in point 3.6 above, is no longer a real alternative. The immigration authorities' change of practice with regard to granting temporary work permits means that such permits are no longer granted to persons who cannot be forcibly returned. SMED would also like to point out that in connection with the processing of Document 8:26 2004-2005 on measures for improved treatment of non-returnable asylum seekers with a final rejection and other non-returnable foreigners, the majority of the committee used the following basis on page 2:

> *"The majority also refer to the fact that the regulations already allow for persons with a final rejection to be granted temporary work permits until the decision on departure is effected. The effort for achieving agreements for the reception of returnees with the individual country's authorities has intensified in recent years."*[36]

At this point SMED wishes to point out that the tightening by immigrations authorities of administrative practice with regard to granting this type of work permit is recorded in writing in Circular NDI 2003-021 ASA. The Immigration Act § 17 (6) in accordance with Immigrations Regulations § 61 (3) is not being practised in a manner that the majority of the committee expected to be possible. SMED mentions this by way of introduction because it illustrates that there are only two real alternatives for this group: the offer of housing and subsistence benefits at a reception centre or assistance from the local Social Services. SMED does not know to what extent the immigrations authorities grant temporary work permits beyond what is assumed under the aforementioned Circular, but naturally we cannot rule out that this takes place.

The main topic for chapter 5 is an analysis of administrative practice. In order to give a complete picture of how the State safeguards its obligations towards persons without legal residence, it is necessary to firstly investigate how the scheme of accommodation in reception centres and the granting of subsistence benefits through the reception apparatus is being practised, and thereafter how the local Social Services give assistance to this group. The starting point is the fact that supplementary benefit is subsidiary in relation to employment income and other benefits, for example social benefits. The principle is described in point 4.3.3 above.

Supplementary benefit is also subsidiary with regard to persons who live in national reception centres, pursuant to the Social Services Regulations § 1-2. To the extent that the State transfers an offer of a place at a reception centre after the applicant has received a final rejection to their application for asylum, this offer is primary in relation to secondary subsistence benefits according to the Social Services Act. As previously mentioned, the State safeguards the subsistence of persons whose application for asylum have been finally rejected through an offer at a reception centre as referred to in point 3.2, even if this no longer happens to the same extent as prior to the implementation of the restrictive measures.

In point 5.2 below SMED will give account of administrative practice connected to the offer of housing and benefits at a reception centre, and the restrictive measures that were implemented and partly carried out. Since the offer of housing in a reception centre and supplementary benefits in a reception centre are an *administrative scheme*, the changes in practice with regard to who is given a place in a reception centre after receiving a final rejection to an application for asylum, as well as subsistence benefits for residents of a reception centre, take place according to

instructions from the Ministry to the NDI and the national reception centre. Since persons with a final rejection to their application for asylum have very limited rights according to the Social Services Act (see points 4.4 and 4.5 above), and since the councils' and the county administrators' administrative practice has been very restrictive as referred to in point 5.3 below, it will be *extremely important for the individual to retain his/her offer of accommodation in the reception centre.*

Even if the offer of accommodation at a reception centre should, as a rule, only be given to persons whose application is being processed or who are waiting to be housed by a council, and should only be used for persons without legal residence as an exceptional measure, it is clear that until recently persons without legal residence were often safeguarded by the fact that they kept their place at the reception centre and their benefits. If this offer is then withdrawn, or the practice with regard to financial benefits is tightened, the State's legal obligation to safeguard persons without legal residence with regard to food, shelter and health services becomes more relevant. In point 5.3 we analyse administrative practice we have become familiar with through our legal aid and other sources.

5.2 OFFER OF HOUSING AND SUBSISTENCE BENEFITS IN A RECEPTION CENTRE

5.2.1 Overview

Many of the individuals whom SMED assisted in the first phase of the project had a place at a reception centre, and received subsistence benefits. Several of these had been living in Norway for many years, and several of these individuals were those that the NDI had registered with regard to the report on long-term residence in reception centres. When highlighting the practice connected to the offer of housing and benefits at the reception centre, it is natural to divide our presentation into different phases: 1) the situation before the restrictive measures, 2) the situation until the government decided that the withdrawal of the offer of accommodation at reception centres should be treated as an individual decision and 3) the practice up until today. The goal of such division is to illustrate the development of administrative practice.

Before we analyse this practice we will give an account of the procedure that led to - and the assessments that were made with regard thereto - the fact that the offer of housing was deemed as an individual decision - see point 5.2.2 and the procedure connected to the offer of a place at a reception centre for persons who cooperate on return through IOM - see point 5.2.3.

5.2.2 Withdrawal of the offer of housing in reception centres – an individual decision?

The procedure that led to the fact that cases regarding the withdrawal of the offer of housing at reception centres became to be considered as individual decisions according to the Administrative Act pursuant to instructions from the Ministry of Local Government and Regional Development to the Directorate of Immigration dated 19 October 2004, started with the fact that in the spring of 2004 the State declared that a woman had to forcibly have her place at a reception centre taken away pursuant to the Eviction Act 13-2 third paragraph litra e). The woman had been living in the reception centre since she received a rejection in 2002.

The woman's counsel claimed that casework errors had been made in connection with the withdrawal decision, and that these errors led to the fact that there was no basis for granting the motion for eviction. In this regard the counsel for the defence referred to the Ministry of Local Government and Regional Development's instructions dated 19 October 2004 as referred to in above. The question of whether a decision regarding the withdrawal of the housing offer in a reception centre is an individual decision, was assessed by the Ministry of Justice and the Police dated 23 September 2004.[37] In this connection the Ministry took as its basis that the granting of a housing offer was an individual decision that initially builds on the fact that the offer would stand as long as the person's asylum application was being processed or that the person was waiting to

be settled in the council. With regard to a decision on the "withdrawal of the offer of housing", the ministry equated this with the fact that the authorities established that there was condition for discontinuance. This ascertainment could not be equated with an individual decision, and the fact that some individuals received the offer of continued residence did not change this. The ministry believed, however, that an offer of continued residence should be deemed to be an individual decision.

Even though the Ministry of Justice and the Police also believed that the withdrawal of the offer of housing in a reception centre was not an individual decision in terms of the Administrative Act § 2, the Ministry of Local Government and Regional Development decided that cases regarding the withdrawal of the housing offer should be treated as individual decisions. In this regard SMED wishes to draw particular attention to two conditions that suggest this is the most correct procedure:

One may question whether it is as clear as the Ministry of Justice and the Police assume that a person accepts a withdrawal of the offer upon receiving a final rejection to his application for asylum. The Ministry of Justice and the Police do not view it as a problem that there are many individuals who kept their places at reception centres and received financial benefits for many years following rejection; in one case for 8 years. These are also people who have established themselves in the local area, and who for instance exercise their parental rights at the reception centre. In many of these cases – that particularly affect those who are long-term residents in a reception centre – there are grounds to question whether the authorities have carried out their obligations in a manner that can be seen as equivalent to a dispositive statement (cf point 4 of the Ministry's assessment).

The withdrawal of accommodation touches not only upon the question of the withdrawal of shelter, but also on the withdrawal of subsistence benefits. The Ministry of Justice and the Police have not found a problem with the fact that some people have received financial benefits – money for food - and subsistence provisions in parallel with accommodation at a reception centre. One may question whether a situation regarding access to subsistence benefits whereby a person does not cooperate on return is so grave g, that a complete assessment of the applicant's situation suggests that the withdrawal of housing in a reception centre must be deemed as an individual decision. SMED confines itself to referring to our assessment of administrative practice in point 5.3 below.

To summarise; a withdrawal of a housing offer was to become an individual decision from October 2004 onwards. We believe that this has significantly strengthened legal protection for the most vulnerable individuals with a final rejection to their application for asylum.

5.2.3 The offer of a place at a reception centre in the case of cooperation on return through IOM

One of the goals of the government's policy was to contribute to the fact that more persons whose application for asylum were finally rejected, would return voluntarily. This was done in several ways, but with regard to the offer of housing and subsistence benefits in a reception centre, it was made clear early on that persons who cooperated with IOM on return through the VARP programme were exempted from the housing offer withdrawal scheme.[38] SMED has no objections to this scheme, and believes that it helped to assure a humane return of former asylum seekers.

The scheme, however, is more complicated in practice than it may appear. Even in the Directorate of Immigration's letter dated 16 December 2003 the Directorate maintains that persons who "apply to travel home voluntarily through IOM and who help obtain travel documents" are exempted. During the cabinet minister's briefing to the parliamentary session of 5 May 2004 the minister maintains that "As long as cooperation is active and credible, financial

support will be given for subsistence according to the Cash regulations".[39] In the case of the information that was given to the individual residents in connection with notification of the withdrawal of the offer of housing in the reception centre, and the right to keep their place in the case of cooperation with IOM, the NDI writes:

> *"The starting of a credible and specific cooperating regarding your real identity and your acquisition of travel documents, will give rise to an assessment of an extended permit for residence at the reception centre.. We ask you to contact IOM or with the police for the participation in the voluntary return programme"*

SMED endorses the authorities' view on the fact that it is necessary to ensure that persons who apply for voluntary return through IOM actually intend to cooperate so that the procedure can be carried out. However it is important when assessing the credibility of the applicant's real motives to assume that many of these individuals lack knowledge of the system and of the language in order to safeguard their interests in the process, and particularly the ability to understand the significance of being able to document his efforts to cooperate on return.

Abdi, case no. 04/163, came to the country in 1995 and received a final rejection to his application for asylum in 1996. He had been resident in a reception centre since his arrival, and an attempt was made to deport him in 2001. Abdi is in a difficult situation; he does not have a work permit, no offer of education or other activities. In 2004 Abdi received notification of the withdrawal of the shelter offer in the reception centre. Abdi applied for assistance for return through IOM, but received a letter from IOM in which he was informed that he could not get any assistance. Reference was made to the fact that:

> *"IOM has received your application, but will not be able to assist you in returning to your country of origin. For further information on your travel arrangements please contact Foreign Department of … Police: …"*

The letter was sent to the reception centre where Abdi was living. At the reception centre Abdi was told by an employee that he could now just wait until he was contacted again by the police. He did so, but as nothing happened he contacted SMED. SMED then contacted the police and were told that the police expected Abdi to contact his relatives in his home country and obtain the necessary information. This was not recorded anywhere, nor was this information sent to Abdi in writing at the reception centre. On this basis SMED assisted Abdi by sending a letter to the relatives, and asked the police in a letter of 15 November 2004 to be kept informed of the case development. SMED has still not heard from the police, or received any documentation on the reasons preventing Abdi from participating in the VARP programme.

This case illustrates two significant problems with regard to the condition of cooperation regard return, which also affect the offer of a continued place at a reception centre:

- SMED questions whether the processing of a case, is sufficiently organised to document at all stages including the reception centre, IOM, the police's immigration department, the matter of cooperation on voluntary return. IOM has no information on the reason why the police would stop a case on voluntary return. In the above case, it proved to be very difficult to obtain both information and documentation of any significance that would allow the keeping of a place at a reception centre and the possibility to apply for a residence permit because the person had to be actually proven non.returnable - and stateless.
- Individuals have no documentation that can show their motivation with regard to cooperation on return other than the application form for participation in the VARP programme. However it is clear that if an unsuccessful attempt has previously been made to deport a person, it can be presumed that the person will not bind himself on cooperation. Furthermore the fact is that there is a need for initiative in addition to a simple registration act, but what it may entail is not necessarily explained to the

applicant. The staff at the reception centres generally have little expertise concerning the voluntary return scheme, as illustrated in Abdi's case.

To summarise, SMED has received some enquiries that illustrate that it is no simple matter to connect the terms of a specific and credible cooperation on true identity through IOM, to the question on the right to keep a place and benefits in a reception centre. This is not because the scheme in itself is unreasonable, but primarily because it raises particular individual questions connected with the documentation of the case development at all stages of the procedure.

5.2.4 Administrative practice

The foundation for administrative practice lies in the two national regulations; the Regulations for the operation of national reception centres (hereinafter called the "Operational regulations") and the Regulations for financial help to persons in national reception centres (hereinafter called the "Cash regulations"). The Operational regulations and the Cash regulations create the framework for the authorities' policy on national reception centres; including the organisation of the reception centre apparatus, division of responsibilities and offers of housing and financial benefits to persons in the reception centres. Both the Operational regulations and the Cash regulations may be changed by the administration.

The use of the Operational regulations and the Cash regulations was amended from 1 January 2004. As regards the Operational regulations, point 2 second paragraph states:

> *"The Directorate of Immigration can provide guidelines for a reduced offer to persons with applications deemed unfounded and persons with rejections to applications for asylum."*

Point 2.1, second paragraph states that:

> *"The offer of a place is valid from the date that an application for asylum is made until the date for settlement within the council area or the deadline for departure set by the immigration authorities. In special cases, the Directorate of Immigration may decide that the offer shall be given for a longer period of time."*

The Cash regulations that regulate financial help to persons in national reception centres also mention the situation for persons who have received a final rejection to their application for asylum, and persons who are not resident in a reception centre. Point 2.2 Absence and relocating states that:

> *"Payment of benefits in accordance with these regulations is conditional upon the recipient being resident at the reception centre."*

Furthermore in point 2.3 Following rejection of the application:

> *"Residents who have received a final rejection to their application for asylum, or who have not been granted postponement after appealing the Directorate of Immigration's decision, lose their benefits with effect from the departure deadline. In special cases the Directorate for Immigration can decide that benefits shall be withdrawn at a later date."*

It is worth noting that point 9 of the Cash regulations explicitly states that decisions according to point 2.3 cannot be appealed. The topic for assessment is therefore whether the Directorate of Immigration has found that there are "special cases" that suggest that benefits must be transferred after a departure deadline has been set, in terms of a place at the reception centre as well as financial benefits.

Up until the beginning of 2004 many individuals without legal residence were living in reception centres and receiving financial benefits. It is true that restrictions were made on the transfer of financial benefits to this group by the withdrawal of pocket money, but these individuals received subsistence benefits and kept their places.

Only one of the cases in which SMED assisted in 2003, referred to benefits and the offer of housing at a reception centre and is accordingly relevant to this report. This was a case that raised questions over both the right of appeal and the possibility to deviate from the condition of the regulations that states that the payment of benefits according to the Cash regulations is conditional on the applicant residing at a reception centre.

Case 03/80 Jonas. Jonas had been living in the country for a long time, and had a place in a reception centre and received financial benefits. Since he was the father of a son whom he wished to spend time with, the offer of housing at a reception centre was unsuitable and he had the possibility of establishing himself privately. However, he was still dependent on financial benefits, and applied on the basis that the immigration authorities could make an exception from the obligation to reside at a reception centre (point 2.2) to received subsistence benefits. The Directorate of Immigration replied to our enquiry by referring to the fact that:

> *"We do not have the possibility of granting … financial help, if he does not accept this offer. At the reception centre he will receive the same offer as other asylum seekers who have received a final rejection to their application for asylum."*

SMED appealed the decision and submitted that the Directorate of Immigration's decision should be regarded as an individual decision, and therefore subject to requirements of reasonableness and proportionality. Referring to SMED's submission that the decision should be regarded as an individual decision, the Directorate of Immigration stated:

> *"the Immigration Regulations § 60 the offer of a place in a reception is not an individual decision, and may not be appealed either in accordance with § 59. There may accordingly be no provision for an appeal within a deadline to a higher body. The fact that the decision regarding a place in a reception centre may not be appealed should have been stated in the letter to … . This is an omission on our part, which should have been stated in such a letter."*

This assessment is different to the one made by the Ministry of Justice and the Police regarding the offer of a place in a reception centre. This case also illustrated that even though persons without legal residence were offered protection by the reception centre apparatus before the restrictive measures were implemented, it was difficult to safeguard this group's requirements in a manner that would have been satisfactory to the individual.

From 1 January 2004 the authorities made changes to the practices within the framework of the provisions of the Operational regulations and the Cash regulations. Financial benefits, in the form of subsistence benefits, were stopped, and individuals received notification of the withdrawal of the housing offer at a reception centre. In two of the cases in which SMED assisted, cases 04/244 and 04/234, the individuals continued living in reception centres despite the warning that enforced eviction would be used, but financial benefits were completely withdrawn. These persons generally received access to food through privately-organised networks and aid measures. When at a later stage it transpired that their cases were pending before UNE for a new reversal examination, these persons were allowed to keep their places and received financial subsistence benefits.

SMED does not know how many individuals received a standard letter with the notification of "Withdrawal of the housing offer at a reception centre" in the first quarter of 2004, but based on figures from the NDI as referred to in point 3.5, 592 individuals received such notification in the whole of 2004. SMED assisted many individuals who received notification, and one of these was *Yohannes, case no. 04/264*. Yohannes came to Norway from Ethiopia in 1995, and received a final rejection to his application for asylum in 1997, and the last time his case was assessed and rejected by the UNE was in March 2003. Yohannes has been living the whole time at a reception centre. Yohannes is ill, and is dependent on daily medicine funded by a modest employment income. In October 2003 Yohannes received notification on a reduction of his basic allowance

pursuant to the practice changes with regard to the Cash regulations, and in March 2003 Yohannes received notification on the withdrawal of the housing offer. Yohannes received the following information in the notification from the NDI:

> *"We request that you leave the reception centre within two weeks of the receipt of this letter. If you do not leave the reception centre the police will have the responsibility to carry out such a move. Following this deadline you will also lose all financial benefits.*
>
> *If you agree to start a specific and credible cooperation regarding your real identity and the obtaining of travel documents, we may assess the possibility for issuing an extended permit for residence at the reception centre. …"*

Yohannes did not know what to do, and like other persons with whom SMED was in contact, he chose to stay at the reception centre without doing anything at all. Yohannes did not contact IOM or in any other way take the initiative to move out. On 20 April 2004 Yohannes received a letter from the NDI in which he was informed that he no longer was entitled to a place at the reception centre and that all cash payments had been stopped. Furthermore he was informed that "the Directorate of Immigration will request eviction without further notice 14 days following the receipt of this letter". Yohannes still did not know what to do, but eventually sent a letter to the NDI to ask for permission to keep his place in the reception centre, referring to the fact that:

> *"I have medical costs to pay (see the attachment regarding costs and the doctor's certificate), and on this basis I am applying to reverse the earlier decision on the withdrawal of the offer of housing at the reception centre".*

The NDI rejected this, and gave a very brief account of their reasons as follows:

> *"The NDI maintains the decision on the withdrawal of the offer of housing at the reception centre since you have received a final rejection to your application for asylum and no decision on postponement applies."*

However, Yohannes was able to keep his subsistence benefits throughout the entire process, as opposed to other individuals SMED assisted. It appears therefore that there was some difference in practice with regard to when financial subsistence benefits were stopped.

SMED is also aware that families with children have been allowed to keep their place in a reception centre. In *case no. 04/238 the Nedova family*, a family kept its place and received benefits despite the fact that the family's children were no longer below the age of majority and that no postponement had been issued in view the family´s new motion for reversal. It appears therefore that the practice has been more generous that the regulations originally allowed, and perhaps particularly for families with children.

After the Ministry instructed the Directorate of Immigration that a withdrawal of a housing offer should be treated as an individual decision, SMED noted that the individual assessments seemed more thorough and open for scrutiny. One case in particular illustrates this, and this is the case of Yohannes as referred to above, case no. *04/264*.

Yohannes did not leave the reception centre in the autumn of 2004, despite the fact that the Directorate of Immigration did not grant his appeal. In January 2005 Yohannes received a new letter from the authorities that gave him the opportunity to describe his case anew, thereby treating the case as an individual decision. The immigration authorities supplied thorough details on the reasons for withdrawing his offer, and pointed out to what kind of information was required in an appeal.

> *"In any appeal you must state that you are appealing against the decision on the withdrawal of the housing offer, and the reason why you believe that you should keep your place in the reception centre after the departure deadline was exceeded. It is important that you give all information you believe to be of significance for assessing your appeal. The appeal must be signed."*

On this basis Yohannes gave a thorough account of his current situation, including how long he had been living in the country, which attempts he had previously made to return to his home country, that he had established a network and supported himself until the NDI withdrew his temporary work permit. The Directorate of Immigration reversed its previous decision, and the reasons were as follows:

> *"The Directorate of Immigration has assessed the information contained in the appeal, and finds reason to temporarily reverse its earlier decision in the case. An extended offer of housing at the reception centre will be valid as long as welfare reasons make it necessary, and a new assessment will be made if the situation changes."*

5.2.5 Summary

The national reception centre apparatus has always been, and to an extent still remains, a significantly administrative scheme to safeguard subsistence benefits for persons who have received a final rejection to their application for asylum. The restrictive measures introduced by the authorities and connected to the withdrawal of the offer of housing at reception centres as well as financial subsistence benefits, affected therefore directly persons whose have application for asylum have been finally rejected. Some have lived at the reception centre for many years and returning to their home country is no longer a real possibility.

Before these cases were treated as individual cases, there was little assessment of the consequence for the individual; with the exception of the group exempted from the scheme – single asylum seekers below the age of majority and families with children. A number of considerations could have been emphasised, such as the length of residence at the reception centre, physical and mental health, age and functional level etc. Instead these individuals were notified of the withdrawal of the offer, and to the extent that any tried to appeal and attempted to provide arguments for maintaining the offer, it was of their own initiative. Based on SMED's individual cases connected with administrative practice as referred to in point 5.3 below, many went to Oslo.

After the establishment of case administration procedures connected with the withdrawal of the offer of housing and financial subsistence benefits, SMED believes a trend can be seen in the direction of a more individual assessment of a person's needs. Yohannes' case illustrates this very clearly; his arguments for keeping his place were first rejected without reason, and then when a renewed application was made in January 2004, it was granted.

5.3 FOOD, SHELTER AND HEALTH SERVICES OUTSIDE OF RECEPTION CENTRES

5.3.1 - No-one shall starve or freeze to death in Norway today

As stated in point 4 above, persons without legal residence have few rights to certain benefits for food, shelter and health services. The benefits concerned would be temporary housing according to the Social Services Act § 4-5. In addition persons will have the right to money for food in accordance with common law principles if they starve, but may they not have their medical costs covered at the same time. If the persons enter into "credible and binding cooperation on return" typically through IOM's VARP programme, the person will be entitled to subsistence benefits pending re-establishment in the reception centre.

The State has a responsibility to ensure that persons on Norwegian territory are not subjected to violations of their rights laid down by convention, or in any other way are subjected to treatment in breach of convention. The State's protective obligation towards this group can either be assured by special administrative schemes such as the national reception centres, or else authority– and obligation – must be delegated. The restrictive measures resulted in the withdrawal of the offer at the national reception centres, without formal law, regulations or

circulars being used to specify which *administrative body* has the responsibility for ensuring that persons without legal residence are assured a minimum of subsistence benefits, as well as which benefits persons without legal residence are legally entitled to, and which situations trigger the obligation of assistance and rights to benefits.

In order for a benefit to be described as *a right*, the benefit must firstly be described as either qualitative or quantitative with a certain level of precision. Food, shelter and health services is a qualitative description of benefits whose access persons in an emergency situation will require the government help. In social security legislation the terms "housing" and "subsistence benefits" as well as "emergency help" are used as legal concepts. Secondly the situation that triggers the rights must be described with a certain degree of precision. With regards to persons without legal residence there are different situations that trigger different benefits. The Social Services Act § 4-5 regarding the obligation to find "temporary housing" is applied for "those incapable of doing so on their own". What triggers the obligation to grant "financial benefits for food" is most unclear, terms such as "acute emergency situation", " an obligation to help persons in need" as well as "no-one shall starve or freeze to death in Norway", have all been used. These descriptions of situations give those who have a duty to practise the regulations little or no guidance with regard to when the benefit must be granted. Thirdly, which administrative body has the competence and obligation – or freedom - to grant the benefit, must be clear.

Rights according to the Social Services Act are *judgement-based*, i.e. assessments that can form the basis for a right, will result from a social/professional assessment of *the situation* in which the person finds himself. Social/professional work with persons in need makes up an otherwise important part of the council's range of services. To ensure the correct application of the law, as well as uniform administrative practice, the Social Services Act is thus supplemented by regulations and circulars that provide guidelines, partly on application of the law and partly on the use of judgement. Consideration of legal protection generally suggests documentation of the administration's application of the law and use of judgement.

With this background SMED wishes to point out that the framework otherwise established for the Social Services' application of the law and use of judgement in cases concerning benefits for persons in need, is not used in the case of benefits or services according to the Social Services Act for persons without legal residence. We will return to the authorities' justification for this below.

5.3.2 General information on the consequences of the restrictive measures etc.

The authorities provided no regulations or general instructions for the application of the law or use of judgement. Yet *general information* was supplied to the councils and county administrators on the actual consequences of the restrictive measures, both in advance of the implementation on 1 January 2004, as well as after the measures were implemented. The councils were made aware that the number of applications from persons without legal residence was expected to increase, and how the council Social Services should tackle this was outlined.

The majority of the information supplied comes from the Ministry of Local Government and Regional Development,[40] the Directorate of Immigration,[41] the Ministry of Labour and Social Affairs,[42] as well as the Social Services and Health Directorate.[43] SMED finds it necessary to undertake an analysis of the contents of this general information, not because it has the status of regulations or a circular - the information makes no specific mention of the application of the law or use of judgement, but because there is reason to believe that this information has influenced Social Services' treatment of individual cases as well as the country administrator's practice in appeal cases.

Both the Social Services and Health Directorate and the Directorate of Immigration knew before the measures were implemented that the withdrawal of the offer of housing would bring

consequences with regard to the number of applications to the local Social Services. In a separate point the Directorate of Immigration has summed up the "possible consequences for the councils":

> *"Persons who either voluntarily leave or are forcibly evicted from the reception centres may wish to stay in the council area. […] however, the capacity in the police regions is limited. It is therefore probable that some persons will approach the Social Services offices […] It is important that the Social Services offices are made aware that there may be increased pressure from asylum seekers who have had their asylum application rejected. Such applicants should be referred to the police."*

The Social Services and Health Directorate state that:

> *"A consequence of the fact that asylum seekers lose their offer of housing when receiving a final rejection, is that the Social Services offices will experience increased applications" […] "The aforementioned persons cannot be referred back to the reception centre, but should be routinely referred to the police".*

In the same letter the Social Services and Health Directorate expressed how the authorities believed that the local Social Services should treat applications from persons without legal residence:

> *"Asylum seekers who have received a final rejection to their application for asylum or who have not been granted postponed implementation are illegally resident in the country, and therefore have no right to financial benefits. The offer of housing at a national reception centre is withdrawn at the time that the departure deadline is exceeded. The person in question has thus a duty to leave the country and will also therefore have no right to other benefits according to the law. […]*
>
> *When a person does not leave the country voluntarily within the deadline, there is in reality no Norwegian authority with a duty to ensure that person's subsistence. Society as such does, however, have a general responsibility to give acute, emergency help in an emergency situation. This is a consequence of the application of common law principles on the principle of necessity. This entails that a person may have a right to assistance in the form of social services in specific acute situations regardless of the legality of his residence status ."*

Briefly summarised, the Social Services Act does not apply to subsistence benefits or other benefits pursuant to a specific law, but a person may have the right to services in particularly acute cases in accordance with common law principles governing the principle of necessity.

Based on SMED's knowledge of Social Services' and the county administrator's application of the law and judgements in these cases, SMED sent on 1 December 2004 a request to the Ministry of Labour and Social Affairs and asked for guidelines for the application of so-called "common law principles of necessity". The Ministry replied to SMED's request in a letter dated 9 December 2004 and expressed the following points about the need for definitions in the form of guidelines:

> *The Ministry fully understands the request for more clear guidelines in this area. At the same time it is* ***impossible to provide guidelines*** *to those who have the responsibility to give emergency assistance in acute situation, as the responsibility to help other persons in need* ***lies with all of us****. This also makes it difficult to provide guidelines for what kind of help* ***the council****s must provide when faced with such cases. (our emphasis)*

5.3.3 Some reflections on our factual basis

Persons without a legal residence status are not a homogenous group, and in point 2.4 we have presented a summary of the number of cases, as well as some background information on the individuals that the cases apply to, including gender, age, length of time in Norway and country of origin. We cannot state the extent to which our individual applications, and statistics based upon these applications are representative. As far as SMED is aware, the only available statistics

that provide information on length of stay, age and gender, are contained in the NDI's report on long-term residence in reception centres.

The material that from our own experience is being used as the basis for the Social Services' administrative practice, is mostly made up of appeal cases from individuals who *have been living in Oslo*, a total of 21 of the 30 cases. This does not mean that these individuals were originally residents of Oslo, in fact quite the opposite. In the majority of these cases we see that the individuals had a place at a reception centre in a location outside Oslo and the Eastern region, and in some of the cases we see that the individuals supported themselves through work based on a temporary work permit. The reason for this is partly because persons with a final rejection to their application for asylum seek assistance from private networks and helpers that are available in Oslo, and that SMED's legal aid scheme is well known amongst this group's private helpers in Oslo.

However it may also be of significance that this group depends on a low-threshold legal aid a scheme, and that for this group SMED is only available for individuals living in Oslo. The group of individuals we have assisted in connection with applications for benefits from Social Services are often "with no fixed abode", lack money for food and transport, and do not have a telephone. Furthermore general experience from these cases has shown that most of these individuals have very poor personal and language skills for making an application themselves, and to present arguments for their rights to the authorities.

Furthermore SMED does not know of persons without legal residence status who have received subsistence benefits or emergency help from the local Social Services, except for persons who apply to us because this assistance was reduced over a period of time. As an example, SMED is aware that some councils, for example Trondheim and Kristiansand, have implemented special measures applying to persons without legal residence who live in the council area. The examples used in the presentation below will thus mostly be based on individual cases from Social Services in Oslo as well as appeal cases from the Oslo and Akershus County Administrator.

5.3.4 Right to health services

The health services and medical treatment to which persons without legal residence status are entitled, are described in detail in point 4.4.1 below. To summarise, patients without legal residence have the right to acute medical treatment as well as emergency health services.

SMED is aware that medical personnel have on many occasions chosen to give medical treatment, even if the need for treatment was not acute at the time of treatment. The reason for this was precisely because the medical personnel understood the situation in which the patient found himself, and from a medical professional assessment they found that it was only a matter of time before the condition would develop into an acute condition.

Case 04/95 Sadiq illustrates this problem. Based on a long-term unqualified situation with regard to his residency status, the withdrawal of his housing and subsistence benefits Sadiq developed a serious depression. The doctor's declaration obtained by SMED when dealing with the case described Sadiq's condition as "serious depression caused by circumstances". In connection with the fact that Sadiq was admitted to hospital, his treatment offer was extended beyond the acute period because the health institution knew that there was no form of follow-up available to him, and furthermore he received medicine in the form of a benefit in kind, instead of a prescription to ensure treatment and prevent a new acute situation.

Afterwards Sadiq received a bill for medical treatment at an out-patients' department for 220 Kroner. At this point Sadiq was completely unable to pay, and applied to Social Services to cover the charges for out-patients' treatment as well as medicine to prevent his depression becoming worse. Social Services rejected his application and referred to the fact that the applicant did not have:

"legal residence in Norway" and that *"the applicant can accept a place in a national reception centre to receive accommodation as well as any financial support for food and any medical help"*

Furthermore, Social Services referred to the fact that:

"Social Services/the local council do not have the financial responsibility for persons who for one reason or another no longer have valid residence in Norway".

Case 04/474 Mikael reveals how random the protection of persons with health problems may appear depending on the circumstances. Mikael had undergone thorough medical examinations and it had been reported that he had unqualified liver problems as well as newly-discovered diabetes. The doctor at the casualty department wrote the following amongst other points, in his notes:

"Pains in the liver area and coughing up blood. Should be examined further US/CT as a first measure. …Social necessity, apply to .. Social Services office. Discuss with the Social Services duty officer who will contact the Social Services office. He may qualify for housing, especially now that he is ill. Going to the Social Services office now. "

The man was rejected when he arrived at the Social Services office. By chance he was discovered by a countryman who took responsibility for him and took him to SMED. We made contact with the Director of Social Services, who made it clear that her job was to make the State's immigration policy more efficient and that it was therefore not Social Services' job to take responsibility for this man. It was not until after a long conversation in which SMED maintained that she had a legal obligation to carry out a social/professional assessment of the man's needs, that Mikael was given the opportunity to apply. While processing of the case Social Services made contact with the Directorate of Immigration to find out the best way for Social Services to handle the situation, and were informed that the person in question would receive a new offer of shelter at a national reception centre. It was only after this was established that Social Services chose to grant transport and food money to Mikael.

As shown above in point 5.2, persons with special health problems will not lose their places at a reception centre, and persons who have lost their places may be able to move back if circumstances make it necessary. The information that originally was given to the national reception centres and the operational managers of the national reception centres did not emphasise that persons with special health problems could keep their places at the reception centres despite a final rejection to their application for asylum.[40] The council Social Services were not – as far as SMED is aware - explicitly informed of the fact that individuals with a difficult health situation could be referred to an offer at a reception centre on this basis. Nor during the first phase, after the scheme for the withdrawal of the offer of housing at a reception centre was implemented, was any explicit information provided to the individuals affected to the effect that health could be an argument for keeping a place at a reception centre.

SMED has obtained information from the Social Services duty office in Oslo that shows an increased number of applications in 2004. The Head of Department, Steinsvåg, confirmed that persons without legal residence status represented one of the groups that explained this increase. The services for which these had specifically applied, were psychosocial counselling but also benefits in the form of money for food and shelter. Psychosocial counselling is a type of advice for persons with social problems but also when there are medical symptoms like sleep disorders and mental stress that are the result of a situation, without the condition yet being serious enough to result in a medical diagnosis.

The Head of Department, Steinsvåg, believed that the obligation to help in these cases was the result of a moral/humanitarian duty to help persons in great need. In its assessments, the Social Services duty office has a strong focus on the particular circumstances for the individual and therefore it was not possible to give any information regarding which criteria were evaluated for

help for this group. When advising his staff he had asked that the group of persons without legal residence status be assessed pursuant to the same guidelines as those used for tourists that fall into various forms of need before being able to leave the country. Persons that were sufficiently weak were taken care of either by admission to the observation ward or other overnight accommodation. In defining weak he described symptoms such as hunger, incontinence, being excessively dirty, fear, lack of money etc. He also said that other circumstances may be emphasised, such as the outside temperature, public holidays etc.

5.3.5 Administrative practice – legal protection and formal case administration

The legislator has tried to safeguard the individual's procedural legal protection by the fact that the decision made by Social Services is to be regarded as an individual decision pursuant to the § 8-1 second paragraph of the Act, by the case administration rules in chapter 8, as well as by the fact that the Administrative Act is applied in general pursuant to the § 8-1 first paragraph of the Act.

Even if persons without legal residence have a limited right to benefits and services according to the Social Services Act, it is just as clear that persons without legal residence status may have a right to benefits and services from Social Services, for example under the provisions of the Social Services Act § 4-5 or in an acute emergency situation, and there is no doubt that Social Services have a duty to follow the case administration rules in chapter 8, the Administrative Act's rules for individual decisions, as well as common law rules about good case administration practice.

Since the material gained through experience by SMED reveals that in most of the cases both Social Services and the county administrator have made the assumption that all decisions - typically rejections for applications for benefits or services, are individual decisions, there are no grounds to criticise the administration for not formally assuming that both the Administrative Act and the Social Services Act chapter 8 shall apply to applications for assistance from this group. However, another question is whether the individual rules for case administration are followed, and we will come back to this below.

Significant case administration rules with which SMED has dealt are a) the common law obligation to process an application for assistance on its merits , b) the administrative body's duty to ensure that the information in the case pursuant to the Administrative Act § 17 seen in conjunction with the Social Services Act § 8-4 on the duty to consult the client and § 8-5 on cooperation with the client to obtain information, c) Social Services' duty to give guidance pursuant to the Administrative Act § 11, d) the requirement for speedy case administration and the unwritten requirement for Social Services' case administration deadlines in cases of emergency help pursuant to the Administrative Act § 11 a, e) the right to assistance from a representative pursuant to § 12, as well as f) the contradictory principle in the Administrative Acts § 18 etc.

a) Obligation to process a case

Through administrative practice SMED has uncovered that persons without legal residence status meet various types of problems when they try to deliver an application for benefits or services. However, when SMED assisted Social Services had generally always processed the case, even though we – we will return to this point below –have grounds to believe the administration of the case may in fact equate a rejection.

Case 04/474 Mikael, also mentioned above, revealed a situation where the Director of Social Services explicitly expressed the opinion that the application should be rejected. It was not until SMED had argued its case for a considerable length of time that Mikael was given the

opportunity to deliver an application. This case also illustrates the significance of the fact that persons are given the opportunity to deliver an application, and that the case administration is on an individual basis. As mentioned above Mikael was offered a place in a reception centre after Social Services had handled the case.

Many of those who have come to us, complain that they are met in a negative way by Social Services.

Case *04/436 Daniel* had, following SMEDs advice,, applied to Social Services many times and applied for assistancedespite a rejection to his applications for emergency help and shelter at each time. After a couple of months he told us that he did not want to contact Social Services again. He then expressed his irritation over the fact that he had repeatedly insisted that Social Services should process the case despite their refusal to help on previous occasions. They told him that there was no point in delivering an application and that he would receive a rejection the same day if he did so. He also believed that a rejection lay ready so that they could simply hand him a copy when they received his application. Daniel was exhausted.

Social Services must adapt to the client's situation in a qualitative manner so that there be an adequate foundation to assess which form of assistance may be necessary for the individual. The purpose provision in §1-1 emphasises that in its work Social Services shall, amongst other things, contribute to *"increased equality of human worth and social status."* , whilst in this case the client experienced that his situation was of no significance or value to the staff at Social Services.

b) The administrative body's duty to ensure adequate case information

The duty to ensure adequate case information is a result of the Administrative Act § 17, and in this connection it is important to note that it is Social Services and not the applicant who has the responsibility for adequate case information pursuant to the main rule of the Administrative Act. The provisions of the Social Services Act §§ 8-4 and 8-5 establish in law certain particular aspects of Social Services' case administration and thus supplement the principle in the Administrative Act § 17. In §1-4 of the regulations for the Social Services Act an opening is given for Social Services to require from a person to document on his own his residency status.

The administration's duty to ensure adequate case information is especially vital when the applicant lacks the ability to safeguard his own interests and requirements and where benefits are concerned in an acute emergency situation. This has particularly been important for this group in the area of documenting identity. Whereas documenting identity can be an instrument used to reveal residency status and prevent abuse, Social Services may not assign the applicant the responsibility to assist in obtaining case information, something the applicant is in no position to fulfil.

In *case 04/388* the client stated that he lacked identity papers, but that the police could confirm his identity if the case manager contacted them. Nevertheless Social Services chose to let the case rest. The case was not administered until SMED contacted the police and asked them to obtain documents that confirmed the client's own statement about his identity. In *case 05/83* the man's residence permit expired whilst the man was serving a sentence in prison. The residence permit was only a formality and there was no doubt that the residence permit would be granted, but it would take some time. At the time the man was released, he was without a valid residence permit, having only information from the immigration authorities that he would not be deported, and thus had "tolerated residence". He approached Social Services and applied for subsistence benefits. Since he did not have papers to show that he had valid residence, Social Services refused to administer his request. It was only after the man received assistance from SMED and other organisations, that Social Services agreed to administer and grant supplementary benefit to the man.

c) Social Services' duty to give guidance

The administration's general duty to give guidance is provided for by the Administrative Act § 11, and is supplemented by more specific information obligations connected to the administration of individual cases. It is obviously highly significant to a group with little knowledge of the Norwegian system and poor language ability to make use of other available information, that the administration gives extensive guidance on this group's rights and obligations. The Social Services Act § 4-1 also precisely states what Social Security's duty to give guidance consists of:

> *Social Services shall provide information, advice and guidance that can help to solve or prevent social problems. If Social Services cannot give any assistance then staff shall do all they can to ensure that others give help.*

It is clear that Social Services defines its duty to give guidance largely in relation to the benefits that Social Services are able to offer. However, it is not acurate that Social Services do not have a duty to give more information pursuant to § 4-1. There are particularly three conditions that Social Services should be expected to provide information about 1) cooperation on return through IOM and by extension the possibility to receive benefits from Social Services during a transitional period, and 2) the opportunity for certain groups of persons with final rejections to their application for asylum to keep their place at a reception centre and 3) which rights the person has in an acute emergency situation or if the person should be acutely ill.

In case 05/141 a man contacted SMED after he had been rejected for assistance for emergency help. The man told SMED that he wanted to cooperate and believed that on that basis the rejection from Social Services was particularly unreasonable. SMED contacted Social Services, who maintained that they did not have responsibility for the man even if he wanted to cooperate on return. SMED insisted that Social Services had a duty to assist the man with a clarification of the offer through the NDI and asked for feedback after they had been in contact with the NDI. The NDI asked Social Services to give the man an offer until IOM had reviewed the situation for the man with regard to return. In case *04/474* as referred to above, the man was first rejected by Social Services without any closer examination of a possible offer through the NDI because of his particular health problems. It was not until SMED became involved that Social Services began to administer the case. SMED is not aware of any cases in which Social Services has provided information on the benefits a person is entitled to in an acute emergency situation.

d) Requirements for case administration times in cases of emergency help, both established in law and in common law

The Administrative Act § 11 a states as a general main rule that a case shall be decided and prepared without "unfounded delay". What is meant by unfounded will depend on various circumstances, but it is certain practice that in cases of benefits and services in an emergency situation, case administration and appeal case administration must be undertaken very quickly. It is recommended that in such cases the maximum case administration time is two days. A requirement for adequate time period for case administration means that Social Services may be criticised for using too much time over a case because it concerns a person in necessity, while at the same time a very quick case administration may result in a lower quality of social/professional work.

In case *04/216* the local Social Services took nine days to administer an application after they had refused to process the case over a lengthy period. It was not until SMED wrote an application for emergency help that we were successful in receiving a reality assessment of the complainant's situation. The Director of Social Services maintained that persons without legal residency did not have the right to assistance from Social Services.

> *"With regard to the claim that the complainant was not given the opportunity to deliver a written application, the County Administrator refers to the fact that Social Services are obligated to register written applications, in accordance with the principles of the Administrative Act."*

However, the County Administrator did *not* pass comment on the long time period for administering the case, or the fact that in situations where they will need a long time to process a case, Social Services should grant temporary help until Social Services have assessed the application.

In case *04/437* Social Services took five days to administer the case. Once again the county administrator found no reason to comment on the time used for the case administration. In case *04/481* it took 7 days before a written decision was provided. In this case Social Services had stated that the complainant had not cooperated in a sufficient manner and that this was the explanation for the long period for administering the case administration. The County Administrator stated:

> *Verbal applications shall be written down pursuant to the Administrative Act §11. An application for acute help shall be assessed quickly. Social Services state that the complainant's situation was assessed on the same day that he visited Social Services. He was offered assistance in filling out the application, but he did not want this. (!)…*

On this basis the County Administrator found no reason to criticise Social Services' case administration. The applicant could not understand why he would not cooperate with Social Services. SMED believes that it may assert a general tendency for longer case administration for applicants that apply without assistance from external representatives or from SMED, than if for example SMED gives direct assistance.

In 2005 SMED has uncovered that many social services offices have made their emergency assistance case administration more efficient. We see that some Social Services offices almost consistently supply a written decision on the same day as the application is received.

In case *04/495* the decision came on the same day as the application was delivered. The decision was a rejection. Following criticism by SMED in case *04/216* of the same Social Services office for its slow case administration, all applications for emergency help known to SMED, were processed on the same day that the application was received. The reasons stated in the rejection that SMED has had access to, were almost identical and the applicants said that they did not feel reassured by such quick case administration.

e) The right to be assisted by a lawyer or other representative

SMED has provided for assistance to many individuals, and this is what constitutes the basis for this report. However we have also specifically experienced Social Services' willingness to communicate with SMED in its capacity as representative in a case. We have generally experienced that Social Services offices that have initially rejected a client after they first attempted to deliver an application, have also been very dismissive towards SMED when we contacted them.

A variant of this occurred in case *04/436* where the county administrator upheld a previous rejection. On this basis Social Services saw no reason to assess the applicant's emergency situation anew because they believed that there was no new information in the case that suggested any other result than the previous rejection. The county administrator had upheld the rejection with reference to the following:

> *"The county administrator finds that the assessment of any further requirements for temporary housing and financial emergency help can be based on the fact that the complainant has another possibility and must use it."*

In this case Social Services refused to process SMED's appeal with reference to the Administrative Act §§ 28, 33 because the question of the applicant's emergency situation was finally decided.

f) The principle of contradictory case administration pursuant to the Administrative Act §§ 16, 17 and 18 etc.

The contradictory principle entails that in the administrative procedure, those affected by the decision have the right to information on what is emphasised in the case, as well as being able to make comments and refute information. A contradictory administrative process will contribute to materially correct decisions as well as prevent the abuse of authority. SMED has dealt with different sides of this principle in connection with applications for benefits and services in an emergency situation.

In case *04/388* Social Services rejected SMED's claim that the case administration had been lacking and all aspects of the complainant's situation had not been assessed. Social Services based its decision on the following:

> *"The applicant expressed a verbal desire to remain in Norway to the Social Services centre and has delivered an application for full subsistence and housing costs…. A long-term requirement for help for persons without legal residence is not deemed to be considered under the principles of necessity that are mentioned in the regulations to the Social Services Act."*

The man was assisted by a priest from the Church City Mission, who understood the situation for persons without legal residence status. In addition SMED assisted by way of numerous long discussions with case managers on the topic of what constitutes a foundation for assessment before a rejection may be decided. The presentation of the applicant's situation created the grounds for the assessment of emergency help based on common law.

The county administrator evaluated Social Services' treatment of this point as follows:

> *"The county administrator understands the case concerns the fact that the complainant applied for "ordinary" support for subsistence and living costs. The rejection of the application for subsistence and housing costs does not automatically and simultaneously result in Social Services having the responsibility to assess whether the complainant finds himself in an emergency situation."*

Persons without legal residence will seldom be aware of which rights they may have and / or which terminology is used to indicate these rights. If the applicant has rights that the applicant has not been informed of, this forms the basis for questioning how thorough the case administration has been. This group has limited knowledge of the system and poor language ability, thereby making it difficult for them be aware of their rights.

In case 04/491 the applicant did not receive a copy of the documents in the case before the county administrator had made a decision. When SMED contacted Social Services, we were told that the case manager had had long conversations with the client and given both guidance and written down the applicant's verbal complaint against the rejection. However, the client had not received copies of these documents, and therefore had no opportunity to see what Social Services had emphasised when his own appeal was formulated, or was administered. The case manager expressed the opinion that she had protected the client in an adequate manner and had devoted much time to him. At the same time she agreed that this ruled out the possibility for external assistance to assess other grounds for appeal, because it was not possible to review documents that revealed the basis for the authorities' decisions. When SMED finally was able to review the documents it transpired that there were further grounds for appeal connected with both questions of the case administration and the application of the law.

5.3.6 The administration's application of the law – common law competence restrictions

An expression that we have used in the introduction is *material legal protection*. The term is used in this report to illustrate the State's obligation to ensure that a group of individuals receive the material rights owed them on the basis of statutory or common law. A significant element of diminished legal protection in the administration, the large differences in the administration's

judgements in comparable cases, as well as a summary case administration with a small degree of individual assessment, can indicate that this material legal protection is poorly safeguarded. In this report it has been important for SMED to illustrate whether the material legal protection of persons without legal residence as a group is indefensible.

In the analysis below we assume that persons without legal residence in an acute emergency situation may have a right to both services according to the Social Services Act's chapter 4 and money to cover the cost of food pursuant to common law principles of necessity. As mentioned in the introduction, benefits and services according to the Social Services Act are based on judgement. This means that whether a person is granted a certain benefit will result from a social/professional assessment of the situation the person finds himself/herself in. When Social Services first have the duty to accept a case for processing, an *obligation* also exists to undertake a social/professional assessment of the emergency situation of the individual applicant combined with any other assessments that Social Services are obligated to undertake.

In the following section we wish therefore to illustrate the following questions regarding the administration's application of the law: a) the obligation to undertake a social/professional assessment of the emergency situation, b) the administration's reference to the legal basis in its decisions, c) the restrictions on the administrations' competence, d) the arbitrary nature of the result.

a) The obligation to undertake a social/professional assessment of the emergency situation of the applicant

The basis here is that an obligation exists to process the case as referred to in point 5.3.5 a above, and by extension we assume that an obligation exists to undertake a social/professional assessment of the applicant in an acute emergency situation. The question of the obligation to use judgement is a complicated legal problem.[41] Whether Social Services have such an obligation, depends upon an interpretation of the rule that gives the right to grant benefits, (see more on this below). To what extent fixed guidelines can be given for the use of judgement in these type of cases, for example by setting certain terms that have to be met to continue with a case, is also a relevant problem that we deal with in point c) below.

The Ministry of Labour and Social Affairs has stated that an obligation to help persons in need does exist and that "[this obligation] lies with all of us". However other authorities have been more specific. For example, the Social Services and Health Directorate states that that "a person may have a right to assistance in the form of social services in specific acute situations regardless of the legality of residence." As far as SMED understands the provisions of the scheme for emergency help established in § 5-1, and what can be said to be common civil law principles of necessity as referred to in point 4.5 above, Social Services may not neglect to undertake a social/professional assessment of an emergency situation. An obligation to help persons in need is conditional on a prior assessment of the emergency situation. There is also a certain degree of support to be found in the Social Services Act's purpose provision: *"to contribute to greater equality of human worth and social status"* must be seen as an expression of the goals of the social/professional work, and through interaction with the client, to establish safety for persons in need irrespective of the reason for the emergency situation or whether the person belongs to a certain group. Without thorough knowledge of individual situations it is impossible to contribute to the positive development of a difficult situation. A basic condition for safety is also predictability. You must know how your most basic needs are protected.

Persons without legal residence who do not cooperate on return must also be protected in a way that protects their most basic needs. A condition for protecting these needs is that a specific assessment of the emergency situation in which the person finds himself, be undertaken. Such a specific assessment will entail that Social Services assess whether the person has the funds to

obtain food and whether the person has the possibility of finding shelter. This did not happen in the cases in which SMED provided assistance.

At this point it is especially important to note that the social/professional assessment must appear in the decision where the application for benefits is rejected. Decisions where benefits or services are granted, naturally build upon a social/professional assessment, the question is how rejections are formulated.

In case *04/491* the Social Services office refused to give assistance by referring to the fact that the complainant had been in the same emergency situation for a long time:

> *"..the Social Security centre deems that this is not a special, acute emergency situation since the applicant has been in this situation since the end of March 2004."*

The Social Security centre put decisive emphasis on the fact that they should only assess the temporary benefits and not what must be seen to be permanent solutions for care requirements. The county administrator agreed with Social Services in this assessment:

> *"On this basis the county administrator finds that the complainant is not in a special, acute crisis situation. It has been emphasised that the complainant has received a final rejection to his application for residence in Norway and that he will be protected through the immigration authorities pending his departure."*

Does this constitute a social/professional assessment of the situation? An important condition to be able to determine the requirements for emergency help for individuals, is in our opinion, that Social Services ask when the client last had a meal, how he has managed to obtain food in his situation, where he sleeps at night and what opportunities he has in the future. Many of those affected by the restrictive measures have survived by "breaking into" their private networks. It is clear that the possibilities for this are limited over time because the strain on the private networks will exceed the tolerance level. If Social Services do not assess such circumstances at all, then Social Services cannot be regarded as a body that protects this group in an emergency situation.

There are two practices in particular that SMED has uncovered through appeal cases. Firstly, an administrative practice developed over time, whereby all enquiries were rejected with reference to the fact that the applicant was not in an emergency situation because the applicant did not make use of the alternative of a return through IOM and the resulting the offer of a shelter in a reception centre. Secondly, new applications from persons who had already received rejections for applications for benefits were rejected without further processing, with reference to the fact that the applicant had already had his requirements for benefits assessed.

In case *04/437* Social Services wrote in the rejection:

> *"The Social Services centre has analysed the information in the case. Social Services do not consider that information has been received that suggests a different assessment."*

Reference was made in this case to the county administrator's upholding of a previous decision. We find it even worse in the cases where Social Services failed even to take a specific position towards the applicant, but where the decision is a mere list of information about the manner in which persons without legal residence must cooperate on their return.

In case *04/481* SMED followed the case over a period of four months. All the decisions we had access to were identical and gave a description of how persons without legal residence should act. It was not until the case presentation for the county administrator that Social Services provided information about the client that suggested that there had been an assessment of the individual circumstances. It should be added that SMED only received the case presentation after numerous reminders and therefore was unable to comment on this information before the county administrator had made his decision on the case.

We have also seen that over a period of time the same person receives decisions that appear to be standard documents without any mention to the particulars emphasized by that the person for new evaluation. SMED has appealed against these decisions to the county administrator with reference to the fact that Social Services have not undertaken the required individual assessment when exercising judgement. None of these appeals have been successful.

In case *04/491* the county administrator referred to the fact that persons without legal residence, who have been informed that they are obligated to cooperate on return, and on that basis will be given an offer of housing at a reception centre, may no longer be regarded as being in an emergency situation. After the county administrator established that the complainant had also previously applied for emergency help and that he had been informed of the possibility to cooperate on voluntary return, the county administrator found that the man could no longer be deemed in an emergency situation.

Nevertheless, the rejections by Social Services where no reference is made to earlier applications from the same person, but to the county administrator's assessment of application from other applicants in similar situations, as a basis for why assistance is not to be granted, are in a class of their own. Social Services wrote the following:

> *"The Social Services centre has many supplementary benefit cases that are established on the same basis as the applicant. In connection with appeal cases the Social Services centre has received decisions from the county administrator. In connection with rejecting the applicant's application for financial support for food and temporary housing there follows an excerpt from the county administrator's decision:……(At this point the text from a decision by the county administrator in a previous case is repeated)."*

SMED received more decisions from the same Social Services office where the county administrator referred to exactly the same decision.

b) The administration's reference to the legal basis in the decisions

There is no doubt that persons without legal residence do not have the right to benefits according to §§ 5-1 and 5-2, pursuant to the regulations of the Social Services Act, that chapter 4 of the Act still applies to persons without legal residence, and that financial benefits for food or provisions are conditionally based on common law principles of necessity or considerations of general common law principles of necessity. Despite this SMED sees that the majority of the decisions both for rejections and consent are being made pursuant to the §§ 5-1 and 5-2 of the Social Services Act. An example is the county administrator's statement in case *04/216***:**

> *"The basis for the case in question is that no right to financial support exists pursuant to the Social Services Act. However, emergency help may be granted through considerations of the common law principle of necessity when necessary, for example help to save life in an acute crisis situation. On this basis and based on common law principles Social Services may find that the complainant should be given help despite the fact that he does not have residence and thereby apply the provisions of the Social Services Act. The county administrator is of the opinion that emergency help granted in such cases, in order to ensure the subsistence of the person in question, should be warranted under § 5-1.*
>
> *[….] The county administrator points out in this connection that support that could only be based on common law will lead to the question of which body in the council should process the case, where the funds should be taken from, as well as cutting off the county administrator's competence to handle an appeal."*

SMED believes that this statement illustrates the uncertainty that has characterised the application of the law in these cases. For the administrative body that must apply common law, considerations of common law principles of necessity have not given a clear enough indication of which kind of services and benefits could be referred to, and who is responsible both in the first case and in case of appeal.

In many decisions, the reasons referred to the fact that there had also been an assessment of the obligation to assist pursuant to common law considerations on the principle of necessity, but there was no reference to the legal basis for the decision.

After a while many Social Security offices developed a uniform practice as to which legal basis would be used for a rejection. The majority followed the county administrator in his assessments of what is practical, while some Social Security offices rejected applications by referring to the Social Services Act §1-2 first paragraph pursuant to the regulations §1-1, as well as general considerations of common law principles of necessity.

c) The opportunity to set conditions for cooperation on return through IOM

As mentioned in the introduction, there is a special question of whether one may impose a condition for processing an application to the effect that the applicant must cooperate on return through IOM. The basis for this, as mentioned in the introduction, is an interpretation of the common law competence provision. We analyse the Svolvær case in point 4.4.3. The court explicitly stated in its terms that it assumes that a person who does not cooperate on return may have the right to *supplementary benefit from the authorities*. The weakness of the court's decision is that it does not say anything about which benefits and services persons who do not cooperate on return are entitled to.

However, administrative practice from the county administrator in Oslo and Akershus has evolved towards referring to cooperation on return both in assessments made in accordance with § 4-5 on temporary housing, and for applications for financial benefits in an emergency situation, including money for food. This administrative practice has been highly significant for Social Services' implementation of the law and the exercise of their judgement in these cases.

In case *04/481* the county administrator agreed with Social Services' implementation of the law on their refusal to grant food and shelter, and referred to the fact that the man had an adequate offer should he cooperate on return. The county administrator specified that emergency assistance should only protect the applicant in an acute crisis situation until the person once again had the possibility of ensuring food, shelter, a place to live or other necessities of life. The county administrator was of the opinion that the offer given under the condition of cooperation on return constituted such an alternative. The County administrator stated, inter alia, that:

> *"In the assessment of the need for emergency help and any temporary housing one should assume the fact that the complainant has another possibility to ensure subsistence and should make use of it.... Accordingly the county administrator does not consider that there is a special, acute situation that gives where the complainant a right to demand food and a place to live."*

Many of the appeal cases dealt with access to temporary housing pursuant to the Social Services Act § 4-5. Many of the persons SMED assisted were of no fixed abode ("NFA"), and had random offers of housing through private networks, voluntary humanitarian organisations, or they simply lived on the street. In case *04/437* the county administrator stated that:

> *"As to the complainant's lack of accommodation any right to temporary housing must be assessed according to the Social Services Act § 4-5. Chapter 4 of the Act provides for no limitations to the right to benefits connected to the legality of residence. Persons without legal residence in Norway may therefore have a right to services according to chapter 4, including temporary housing pursuant to § 4-5. However, the Social Services Act is subsidiary and as mentioned the county administrator finds that the complainant is adequately protected through the offer from the immigration authorities until he is able to leave the country."*

As a starting point Social Services may refer to another offer if there is one. A place at a reception centre conditional upon cooperation on voluntary return is out of the question for many persons whose application for asylum has been finally rejected. There may be different reasons for these persons not wanting to return, but of the persons that SMED assisted there were many

individuals that expressed a real fear for their life and health if they returned. Social Services have aligned their practice to the county administrator's implementation of the law and made the assumption that an offer of housing in a reception centre conditional on cooperation on return, is a suitable offer. An analysis of our individual cases does not reveal any individual assessment on the fairness and reasonableness of referring to this kind of offer in light of the applicant's specific acute situation.

Many of the appeal cases where SMED provided assistance by bringing the case before the county administrator dealt with access to financial benefits for the purchase of food. In these cases too, the county administrator referred to alternative offers that are conditional on cooperation on return. In case 04/216 the county administrator made the following statement:

> " *The county administrator assesses that the complainant's situation is protected by the fact that she can contact the police and be offered a place at Trandum reception centre until such time she is in a position to leave the country. The complainant will have her most important subsistence needs covered until departure, so that she will not be in need of emergency help as provided pursuant to general principles of necessity."*

To refer persons to the use other possibilities may not be done without any limitation. As mentioned above the notion of assistance pursuant general principles of necessity is still relevant. In addition one has the right to assist in cases where it would be obviously unreasonable to refer to another offer. In Circular 1-34/2001 points 5.3.5.3 and 5.3.5.4 that apply to the requirement for the setting of conditions it is specifically emphasised that Social Services may not set conditions that are in breach of other provisions in the Social Services Act or that could be regarded as an abuse of authority. It is stated, inter alia, that:

> *"The setting of conditions may not take place in an arbitrary manner, but following an individual examination of the individual case. It must be assessed whether the condition that is to be set is appropriate for precisely this recipient. "*

Regardless of whether it may be legal to refer to an alternative offer, the condition may not be seriously unreasonable or disproportional in relation to the individual person. In the case in question, and in other cases where SMED provided assistance, SMED uncovered an administrative practice that made cooperation on return a condition for an alternative offer leading thereby to a rejection of an application for benefits or services. We discovered, after the county administrator's practice had become established, that Social Services failed to carry out in its decisions any individual social/professional evaluation of the applicant's emergency situation. This became increasingly clear in the decisions made by certain Social Services offices, since the decisions were almost identical despite the considerable individual differences between the persons involved. In case *04/437* the county administrator wrote the following:

> *"The county administrator finds that Social Services may emphasise that part of the questions and problems have been assessed previously in the case, and that one may refer to previous decisions or other decisions from the county administrator."*

It is clear that an individual assessment could have been made based on the individual emergency situation, even though the legal basis for applying a social/professional judgement in such cases is marginal. As mentioned above the county administrator, when handling appeal cases has categorically stated that persons who do not cooperate on return have a shelter offer of at a reception centre on that basis.

d) Arbitrary protection of persons in need?

Both the State and the council may protect persons in need without using the Social Services Act as a basis for such benefits. SMED knows that some councils made special offers to this group, that that covered he persons' main need for food, other provisions and shelter. The benefits were not rooted in social legislation. To what extent the group were also offered health services is not

known to SMED. We believe that there will be qualitative differences between the various councils upon establishment of administrative programmes for the special protection of this group, and this must generally be accepted.

With respect benefits or services granted by the council for Social Services, SMED has uncovered the implementation of local solutions that are very different. As mentioned above the County Administrator for Oslo and Akershus established a practice where applications were systematically rejected with reference to an alternative offer if the applicant cooperates on voluntary return through IOM. In many cases benefits have been granted, but such benefits have been very different in their quality and quantity.

In *case 04/481* the man received emergency help several times over a long period. He was also granted shelter during the same period. At the same time he was told of his obligation to cooperate on voluntary return. No special reason was given beyond the fact that it was established that he lacked food and shelter. The man stated that he knew of others belonging to the same office who had received the same kind of help.

SMED has also revealed other variations in the nature of the benefits granted. In *case 04/437* Social Services granted 60 Kroner per day with reference to the "council rates for emergency help." When SMED enquired as to the council guidelines, it transpired it had only been referred to the usual standard of the particular Social Services office. SMED appealed against the decisions referring to the fact that persons without legal residence were in a completely different situation to persons who otherwise received emergency help. The appeal was based on the fact that in other cases Social Services had a duty to assess the extent to which there were possibilities to prepare food at home, or if all food had to be bought ready-prepared. The county administrator upheld the decision by Social Services. In case *05/51* in which the man was granted help as a result of the fact that he said he was willing to cooperate on return, he was granted 70 Kroner per day as emergency help for a time period of 14 days at a time. There was no special explanation for this generosity apart from the fact that the man was cooperative. In case *05/132* the man received only 40 Kroner per day. Furthermore, there were additional whereby he had to make himself available for daily work for the council. Social Services wrote in the decision:

> *"Assistance is granted pending his return to his home country."*

This is conditional on participation in the Rusken campaign in the council area. The reason given for the decision was as follows:

> *"The condition is set to ensure that the applicant fully uses the possibility to help himself"*

This seems to be very strange when compared with the statement that the applicant is granted support while waiting to travel home. Social Services did not understand the appeal when we contacted Social Services by telephone. They referred to the fact that the complainant should not actually have received any assistance because he had no rights. Social Services evidently believed that their judgement had been more adequate in the case.

Based on the above SMED wishes to emphasise that there are serious differences in the protection afforded by the local Social Services, and the manner of it. This gives reason to question whether the administration uses arbitrary judgement.

5.3.7 Summary

There is a close relationship between the social situation of the person at a time and the danger of developing serious health problems. Such serious health problems can be of both a physical and mental character. SMED's experience is that many of the persons we have been in contact with, who have received a final rejection to their application for asylum, and have been living for a long time in an precarious situation, have different forms of mental problems caused by this situation. Sadiq's case is in many ways a typical example of a worsening of mental health, which is mainly attributable to a worsening of his ability to provide for his subsistence.

There are many factors that can be emphasised that contribute to a worsening of the group´s situation: 1) they lack the personal abilities to protect their rights, 2) it takes a long time before they come into contact with health institutions and experience rejection when they make contact, 3) they lack the financial ability to follow up treatment/examinations, and 4) Social Services do not know which rights and offers exist for this group when they have serious health problems.

On the question of access to subsistence benefits and shelter, the system has generally failed this group. SMED's experience is that benefits according to social legislation and benefits granted on the basis of common law, are unavailable to this group as assumed in the court statement in the High Court's decision in the Svolvær case, see point 4.3 above. There are many explanation factors, and each reason that led to Social Services´ failure to protect this group must beappreciated together with the others. Accordingly we wish to summarise the following points:

1) The legal rule that gives the right to a benefit is not precisely formulated. Even for individuals with knowledge of the legal system it is difficult to say anything precise as to when an obligation to assist exists, when a right to receive assistance exists, as well as the degree of exhaustion that must exist before Social Services has the right or the duty to give assistance. The decision is based on the provisions of § 5-1 despite the fact that it is quite clear that this provision does not apply to this group.

2) The councils are not clearly ordered to assist this group by an Act, regulation or a circular. This results in who is being granted assistance from Social Services becoming arbitrary. We see that some individuals are rejected, others are allowed to deliver an application, but the assessment of the application is summary and not based on reality, while others who benefit from a reality assessment are granted benefits.

3) The benefits that the individuals are entitled to when if obligation to assist clearly exists, are also poorly defined. Which are the benefits that Social Services should use to redress an emergency situation? To the extent that decisions are made to assist applicants, benefits have primarily been granted in the form of money for food.

4) Certain individuals are unable to protect their own interests, both practically and language- wise; and the guidance this group is being provided for as to its rights is clearly insufficient beyond the information they receive on the IOM return programme.

5) The county administrator's practice with respect the subsidiary principle and its reference to an alternative offer at a reception centre, has led to the an administrative practice which lacks specific assessment of whether the person is in need. It is possible to practise the regulations on a more individual basis. Employees of Social Services do not use professional judgement in these cases.

6) Regular case administration errors occur. Many of the mistakes must be attributed to a combination of uncertainties regarding the material right, uncertainties regarding Social Services' obligation to carry out a professional assessment of the emergency

situation and the lack of competence amongst the employees of Social Services to assess these persons' actual situations.

7) It is a serious matter that the guidance obligation is being neglected, that the administration does not help to provide sufficient information on a case and that the case administration does not fulfil the requirement for contradiction.

If we are to sum up the administrative practice based on a limited selection of cases, we wish to put into question the material and procedural legal protection that persons without legal residence may have with respect to the group´s access to protection benefits from acute and life-threatening need.

6 SUMMARY

6.1 SUMMARY AND MOST IMPORTANT ASSESSMENTS

The topic for the report was an investigation of administrative practice with regard to access to food, shelter and health services in a situation where political measures were implemented to make the State's immigration policies, and particularly the principle of voluntary return, more efficient. The legal questions that SMED wanted to highlight were firstly whether the State had safeguarded *its protective obligation* with regard to international human rights conventions, including the ECHR, CCPR and the CESR, whether there were breaches of other convention obligations for example the ECHR Article 3 or the CESR Article 11, and whether the administration's application of the law complies with Norwegian law.

Furthermore SMED wanted to illustrate whether there was discrimination against persons without legal residence on one or more grounds for discrimination. The ban on discrimination is aimed both at the legislator and the administration's exercise of authority. As the ban on discrimination in the convention in reality constitutes a restriction on the competence of the administration's exercise of authority, it is natural to pass comment on this in connection with the fact that we assess whether the administration's application of the law complies with Norwegian law.

Our analysis of administrative practice revealed that the restrictive measures had an effect. People without legal residence lost their offer of housing at reception centres, and many left the reception centres voluntarily (cf statistics from the NDI). As the authorities anticipated ahead of the restrictive measures, these people applied to the council for Social Services, and particularly Oslo Social Services. However, some other cities, such as Trondheim for example, chose to implement specific council schemes that safeguarded the group despite the fact that this conflicted with the authorities' recommendations. The basis for SMED's knowledge and analysis of administrative practice revealed that individuals with final rejections to their application for asylum lived on the streets of Oslo, without food, shelter and with significant health problems. It is also clear that these people were rejected by Social Services and referred to a suitable offer at the reception centre if they cooperated on return.

What SMED cannot comment upon is the number of people who left the reception centres without alternatives for ensuring their subsistence, and the whole group's degree of necessity and vulnerability. NDI has reported that 46% of the 592 who were informed of the repeal of the housing offer at a reception centre, left the reception centres. This amounts to almost 300 individuals. SMED has been in contact with some of these; over 60 individuals, some of whom are in Norway, surviving through private networks and unregistered work, while others have probably left the country. An additional group that is not covered by the NDI's statistics are people that were living outside of the reception centres, but ensured their subsistence through temporary work permits. Many of these people were unable to renew their work permits. We do not know how many, but SMED has assisted some of these in connection with the fact that they made contact with the Social Services office and applied for assistance.

Despite the fact that many have survived thanks initially to the assistance from a private network and humanitarian organisations, there is no doubt that the strain on this network has been severe. We are aware that humanitarian organisations have given offers of housing beyond that which the organisation normally would be able to, and we are also aware that private persons have given their homes for the use of individuals who would otherwise have to sleep outside. In other words, civil society helped to redress the potentially serious consequences of the Social Services' administrative practice. It is positive that civil society helps, but it was not this kind of safety net

that the Appeals Court assumed would appply to individuals without legal residence when the court referred to "the authorities".

6.2 HAS SOCIAL SERVICES' USE OF APPLICABLE LAW AND JUDGMENTS BEEN IN COMPLIANCE WITH NORWEGIAN LAW?

In our analysis of the administration's use of applicable law in point 5.3 above we take as our basis the existence of rules of law that give the Social Services the competence and obligation to provide assistance to people who find themselves in an acute emergency situation. The "safety net" that we refer to in this case is not made of the general rules that otherwise protect the population against financial, health or social emergencies; for example financial benefits for subsistence pursuant to chapter 5 of the Social Services Act, but rather benefits that prevent an individual from falling by the wayside.

Based on our analysis of administrative practice, SMED's assessment points clearly towards the fact that the safety net failed. We will present out legal assessments of this point below, based on the fact that it must be clear that Social Services, according to Norwegian law (cf the case law conditions in the so-called Svolvær case point 4.3), have an obligation to carry out a social/professional evaluation of whether a person finds himself in an acute emergency situation that means that the administration must assist with "food, shelter and care in a care situation" as referred to in point 3.8 above.

Firstly we would like to emphasise that administrative practice reveals that applicants have been rejected when they had attempted to present an application. The basic fact is that Social Services have the duty to register an application from a person applying for benefits in an emergency situation; here SMED refers to point 4.3 above on the discussion regarding a minimum standard, point 4.4.2, that states that individuals without legal residency are not exempt from the Social Services Act § 4-5, as well as point 4.5 regarding the common law principle of necessity. The fact that some employees at Social Services explicitly expressed that it was not their job to safeguard this group, substantiates the fact that people were being dismissed.

Secondly we would like to emphasise that administrative practice reveals that in many cases Social Services failed to carry out a social/professional evaluation of the applicant's emergency situation. To an extent, this led to the fact that applications for benefits were rejected with reference to the fact that the applicant had previously received a rejection; in other cases reference was made to the county administrator's practice of referring to the housing offer at the reception centre and that the applicant could not thus be regarded as being in an "acute emergency". The county administrator's practice in connection with making reference to the alternative offer at the reception centre, both in the case of "temporary accommodation" according to § 4-5 and "money for food" on unwritten grounds, became highly influential on the individual Social Service office's practice of the regulations. The fact that Oslo council, for example, provided other guidelines centrally, did not change the practice for the period of time during which SMED assessed administrative practice. However, we must at this point make the reservation that we had limited access to cases where people received benefits.

Thirdly, we would like to raise the question of whether it should be possible to reject every application for benefits by setting the condition that the person may not have another offer of assistance through the reception centre system. In reality this refers to a restriction of social/professional judgement through arbitrary practice. The problem is two-fold with regard to which benefits are involved: with regard to benefits under the provisions of the Social Services Act § 4-5 "temporary accommodation", the question becomes whether the administration can refer applicants to another suitable offer. The question then becomes one of whether the offer of housing in a reception centre conditional on cooperation on return, is a suitable offer. As

mentioned, people who are not entitled to housing in a reception centre, do not have the right to benefits according to the Social Services Regulations § 1-2. With regard to benefits pursuant to the provisions of common law principles, typically money for food, the question becomes one of whether Social Services, in view of common law provisions, may condition the fact that the individual will receive access to food and other provisions in the reception centre upon the applicants cooperation on the matter of his return. See the analysis in point 4.4.3 above.

Even though the assessments are based on different legal foundations when discussing the right to money for food and the right to temporary accommodation, there is no doubt that the substance in these assessments is the same, and we discuss these two questions as one.

The provisions do not apply to conditions for the benefits applied for by this group, but they nevertheless provide certain guidance with regard to which conditions can be made in accordance with common law principles. In the assessment of conditions that put a group of disadvantaged people in a special situation based on their "status", i.e. "foreign citizens without legal residency", the ban on discrimination in the ECHR, CESR and CCPR becomes a restriction on competence. The Social Services Act § 5-3 states that conditions must be "closely related to the decision" and "not unreasonably restrict the freedom of action or choice of the recipient of the support". To some extent, these assessments will also form part of the proportionality assessment that is a part of the ban on discrimination in the ECHR, CESR and CCPR. At this point SMED would like to emphasise the following:

- The basis for assessing which conditions are legal, will be the character of and the purpose of the benefits applied for. When referring to benefits that prevent or redress an acute emergency situation, it would be less obvious and reasonable to refer to the fact that the applicant should have chosen alternative courses of action and avoided ending up in an emergency situation. In addition we refer to the Social Services Act § 5-3 and the point "closely related to the decision", and question whether there is a sufficiently close relation between redressing an acute emergency and giving people an incitement to return voluntarily by attaching conditions to these benefits.
- A specific *proportionality assessment* should be carried out where the assessments are in reality two-fold: firstly on whether the conditions are suitable for realising the goals of the decision, and secondly on whether there is proportionality between the goals and the instruments used.
    - With regard to the *suitability assessment* the question is whether the conditions result in more individuals of the group in question returning willingly. SMED has limited information about this, but nevertheless we would like to emphasise that even the people that have been in acute emergencies have expressed little desire to return voluntarily when they are told of the possibility. Furthermore we refer to the figures from the NDI that show that only 10% have returned voluntarily, while 46% left the reception centres. SMED believes that the authorities must document the fact that such radical means are indeed suitable for achieving the goal of the measure. SMED has not seen any documentation showing that the condition is suitable in contributing to more people, returning through IOM, when these persons *cannot be forcibly deported* .
    - With regard to the *proportionality assessment* the question is whether the condition is proportional to the negative consequences of the condition. It is on this point in particular that SMED believes there is reason to be critical as to whether the condition is proportional. SMED appreciates that there can be good reasons not to influence the fact that an illegal alien has been negatively affected socially or economically by a rejection. On the other hand the fact of the matter is that the benefits in question *are not* intended to making a situation comfortable for the

furtherance of an illegal residence in Norway; rather they are intended for preventing acute and life-threatening emergencies. Individual cases have revealed that people without legal residence are in an acute emergency situation and in such cases we question whether the purpose of the condition – to "motivate" more of these persons to return voluntarily – is proportional to the negative consequences of the measure.

Our assessment is that there is much to suggest that the Social Services are not empowered to interpret their competence restrictively so that people applying for benefits in an acute emergency situation may be rejected in general terms by a reference to the fact that these persons have access to an alternative offer at the reception centres – as well as benefits at the reception centres - on the condition that they cooperate on return through IOM.

If we assume that it is permissible to refer to the alternative offer at the reception centres and subsistence benefits at the reception centres, upon cooperation on return through IOM, the question is whether Social Services remain under the obligation to assess specifically whether it could be disproportionate and completely unreasonable to set such a condition in a particular case at hand. This question is closely related to the question of whether Social Services have a duty to undertake a social/professional assessment of the emergency situation in each case.

If the court, in the same way as Social Services, relies on an "obligation to help people in acute state of emergency " to prevent their downfall in acute situations, there is reason to question whether it is acceptable to set conditions that reject an application for assistance, without a social/professional assessment on whether the applicant is in acute necessity, and without an assessment of the individual consequences of such a rejection. The duty to undertake an assessment of whether it is proportional to set conditions regarding the individual application is a consequence of both the proportionality requirements set forth under common law principles and the principle in the Social Services Act § 5-3. It is argued in legal theory, that conditions under the provisions of § 5-3 cannot be established out of purely control or penal considerations, and that the condition may not constitute a burden to an extent as to become disproportionate to the purpose being achieved (proportionality).[42] An equivalent requirement for proportionality must without doubt be inferred as part of a legal provision whose purpose is to prevent acute necessity.

- Based on our analysis of administrative practice it appears to be clear that the person was referred to the alternative offer in the reception centre without any individual assessment as to whether it would be proportional to refer to an alternative offer that was conditional on cooperation on return, without a social/professional assessment of the emergency situation being carried out. Based on how Social Services and the county administrator have interpreted their competence, it is clear according to our assessment that the county administrator has confirmed that the local Social Services can omit using its *administrative judgement in the individual case* with regard to assessing whether the individual person is in a position of acute necessity.
- It is beyond doubt that Social Services have the qualifications to undertake such an individual assessment of the acuteness of the situation of the individual applicant; Social Services are able to assess the degree of vulnerability, the last time the respective person had any food, where he or she slept etc. In some cases we noted that a social/professional assessment of for example, the relationship between the applicant's health situation and access to food and shelter, led to the applicant receiving a housing offer at a reception centre without any requirement of cooperation on return.
- In addition, SMED refers to the discussion above regarding the suitability assessment and proportionality assessment.

Our assessment is that if Social Services have to refer to the fact that the applicant has access to benefits subject to cooperation on return, Social Services must carry out a specific proportionality assessment with regard to each application. This was not done in many of the cases where SMED has provided assistance. In addition, SMED would like to refer to the fact that the administration's application of the law shows signs of uncertainty on both the legal grounds and on which benefits are to be granted, and for example, the level of these. SMED has at times also undercovered serious casework mistakes. Following a complete assessment, this suggests that the group's material and procedural legal protection is poorly safeguarded. In addition we refer to the summary in point 5.3.7 above.

6.3 SUBSISTENCE BENEFITS AND THE OFFER OF HOUSING IN A RECEPTION CENTRE – SOME COMMENTS ON ADMINISTRATIVE PRACTICE AND LEGAL REGULATION

The analysis of what SMED has chosen to call administrative practice revealed that decisions of great significance to the individual, both offers of housing and financial benefits, were only assessed and decided administratively. It was not until October 2004 that these decisions were subject to formal case treatment.

SMED is in no doubt that the reason for this is a long-standing administrative tradition in Norway where the reception centre system and the benefits granted through the reception centre, are fully subject to political control. Both the Cash regulations and the Operational regulations are modified by the administration. A case in which SMED assisted showed that the case treatment of the restrictive measures was also markedly administrative. However, for obvious reasons the discussion regarding rights to services in the reception centres only first became particularly relevant at the time that the restrictive measures were implemented.

The Ministry of Justice and the Police have determined that a repeal of the offer of housing at the reception centre does not consitute an individual decision, but rather only an administrative decision that confirms the withdrawal of an offer - as provided in the measure for the granting of the accommodation. This gives us a reason to argue with this to a greater extent than the Ministry of Justice and the Police have done, even though we look positively on the Ministry of Local Government and Regional Development's decision to treat such cases as individual decisions. The reason why we question whether the repeal of housing offer in reception centres as well as benefits in the reception centres constitute an individual measure is as follows:

- The Ministry of Justice and the Police do not view as a problem the fact that there are many people who kept their places at reception centres and received financial benefits for many years following rejection, in one case for 8 years. These are also people who have established themselves in the local area, and who for instance exercise their parental rights at the reception centre. In many of these cases – that particularly affect those who are long-term residents in a reception centre – there are grounds to question whether the authorities have carried out their obligations in a manner that can be seen as equivalent to a dispositive statement (cf point 4 of the Ministry's assessment).
- The withdrawal of accommodation is not simply a question of the withdrawal of shelter, but also the withdrawal of subsistence benefits. The Ministry of Justice and the Police have not found a problem with the fact that some people have received financial benefits – money for food - and subsistence provisions in parallel with accommodation at a reception centre. One could argue that the situation of a person who does not cooperate on return is so acute regarding subsistence benefits that an overall assessment of the applicant's situation leads to the conclusion that the withdrawal of housing offer in a reception centre should be deemed an individual decision.

SMED on the other hand is pleased with an administrative practice that now seems to be developing that implements a complete assessment of the individual's situation based on keeping his/her place at a reception centre. We also wish to emphasise that this practice should create the basis for assessing which persons should keep their place in an ordinary reception centre when so-called departure centres are established.

SMED believes that there are grounds for recommending that the authorities address the general question of the application of administrative law on a broad basis with regard to people living in reception centres. In this regard it must also be noted that the Court of Appeal in the Svolvær case has determined that the repeal of accommodation at a reception centre is an individual decision.

Regarding other issues that SMED wishes to highlight, it is of great importance that at all levels of case treatment on the question of cooperation on return, there be safeguards for ensuring written documentation and for an opportunity for contradiction. Through this project - and previous cases - we uncovered that individuals who have done something regarding their return are unable to document this because their enquiries, for example to the police, are not registered, and the person is incapable of documenting such an initiative on his own. If a person has made an unsuccessful step towards his return in the manner expected by the authorities, the person should pursuant to a specific assessment be regarded as un-returnable de facto stateless with all the according rights and powers.

6.4 THE STATE'S PROTECTIVE OBLIGATION TO PEOPLE WITHOUT LEGAL RESIDENCE

SMED wishes to point out that the protective obligation towards people without legal residency is primarily aimed at ensuring that 1) people are not subjected to violations of their rights pursuant to ECHR Article 3 or Article 8 as well as the parallel provisions in the CCPR, 2) that peoples' rights according to the CESR Article 11 are not violated, and 3) that people are not subjected to illegal discrimination both with regard to convention-based rights and freedoms, but also on a broader basis (cf the scope of the discrimination ban laid down by convention).

By way of introduction it must be emphasised that the question of whether the State fulfils its protective obligation with regard to the repeal of the housing offer at reception centres, is assessed by the High Court in the so-called Svolvær case cf point 4.3. The High Court found no reason to state that continued residence at the reception centre was necessary to prevent the woman from being subjected to inhumane and degrading treatment. However, the High Court did take its basis from the fact that the woman would have the right to social benefits from the "Norwegian authorities" based on "general principles of necessity". Consideration of the problem as to whether the State has fulfilled its protective obligation with regard to ECHR Article 3 also entails that the legal terms of the High Court's ruling can be seen as problematic. At this juncture SMED would like to point out some conditions that are central with regard to our assessments of whether the State has fulfilled its protective obligation:

1) There is little doubt that the ECHR, CCPR and CESR, through various provisions, protect the individual from falling by the wayside due to social, physical or mental reasons as well as by providing some protection of his private life. CESR Article 11 gives the authorities a specific obligation for giving people access to food, including the prevention of starvation. We make particular reference here to the UN's Human Rights Committee General Recommendation no. 15 no. 5

2) The conventions give no absolute recommendation as to which measures should be adopted to ensure convention-based rights, but all conventions mention "legal or other measures". The CESR, which in Article 11 particularly ensures the right to food, prefers "legal measures". What measures a national state must use to ensure the individual's rights

will be closely connected to the national state's traditions with regard to internal rights legislation. If, for example, the administration is bound by the law, it will be natural to enact laws to ensure rights.

3) In Norwegian law illegal residents are to a considerable degree exempt from the general safety net that is established by law to protect people in acute need (cf the Social Services Act chapter 5). This is explicitly stated in the Act and Regulations, see point 4.4. This group has thus limited rights according to Norwegian legislation, and the group has, according to certain administrative practice been safeguarded through benefits granted administratively through the reception centre system - also for a long time after the point at which they received a final rejection in response to their application for asylum.

4) With respect to the withdrawal of accommodation in the reception centre the authorities knew that the people who lost their offer would apply to the Social Security offices. The authorities informed the Social Security offices on how these people should be attended to. As far as SMED has been able to ascertain (see point 4.5 on common law on the matter of emergency – the establishment of a new legal institution for social care) little information exists from the authorities on the question of who has a duty to give assistance, what triggers the right to benefits or which benefits apply according to the law. Also, the authorities made a specific choice by refraining from defining applicable legal regulations, not even after the specific request to that effect from institutions that foresaw the consequences of the measures, see point 4.5.4.

5) On the matter of the repeal of housing offers at reception centres, no new review was carreid out on the consequences of how many people would be affected by the restrictive measures that are public knowledge today, nor on the specific effects that the measures would have beyond making the State's immigration policy more efficient. This could have been done. There is still no available information from the authorities on the degree to which people who have been rejected for Social Services benefits have been more willing to cooperate on return.

6) The resulting administrative practice that SMED has uncovered, revealed that the administration made both formal and material mistakes in handling applications from these people. Individuals who found themselves in acute health and nutritional need were rejected by Social Services and recuperated by a civil society network. SMED has questioned whether the group's procedural and material legal protection is satisfactorily safeguarded.

SMED believes that there are grounds for criticising the authorities on how the restrictive measures were implemented for ensuring that people were not subjected to a disproportionate emergency situation. It was particularly the lower safety net that failed, while it should have prevented acute necessity. SMED believes there are reasons to question whether the State neglected its protective obligation in two ways: firstly because the legal basis that the Social Services were to use to prevent acute necessity was far removed from the rules of law that the administration usually used, and secondly because the authorities failed to take the initiative for specifying the applicable provisions of the law, when it became clear that there were clear mistakes in the administration's application of the law.

At this point SMED confines itself to expressing what, according to our assessment, is the basis for criticising the authorities over the fact that administrative practice did not develop in such a way that people were safeguarded in an acute emergency situation by Social Services.

6.5 DISCRIMINATION? AND IF SO, ON WHAT GROUNDS?

The question of discrimination is relevant with regard to the questions raised in this report, because protection against discrimination is meant to protect the individual against violations of

his/her rights laid down by convention, see point 4.2.6. As noted in point 4.2.6 there is no doubt that individuals without legal residence are covered by protection of the law against discrimination, but that difference in treatment of this group to a greater extent should be proportional compared to other groups with legal residency.

A question of academic interest at this stage, as well as of interest on a subsequent assessment of SMED's mandate, and the future mandate of the discrimination and equality commission, is the extent to which people who were affected, were indeed affected due to ethnic or national origin. The question that SMED raises here is thus whether these people are subjected to indirect discrimination on grounds of ethnic or national origin. At this point SMED would like to make some evaluations in this respect.

SMEDs statistics show that the people that were rejected by Social Services are mostly of ethnic African origin in general, and particularly Ethiopian/Eritrean origin. In pure factual terms it is accordingly – based on SMED's statistics – such that the restrictive measures affected these two groups particularly badly. The reason for this is obvious; the states with which it has been difficult or impossible to find an agreement for returning citizens thereof, are mostly African, and the criteria for the choice of which persons should lose their housing rights at reception centres primarily resulted in affecting people of Ethiopian or Eritrean origin.[43]

Furthermore it is clear that the people who refuse to return can usually document that they have been subjected to persecution and violations in their home country, but the violations that they have suffered - or will be subjected to upon return - are not sufficient to gain protection under Norwegian law. Statistics from IOM show that so far, very few people of Ethiopian or Eritrean background for instance, have been returned through the programme.

In order to make a final decision on whether these people were *indirectly* discriminated against *on grounds of* ethnic or national origin with regard to food, shelter and health services requires more detailed statistics than SMED currently has access to. To determine whether the grounds for discrimination were ethnic or national origin, the relevant statistics would consist of the following:

a. National or ethnic origin of individuals who applied for benefits from Social Services such as temporary housing and money for food on the basis of common law,

b. Statistics regarding the ethnic or national origin of persons who lost their housing rights at reception centres, statistics regarding the ethnic or national origin of persons who left the reception centres and those who maintained their housing rights at the centres,

c. Statistics concerning the ethnic and national origin of individuals who lost their housing rights at a reception centre and who entered into binding cooperation on return through the IOM.

Our summary is therefore that, based on the information that SMED has on the ethnic and national origin of those affected by the administration's restrictive measures, it is clear that people with ethnic or national origin from Ethiopia or Eritrea were primarily affected by the restrictive measures and that it was these people who mainly applied to Social Services. Furthermore it is clear that neutral selection criteria that work in such a way that a group – with a particular ethnic or national origin – ends up in a particularly difficult situation, is sufficient to result in the fact that "there may exist" an indirect discrimination on the grounds of ethnic or national origin.

On the other hand it is clear that regardless of whether the ground for discrimination is ethnic or national origin or the so-called "other status", the decisive factor for judging the legality of the authorities' restrictive measures will be whether the treatment is proportional. In this regard it will be – conditional on our statement below – irrelevant if the discussion is based on one or the other grounds for discrimination. The proportionality assessment that has been carried out with

regard to the administration's application of the law, (cf the assessment in point 6.2 above) are identical.

The condition that must be considered with regard to the grounds for discrimination is whether it is largely disproportionate that individuals of Eritrean or Ethiopian ethnic or national origin were first targeted by the restrictive measures through the selection criteria used by the authorities to decide who would be targeted by the restrictive measures. At this point we would like to emphasise that there may be particular considerations that manifest themselves with regard to some groups compared to other groups, and which again may be of significance in judging the proportionality of a decision. At this point SMED would like to emphasise the following:

a. If the selection criteria primarily affect individuals of a particular ethnic and national origin that have been resident for a long time in reception centres, this can suggest that this group also struggle with the long-term effects of living in reception centres (cf the NDI's report on long term residence in reception centres). This group will subsequently be affected particularly badly by the restrictive measures, for example if they must live on the streets.

b. If the selection criteria primarily affect individuals of a particular ethnic and national origin that have a particular reason to fear for their life and health on return. This will be relevant even if the actual conditions that upon which the group based its applications are not in themselves sufficient to form the basis of a need for protection. To impose on this group the condition that a person must cooperate on return, seems both particularly harsh compared with other groups with clearly unfounded applications, as well as less suited for achieving a voluntary return.

It is our assessment that in this context – and in the future - it will be important to look at which selection criteria are being used in connection with restrictive measures, so that the relevant measures do not affect the most vulnerable of the immigrant groups that are entitled to protection. SMED maintains that in regard to this project there is no doubt that there existed – and continues to exist - a reason to question whether the ground for discrimination was ethnic or national origin, in light of the nature of the groups that became affected by the restrictive measures.

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[1] See Proposition to Odelsting no. 33 (2004-2005) regarding the law banning discrimination due to ethnicity, religion etc. (the Discrimination Act) and White Paper no. 69 (2004-2005) White Paper from the council committee regarding the law banning discrimination due to ethnicity, religion etc.

[2] The same basis is also used for the preparatory work for the law on protection against ethnic discrimination, see Proposition to Odelsting no. 33 point 10.1.8.3 in which the department establishes that there are no grounds to discriminate between different foreign citizens.

[3] See Eckhoff/Smith; Administrative law, 6th edition, particularly page 303.

[4] See also Proposition to Odelsting no. 69 (2004-2005) point 7.2 and the notes from the majority, and their proposal that "Parliament ask the government to begin work on the consideration of a comprehensive discrimination law in accordance with international obligations and protection in ECHR Article 14 and the UN's convention on civil and political rights Article 26".

[5] See Bernt, "Legal protection and the fight for the basic values of the welfare state"

[6] The Royal Resolution of 11.09.1998 is extended annually until a new enforcement body for discrimination and equality is established. The mandate is included as a separate attachment to the report.

[7] See also SMED underway: A procedural evaluation by the Centre for Combating Ethnic Discrimination, points 3.4.2 and 3.4.4.1

[8] Moving towards a better protection 2003, Chapter 5 "The Unreturnables"

[9] The annual report from the Oslo Health and Social Services ombudsman 2002 pages 61-66

[10] Case 2002/2124 of the Health and Social Services ombudsman, see the 2002 Annual Report page 63

[11] Here we assume that the scheme involving compulsory introduction courses and Norwegian courses can result in the situation that the individual has less opportunity to choose self-settlement.

[12] See NDI statistics dated 29.03.2005

[13] Long term residence in reception centres, Report from the Directorate of Immigration working group dated 10 April 2004. The group was established based on an enquiry from the Centre for Human Rights on 1 November 2002.
[14] See Long term residence in reception centres point II Mandate, sub-point 2)
[15] Long term residence in reception centres pages 9-10
[16] The total for 2003 was 15,600, whilst in 2004 this was almost halved cf NDI statistics
[17] The Coalition Government's refugee and immigration policy dated 1 June 2003, Ministry of Local Government and Regional Development.
[18] KRD Newsletter no. 2 of 2004, the figures are reproduced in connection with the implementation of the repeal of the offer of housing in reception centres.
[19] In connection with police action the figure of 20,000 was provided, however this figure has not been officially confirmed by the ministry, the police or the immigration authorities; see for example Aftenposten, 20000 Illegal immigrants in Oslo, 20 November 2002.
[20] See The country Report to the Norwegian Council of Ministers' Migration Committee from October 2004
[21] See http://www.hyperionwebs.com/iom/varp/norsk/statistical_norsk.htm
[22] UDI Information letter: Repeal of the offer of housing in reception centres of
[23] The Council Minister gave account of this practice during question time at the Storting, see Document 15 question 637 (2003-2004)
[24] In a letter from the Ministry of Labour and Social Affairs dated 1April 2004 it is explicitly stated that "A real change is implied in the proposal connected to the requirement for legal residence for the right to services."
[25] See page 6 of the consultation paper
[26] Doc 8:50 (2003-2004) of 12 March 2004.
[27] White Paper no. 210 – 2003-2004 page 2 second section.
[28] General Comment No 15 The position of aliens under the Covenant: 11/04/86
[29] Aslak Syse: Law and Justice no. 10 2004 Editorial.
[30] General Comment No 18 Non-discrimination: 10/11/89
[31] Lofoten court, no. 269/2004 D
[32] Hålogaland Court of Appeal, case no. 04-050416KSI-HALO
[33] This is stated by Syse and Kjønstad in Welfare Rights II page 74 about the area of social justice.
[34] A unique contributor to Norwegian legal theory is Kjell V. Andorsen, Civil necessity, see page 4 etc.
[35] The Parliamentary Ombudsman for Public Administration's case no. 2004/3108
[36] White Paper no. 151 (2004-2005) page 2
[37] The assessment is available at http://odin.dep.no/jd/tolkningsuttalelser/forvaltningsrett under Immigration Act
[38] See the letter from the Directorate of Immigration to the national reception centres and operational managers dated 16 December 2003
[39] Document 15 question 637 (2003-2004) page 1
[40] Ministry of Local Government and Regional Development's briefing to the councils on 13 October 2004
[41] Letter from the Directorate of Immigration to all councils of 29 December 2003
[42] Briefing from the Ministry of Labour and Social Affairs on the letter sent to all councils in the country on 4 October 2004
[43] Letter from the Social Services and Health Directorate to all councils as well as the country's Social Services offices of 19 December 2003
[44] Letter from the Directorate of Immigration to the national reception centres and operational managers dated 16 December 2004 as referred to in "persons covered by the scheme".
[45] See for example Eckhoff/Smith; Administrative law, 6th edition, pages 309-310.
[46] See for example Kjønstad/Syse; Welfare Rights I, 2nd edition pages 358-359
[47] The NDI has stated that the scheme involving the withdrawal of the offer of accommodation at the reception centres was first implemented for the group that had been resident longest in the reception centre, and that this was the reason why those that received notice of the withdrawal of the offer of housing at reception centres were primarily people from Ethiopian and Eritrea.

Mailing Address:
P.O. Box 677 Sentrum
NO-0106 Oslo, Norway

Street Address:
Prinsensgate 22, Oslo

Tel.: +47 22 24 69 70
Fax: +47 22 24 69 72
E-mail: smed@smed.no
Website: www.smed.no