



BACKGROUND PAPER TO CONFERENCE

ADDRESSING THE PROTECTION GAP FOR UNACCOMPANIED AND SEPARATED CHILDREN IN THE EU: ROLE OF THE STOCKHOLM PROGRAMME

BRUSSELS SEPTEMBER 15, 2009

Introduction

This note provides some background to the conference organised by Save the Children, under the auspices of the Swedish Presidency of the Council of the EU, in Brussels on September 15 2009 on “*Addressing the Protection Gap for Unaccompanied and Separated Children in the EU: Role of the Stockholm Programme*”. The conference will explore the need for further steps at EU level to address the situation of unaccompanied and separated children of third country origin within the EU under the EU asylum, migration and trafficking policies. This policy discussion is intended to contribute to the Council’s reflections on the next five year programme for the EU Justice, Security and Freedom policy area (“the Stockholm Programme”) and the subsequent action plan to implement the Stockholm Programme.

The Situation of Unaccompanied and Separated Children in the EU

Unaccompanied and separated children in the EU may find themselves in a number of different situations. Some unaccompanied and separated children are seeking asylum or protection because of a fear of persecution or because of human rights violations, armed conflict or disturbance in their own country. Other unaccompanied and separated children are the victims of trafficking for sexual or other exploitation. Others have travelled to Europe to escape conditions of serious deprivation or to look for new opportunities or a better life. Some unaccompanied and separated children arrive in Europe seeking family reunification with family members already present. Children move from “category” to category over time, or belong to several categories. Some are be in transit, passing through the EU en route to a final destination.

As recognised by the UN Convention on the Rights of the Child, Member States owe a special duty of protection and assistance to all unaccompanied and separated children, irrespective of nationality, immigration status or statelessness. All of the rights under the UN CRC apply to unaccompanied and separated children of third country origin within the EU, including the obligation to take their best interests as a primary consideration in all actions concerning them. When dealing with the situation of unaccompanied and separated children, Member States have an immediate obligation to address the child protection concerns, such as providing safe accommodation, protecting children from exploitation, meeting their medical needs and providing legal representation and assistance. The way in which the immigration and asylum rules affect these children must be anchored in that obligation and perspective. Indeed, the rights and needs of these children to assistance arise often before the appropriate protection route or long term solution options are known.

The Protection Issues at EU Level

The general EU measures in the field of asylum, migration and trafficking necessarily address the situation of unaccompanied and separated children of third country origin within the EU. As affirmed by the European Court of Justice, these EU provisions must respect the rights of children.

However, whilst the current EU system contains some provisions dealing with the situation of separated and unaccompanied children, further work needs to be undertaken to address the protection needs of these children in the EU, as they evolve over time. The issue of meaningful access for unaccompanied and separated children to the asylum system is often put forward as a specific challenge. The fact that EU law provides certain essential assistance, such as the appointment of a guardian, only *after*, rather than *before*, unaccompanied and separated children have actually filed an asylum application, is a case in point. Equally, there are scant provisions at EU level on how unaccompanied and separated children obtain assistance and protection where they are victims of trafficking. Although there are provisions on how the rights of unaccompanied and separated children are respected before any decision on return is taken, these are limited in scope.

EU policy makers increasingly recognise these gaps in child protection and more generally the need to improve the standards of reception and assistance to unaccompanied and separated children, as is seen in the ongoing revision of the EU asylum and trafficking instruments. The Fundamental Rights Agency and the European Migration Network are carrying out studies concerning the situation of asylum seeking unaccompanied minors and unaccompanied minors of third country origin generally within the EU.

The Stockholm Programme provides an opportunity actively to explore what further measures might be needed for all separated or unaccompanied children at EU level. Contributing to the development of the Programme, the Commission Communication to the European Parliament and the Council “An area of freedom, security and justice serving the citizen” has noted that *“Unaccompanied minors entering the EU territory illegally present another challenge that needs to be studied in depth. This will be followed by an action plan to underpin and supplement the relevant legislative and financial instruments and strengthen forms of cooperation with the countries of origin, including cooperation to facilitate minors’ return to their country of origin.”*

In its reflections, the EU may consider adopting an integrated, or “horizontal”, approach across each of its asylum, migration and trafficking policy areas to all unaccompanied and separated children of third country origin. A horizontal approach would ultimately aim to identify and properly address the child rights and child protection concerns common to all separated children (whether they are asylum seeking, trafficked or economic migrants) in a coherent way in EU actions. A horizontal approach would seek to ensure that effective identification, reception, assistance and protection is put in place for all unaccompanied minors, with the aim of permitting Member States to establish an appropriate solution for the child, be that return to the country of origin, transfer to another country or integration into the host country, having regard to the child’s best interests. Horizontal EU measures might take a variety of different forms, including practical measures of support, funding, exchange of good practices, guidelines and ultimately legislation.

The Stockholm Programme & the Aims of the September Conference

The September conference has the aim of further raising awareness and stimulating concrete and practical discussion with EU policy makers on the situation of separated and unaccompanied children within the EU and more particularly the role of the EU in their regard. With the participation of the Swedish Presidency and other key EU institutional actors, as well as key actors in the field, including Human Rights Watch, the Separated Children in Europe Programme, UNHCR and UNICEF, we will focus on some good practices in both EU and national law and policy. We will also discuss the tools which might be used to build on existing initiatives, including further research and better statistical information. The discussions can begin to identify possible regional responses, taken into account the wide range of ways in which the EU can act.

FURTHER BACKGROUND

Below we describe in further detail:

- (1) The current situation as regards unaccompanied and separated children in the EU;
- (2) International law obligations as regards unaccompanied and separated children;
- (3) The legal basis for EU action in the field; and
- (4) Why further horizontal EU action in relation to all separated children is necessary;
- (5) Ongoing processes in the field.

1. The Current Situation as Regards Unaccompanied and Separated Children in Europe

There are very limited data available in relation to how many unaccompanied and separated children currently are present within the EU and in relation to their circumstances (for example, their country of origin, reasons and means of travelling, family situation). The most frequently available data relates to how many unaccompanied or separated children are seeking asylum within the EU and in which countries. In recent years, some EU Member States have seen a large increase in the number of asylum claims from unaccompanied children (for example, Sweden received over 1500 claims in 2008); whilst others have seen reductions (for example, France, the Netherlands and Germany). Some countries have noted an increase in the overall arrival of unaccompanied children, with over 7000 unaccompanied children arriving in Italy in the first quarter of 2009. Other EU countries, including Spain, have also traditionally received large numbers of unaccompanied minors.

2. International Law Requirements

International Law

Under international law, State obligations under the UN Convention of the Rights of the Child (UNCRC) apply to all children within a State's jurisdiction (Article 2), irrespective of nationality, immigration status or statelessness. This includes children of third country origin. Whilst present in

the EU, all such children should also benefit from the full range of their rights as children under the UNCRC. Article 20 of the UNCRC provides that States have a duty to provide special assistance and protection to children temporarily or permanently deprived of his or her family environment deprived of parental protection (unaccompanied and separated children).

General Comment No 6 of the Committee on the Rights of the Child further provides authoritative guidance regarding how the UNCRC principles and rights apply to unaccompanied and separated children outside their country of origin. In summary, States are obliged to identify, assist and protect unaccompanied and separated children. To this end, proper identification procedures should be put in place, a guardian should be appointed to advise and protect them, family tracing procedures should be initiated and detention must be avoided. Such children should have access to all necessary services including housing, education and health. States' ultimate aim should be to find secure, concrete, and durable solutions to their situation, having their best interests as a primary consideration. When determining such a solution, formal procedures should be in place to ensure an appropriate assessment of best interests, with appropriate legal representation for, and assistance to, the child. Depending on the individual circumstances of the children, such solutions may include return to their country of origin or integration into the country of origin as well as transfer or relocation to another country.

Current EU Law

Currently and as noted above, EU law deals with the situation of separated children in a variety of its instruments including:

- the EU asylum instruments;
- the Council Framework Decision on combating trafficking and the Directive on temporary residence permits;
- the Family Reunification Directive, which may also be applied by Member States to separated children already in the EU;
- the Returns Directive, concerning obligations and procedures relating to the return of illegally staying third country nationals; and
- EU readmission agreements with third countries.

Analysis of these measures shows that, although all separated and unaccompanied children are affected by EU policies, EU measures have addressed the rights and needs of these children in an ad hoc manner. For example, there are certain provisions for unaccompanied minors under the *EU asylum rules*, but these apply only if the children have already applied for asylum. Children are mentioned in the *EU measures addressing trafficking*, but the 2002 Framework Decision does not identify specific assistance measures for unaccompanied minors. (The current proposal for a revision of the Framework Decision improves on this but is not comprehensive as regards assistance measures.) Under *EU measures to combat illegal migration* in the form of the so-called Returns Directive, there are some safeguards in relation to returning unaccompanied minors to a third country but they are limited in their scope.

Save the Children has discussed this issue in a series of positions on the EU measures including Save the Children Submission on the EC Green Paper on the Future of the Common European Asylum System, Save the Children Comments on the Revision of the Reception Directive November 2008, Save the Children Comments on the Revision of the Dublin II Regulation November 2008, Save the Children Europe Group Press Release on Returns Directive, Save the Children Comments on the Commission Proposal to Revise the Trafficking Framework Decision April 2009, SC Initial Comments on the Revision of the 2002 Trafficking Framework Decision October 2008, and Save the Children submission on the JLS consultation, all of which can be found on www.savethechildren.net/alliance/europegroup/europegrp_pubs.html.

Partners in the Separated Children in Europe Network have shared their practical experience and expertise with Save the Children in the preparation of these positions.

Current National Law

Within the EU, national laws and policies address the situation of separated children in a range of different ways (for example, in some countries, detention of separated children is permitted, in others not) and through diverse mechanisms (for example, in some countries, unaccompanied minors are appointed guardians who should ensure that actions in relation to the child take their best interests as a primary consideration, whereas in others there is only a nominal system of guardianship). Within Member States, local policies and practices may vary, with local and regional authorities sometimes struggling to address the situation. It is worth noting the Opinion of the Committee of the Region on “*the situation of unaccompanied minors in the migration process – the role and suggestions of regional and local authorities*” (2007/ C 51/07).

3. What Legal Bases Exists to Adopt Horizontal EU Measures?

Currently, the EU has competence under Article 63 of the EC Treaty to act on certain aspects of asylum and migration, including addressing illegal migration and residence. In acting in these areas, the EU must respect fundamental rights under Article 6 of the Treaty of the European Union, including child rights. As a consequence, we believe the EU currently has the competence to address the situation of both children who are asylum seekers and children who might be considered to be in violation of migration and residence laws. In doing so, it has to take due account of the UN CRC. As a result, the EU could explore a horizontal policy which addresses the common needs and rights of all third country separated children.

In the event of the Lisbon Treaty coming into force, EU competence to act on asylum, migration and trafficking issues will be extended, in a way that may further strengthen the legal base for horizontal measures. The Lisbon Treaty would also facilitate the legislative procedures by rendering both asylum and migration measures subject to co-decision. However, the development of a horizontal EU policy for all separated children does not rely on the Lisbon Treaty entering into force.

Regional action can take a wide variety of complementary forms, including further data collection and research, practical measures of support, EU guidelines, EU training and ultimately potentially legislation.

4. Why is Further Horizontal EU Action on the Issue Necessary?

The EU should take action where, by reason of the scale or effects of the proposed action, it can be better achieved at EU level.

Given the transnational character of the situation of many unaccompanied and separated children, further regional actions in relation to the issue may provide the best mechanisms for dealing with certain aspects of their situation.

Moreover, as discussed above, further EU action is necessary to ensure that the current EU measures in the field are coherent and properly take account of child rights and child protection needs. For example, affording protection and assistance to all separated children would ensure meaningful access to the common European asylum system to those children who may have a claim. Equally, affording such protection and assistance will help both in preventing, identifying and assisting trafficked children under EU anti-trafficking measures. Furthermore, to ensure separated children properly benefit from an assessment of their best interests prior to any return under the EU Returns Directive, they should all benefit from certain protection and assistance while within the EU.

Finally, within the EU, solidarity with Member States who bear the greatest burden in relation to separated children should be considered.

5. Ongoing Processes

There are a variety of ongoing EU policies and initiatives that will inform the discussion on future policy in the field. These include: (i) legislative work and in particular, the revision of the EU asylum and trafficking instruments and the implementation of the Returns Directive(ii) the EU Child Rights Strategy work, in particular, its exploration of the situation of “invisible children” and (iii) the abovementioned research in the field by the European Migration Network through its comparative study on “*policies on reception, return and integration arrangements for, and numbers of, unaccompanied minors*” and the Fundamental Rights Agency study on “*separated asylum seeking children in EU Member States : an examination of living conditions, provisions and decision-making procedures in selected EU Member States through child centred participatory research*”.