

SEPARATED CHILDREN IN EUROPE PROGRAMME



*Separated Children
and EU Asylum and
Immigration Policy*

by Sandy Ruxton



Save the Children

The Separated Children in Europe Programme is an initiative formed by some members of the International Save the Children Alliance in Europe and the United Nations High Commissioner for Refugees.

The International Save the Children Alliance is concerned to see the full realisation of the rights of all children.

Separated children are children under 18 years of age who are outside their country of origin and separated from both parents or their previous legal/customary primary caregiver. The programme aims to realise the rights and best interests of separated children who have come to or across Europe by establishing a shared policy and commitment to best practice at national and European levels. As part of this process the programme is developing partnerships with organisations working with separated children in European countries and working with European institutions.

SEPARATED CHILDREN AND EU ASYLUM AND IMMIGRATION POLICY

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Picture cover: Separated Children in Europe Programme logotype.

Reproduced from a calendar published by the Association for Preventative and Voluntary Work, Ljubljana, Slovenia.

Painted by a refugee child from Bosnia, Osman Islamovic. He called the picture "Peace and War".

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About the report

This report was commissioned by Save the Children Denmark, Italy, Norway, Sweden, and UK with financial support from the European Refugee Fund (ERF). It aims to provide an accessible study of the policy changes affecting separated children which have occurred since 1999 at EU level, and further changes which can be anticipated within EU asylum and immigration policies.

The report primarily addresses EU-level developments (Commission proposals, Council and Parliamentary decisions) rather than country-level policy, although national developments are referred to where particularly relevant. In light of impending EU enlargement, the report highlights relevant EU policy developments as they affect accession and association countries.

The study aims to inform a range of actors: NGOs and others lobbying on behalf of separated children in the EU; EU representatives and officials; representatives of Member State Governments; media organisations; and other international agencies or fora with an interest (e.g. Council of Europe, UN Committee on the Rights of the Child).

The project was managed by Madeleine Tearse.

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About the author

Sandy Ruxton is an independent social policy expert, specialising in children's rights. He worked for ten years with young people in education, community work and the prison system. He was the author of the report *'A Children's Policy for 21st Century Europe: first steps'* (Euronet, 1999) which first set out a comprehensive agenda for an EU children's policy. Previous work for the SCE Programme also includes *'Separated Children Seeking Asylum in Europe: a Programme for Action'* (Save the Children and UNHCR 2000), which explores the extent to which law, policy and practice on separated children in Western Europe conforms to international standards. He lives and works in Oxford, UK. Email: sandy.ruxton@ntlworld.com

Executive summary

The risks facing Separated Children

‘Separation increases the risks faced by internally displaced, refugee and other war-affected children. Such risks include military recruitment, exploitation, abuse and even death.’

Report of the United Nations High Commissioner for Refugees to the UN General Assembly, *Protection and assistance to unaccompanied and separated refugee children*, Fifty-sixth session, 7 September 2001, A/56/333

Among the refugee, trafficked and migrant children who arrive in the European Union, many are separated from their parents, legal guardians or habitual caregivers. Many flee for refugee reasons, having a well-founded fear of persecution. Others are displaced by war, or escape from abusive environments or extreme poverty.

These are ‘separated children’, often referred to officially as ‘unaccompanied minors’. Although such children often demonstrate extraordinary qualities of resilience, the removal of emotional and physical security through separation can have hugely damaging social and psychological consequences.

The vast majority of separated children remain within their regions of origin, but a small and increasing number – currently around 20,000 each year – seek asylum in Europe. The real extent of movement is likely to be considerably higher, especially because in some countries many, if not most, separated children do not claim asylum.

In most cases, it is family members and/or friends who, fearing for the child’s safety and wellbeing, take on huge debts to buy an airline ticket or to arrange travel with smugglers or traffickers. Such journeys often prove traumatic. This can be because the means of travel – walking huge distances, hiding in lorries, hanging under trains – are difficult and dangerous. Or because the children may be abused and exploited en route by adults, and/or they may experience hunger, illness or injury.

When they arrive in Europe, the practical problems they are likely to face are immense, including: complex asylum and immigration procedures; probing interviews from uninformed officials; fingerprinting and invasive medical examinations; detention in airport ‘waiting zones’, reception centres, or even prisons. Throughout this process, they may lack the support of an adult guardian/advisor or legal representative, and may not have access to appropriate food, housing, education, health, social care, and cultural links.

The EU Context

‘Despite progress mainly in awareness-raising and capacity building, many protection concerns remain. Separated children are still being detained regularly in some countries and deported without necessary safeguards; increasing numbers of separated children disappear either shortly after arrival, during the procedure or after being finally rejected and run a high risk of becoming victims of trafficking and other crime; guardianship systems are inadequate; in several countries specialised reception conditions are still lacking...’.

Statement by Mr. Raymond Hall, Director, UNHCR Bureau for Europe, 26th meeting of the Standing Committee, 4–6 March 2003

The 1997 Amsterdam Treaty transferred asylum and immigration into issues of EU, rather than inter-governmental, competence. In 1999, the Tampere European Council reaffirmed ‘*absolute respect of the right to seek asylum*’ and agreed to work towards establishing a Common European Asylum system, ‘*based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to face persecution*’.

Since then, Member States have become much more conservative, owing to concerns about national security, economic downturn, and rising xenophobia. Some legislative progress has been made, but many NGOs believe the policy priority – led by Justice and Interior Ministries – has increasingly been on deterrence. The knock on impact has been to drive standards setting down towards ‘lowest common denominator’ policies.

In several cases, legislative proposals – including those regarding separated children – have been watered down in the final stage. For example, the definition of ‘family’ in the Dublin II Regulation (see Chapter 3, Part 1c) was narrowed in the latter stages of the regulation’s passage, which will mean that reunification for a separated child with an extended family member in another EU state remains very difficult to achieve. The definition of ‘family’ in the Directive on Family Reunification (see Chapter 3, Part IIb) has also been restricted during negotiations over the draft.

Similarly, the importance of guardianship is recognised in the Temporary Protection, Reception, Refugee Definition and Asylum Procedures Directives, but this provision has been weakened in all cases so that a ‘*representative*’ – potentially an individual with insufficient training or knowledge – is deemed adequate rather than a ‘legal guardian’. The most recent draft of the Asylum Procedures Directive suggested that even this provision may be watered down further by reference to certain circumstances in which a representative need not be appointed.

Alongside the development of a Common Asylum Policy, increasing emphasis is also being placed on the creation of a Common Immigration Policy. Whilst not all the proposed measures concern separated children, there is so far little focus on them even in those that should do so. For example, the EU Action Plan on Returns (see Chapter 3, Part IIb) makes only one significant reference to children.

The development of legislation towards separated children has therefore been patchy (see Chapter 3). This is perhaps unsurprising, given that it reflects the wide variation in policy and practice between and within Member States which has existed for some time. In a previous SCE report¹ we highlighted that, although examples of positive policy and practice towards separated children can be found within European states, the problems faced by separated children tend to dominate. These include:

- Restrictive definitions of ‘separated child’;
- Refusal of access to EU territory;
- Difficulties establishing the identity and age of a separated child in the face of official disbelief;
- Poor registration and documentation procedures;
- Deprivation of liberty, sometimes in prison environments;
- Lack of awareness and training among officials;
- Absence of sufficient support at all stages of the asylum procedure, from both guardians and legal representatives;
- Failure to undertake family tracing, to establish contact with family, or to provide for reunification;
- Lack of opportunities for children’s views to be considered; and
- Inappropriate, even hostile, determination procedures.

It is unrealistic to expect the process of harmonisation of EU asylum instruments to solve all these wide-ranging issues. Nevertheless it is essential that the development of common policies does more than entrench existing policy and practice failings.

Key findings

Although the report identifies some progress in recent years in advancing the rights of separated children within EU asylum and immigration policies (e.g. the establishment within the European Commission of a focal point to monitor issues relating to children horizontally across all asylum and immigration Directives), overall it identifies serious shortcomings. For example:

- **Limited legal framework:** The EU’s approach is based on the 1997 Council Resolution on Unaccompanied Minors, and the EU Charter of Fundamental Rights. Although these instruments provide some protection, both reflect inadequately the principles of the UN Convention on the Rights of the Child (CRC) (see Chapter 2). Developing EU legislation does not therefore incorporate the principle of the ‘best interests’ of the child (Article 3, CRC) throughout all texts. References to other core Articles (e.g. 2 on ‘non-discrimination’ and 12 on the right to participate in decisions) are also missing.

¹ S. Ruxton (2000) *Separated Children Seeking Asylum in Europe: A Programme for Action*, Separated Children in Europe Programme, Save the Children/UNHCR, Save the Children Sweden

- **Lack of access to EU territory:** In several European states, separated children seeking protection face great difficulty in gaining access to the territory, largely because states have established a growing range of measures which make it more difficult to enter the EU (e.g. visa regimes, gate and pre-boarding checks, and carrier liability legislation).
- **Failure to address issues concerning separated children who are not asylum seekers:** There are many separated children who travel to Europe to escape situations of extreme poverty, or who may have been trafficked for the purpose of exploitation. As there are few, if any, instruments enabling them to migrate to the EU legitimately, they often apply for asylum; many others exist on the margins of society, lacking any form of status.
- **Lack of consideration of separated children in EU Enlargement:** There has been little attention to the issues involved in relation to accession negotiations, although the extent of migration – and in particular child trafficking – is significant. There is also a risk that weak standards, such as the 1997 Council Resolution on Unaccompanied Minors, will be enshrined in the law of accession countries.
- **Children as a ‘vulnerable group’:** EU policies tend to regard children (and especially separated children) as a ‘vulnerable’ group, reinforcing a traditional image of children as purely ‘dependent’, an unproductive drain on resources. However, many confront and overcome enormous obstacles and risks in their lives, and usually prove highly adaptable to a new country and its language and mores. With the necessary support, separated children are able and willing to learn new skills and to contribute to host countries, and should be given the opportunity to demonstrate this.
- **Poor information base:** In 2001, a brief study by UNHCR of trends in separated children seeking asylum in Europe² revealed: ‘...significant differences in national definitions for unaccompanied and separated children seeking asylum, jeopardising a basic analysis of the problem at the international level.’ Such information as is available at EU level appears to be incomplete, and not readily available publicly.
- **Lack of engagement with separated children and children’s organisations:** There is little practical evidence of Member State governments making particular efforts to engage with separated children or the organisations which represent them during the process of drawing up EU legislation. Indeed, the reverse has been the norm, with the final decisions being taken behind closed doors with minimal external consultation or involvement. One effect of this has perhaps been the watering down of the positive aspects of some policy proposals.

2 UNHCR (2001) *Trends in Unaccompanied and Separated Children Seeking Asylum in Europe*, 2000, Geneva, www.unhcr.ch

Recommendations

‘To take into consideration the specific situation of groups with special needs, and in particular children, must be a key concern for the development of immigration and asylum policies that are both fair and efficient.’

António Vitorino, Commissioner for Justice and Home Affairs, speech at seminar on ‘Children affected by armed conflict and forced displacement’, Norrköping, 2 March 2001

The general recommendations below draw upon the child rights principles of the 1997 UNHCR Guidelines and the Separated Children in Europe (SCE) Programme ‘Statement of Good Practice’ (see Chapter 2). Recommendations in relation to specific EU legislation and proposals are set out in Chapter 3 of the report.

1. Promoting the ‘best interests’ of the child: The ‘best interests’ principle, derived from Article 3.1 of the CRC, should be integrated as a primary consideration within all EU and Member State asylum and immigration policies. It should also inform decisions on the cases of individual children. Specific guidance should be developed by the EU to assist Member States interpret this key principle, and mechanisms should be established for monitoring and evaluating implementation.

2. Addressing the child’s right to participate in decisions: The child’s right to participate in decisions affecting him or her (Article 12, CRC) should be addressed at all stages of the asylum and immigration process and integrated throughout relevant legislation. States should also fulfil their positive duty to assist children to express their views. To facilitate child participation, consideration should be given to: the early appointment of guardians and legal representatives; the availability of skilled interpreters; access to education; and child-friendly environments.

3. Strengthening children’s rights within the Common Asylum Policy: EU institutions should ensure that the safeguards set out in the 1997 Council of Ministers Resolution on Unaccompanied Minors are strengthened, where these are incorporated into EU or national law. Member States should also resist any pressure to lower standards within existing proposals under discussion. Specific recommendations are that:

- separated children should never be refused entry to EU territory.
- the use of detention in relation to immigration status should be forbidden for all separated children.
- all children under 18 should be assisted by a legal guardian or adviser at all stages of the asylum process and in relation to durable solutions.
- refusal by a separated child to undergo medical examination should have no bearing on the substantive decision regarding his or her application.

4. Addressing the rights of children in Immigration Policy: Separated children should be entitled to make an asylum application and/or an application for residence, and should have access to child welfare protection, education and health services. The safeguards set out in Recommendation 3 above are also relevant to separated child migrants. And EU immigration policy should set out minimum standards for returns procedures that safeguard the rights of separated children, as highlighted in the SCE Statement of Good Practice. For example:

- a child should be returned only if it is in his/her best interests and taking into account his/her views, and must never be returned if it is not safe or adequate reception and care is not available.
- separated children should not be subject to pre-deportation detention.
- return programmes and readmission agreements with third countries should set out specific provisions for separated children.

5. Tackling child trafficking: All measures taken by states to prevent and eradicate trafficking (e.g. by sharing information with other states) and to provide treatment for child victims should be motivated by child protection principles, rather than solely migration or crime control measures. In relation to the proposed directive for a short-term residence permit for victims, child victims of trafficking should be granted a permit of stay *without* having to testify against traffickers, though they should be enabled to testify if they so wish.

6. Ensuring coherence in EU legislation: In practice many separated children are likely to remain in the country of arrival with an indeterminate status and lacking long-term security, in part as a result of gaps in legislation. There is a role for the European Commission (and in particular the focal point monitoring issues relating to children horizontally across all asylum and immigration Directives), in ensuring that inconsistencies in the drafting of legislation are addressed.

7. Transposing and implementing legislation in the Member States: It is essential for Member States to transpose and meet the minimum standards laid out in EU legislation, however there is leeway for individual states to offer more generous provision. Where better provisions already exist for separated children Member States should maintain them, and other states should be encouraged to develop them. Ideally they should seek to meet the more comprehensive standards set out in the 1997 UNHCR Guidelines and SCE Statement of Good Practice.

8. Monitoring Member State implementation: NGOs have a key role to play in monitoring the extent to which Member State governments have transposed and met the minimum standards set out in EU legislation in relation to separated children. The SCE Programme will also seek to report regularly to the European Commission on progress across Member States.

9. Meeting the needs and rights of separated children within the enlargement process: The SCE Programme endorses the recent call by the Council of the Baltic Sea States for the elaboration of a 'Plan of Action Regarding Unaccompanied Children' in the region by end 2003, and believes the plan should be extended to other states in Central and Eastern Europe and supported by the EU institutions.

10. Improving statistical information: In order to monitor and address the particular needs and rights of separated children, it is essential that the European Commission Action Plan to collect and analyse migration statistics makes it mandatory for Member States to provide more comprehensive disaggregated data on this group.

1. Introduction

'I had never left my village before. It is near the border with Côte d'Ivoire and one day bad people came from there and attacked us. I was living with my father. I don't know where he is now. I had to leave. I escaped with some friends and came to England, but I lost my friends in London.'

Albert, 16, from Ghana

'I come from a village near Mosul in northern Iraq. My family are still there. I left partly because I knew I would have to do military service when I was 18. I had also been picked up for buying Kurdish books in the market – this is forbidden. I was beaten and in hospital for 45 days. I got better but it was expensive for my family.'

Hassan, 17, from Iraq

'I came here because of the war. I have no family. I have been here six months. I came on a boat to Dover with my best friend, who was 14. His mother was Bosnian and his father Albanian. But somehow at Dover I lost him. I never saw him again.'

Behar, 16, from Kosovo

Extracts from text of exhibition 'Picturing Oxford: the city through the eyes of young asylum seekers, Modern Art Oxford, April 2003,
www.bbc.co.uk/oxford/features/2003/04/asylum_seeker_photos/

Separated children – causes and consequences

Among the refugee, trafficked and migrant children who arrive in the European Union, many are separated from their parents, legal guardians or habitual caregivers. These are 'separated children', often referred to as 'unaccompanied minors' in official language. Although such children often demonstrate extraordinary qualities of resilience, the removal of emotional and physical security through separation can have hugely damaging social and psychological consequences.

When they arrive in Europe, the practical problems caused by insecurity and separation are immense (see box below). They are faced with complex asylum and immigration procedures which are not fully explained to them. They undergo probing interviews about their backgrounds, identities and motives, from officials who may lack any understanding of their culture or circumstances. They will probably be fingerprinted and experience invasive medical examinations to establish their ages. They may be detained in airport 'waiting zones', reception centres, or even prisons. Throughout this process, they may lack the support of an adult guardian/advisor or legal representative, and may not have access to appropriate food, housing, education, health, social care, and cultural links.

In addition, they must cope with conflicting emotions of fear, loss, guilt, and uncertainty, partly for themselves but also for families and friends left behind.

Identity issues are also central, as the children struggle to cope with the challenges of adolescence in a Western society, usually very different from the situation in their country of origin. Finally they are likely to find that the welcome they receive in Europe is less positive than they had envisaged – indeed, the majority are likely at some stage to experience racist attitudes and behaviour.

‘On arrival a child is disorientated and in shock, facing a strange land, culture and language, without the support of family and friends. They must negotiate an array of bureaucratic systems and the all-too-often bewildering refugee determination process that takes little, if any account, of their status as children. They must discover the mores of an alien culture and adapt to an unfamiliar education system. All this is normally carried out in a foreign language which they are endeavouring to learn...’

W. Ayotte (2002) *Separated Children, Exile and Home-Country Links: The Example of Somali Children in the Nordic Countries*, Save the Children Denmark

The reasons for the children’s separation from country of origin and family are wide-ranging and complex. Many children flee for refugee reasons, having a well-founded fear of persecution. Other children are displaced by war, or escape from abusive environments or extreme poverty. In many cases the reasons are inter-linked³.

Over the past decade, conflicts around the world have uprooted an estimated 20 million children from their homes⁴. Such upheavals are disastrous for children – not only are many killed, but a greater number are disabled or maimed⁵. Fuelled by growing global inequality, these dangers may be compounded by factors such as persecution, the death or disappearance of parents, family and institutional abuse, environmental disaster, malnutrition and poor health, lack of education (especially for girls), and extreme poverty and hardship.

‘Separation increases the risks faced by internally displaced, refugee and other war-affected children. Such risks include military recruitment, exploitation, abuse and even death.’

Report of the United Nations High Commissioner for Refugees to the UN General Assembly, *Protection and assistance to unaccompanied and separated refugee children*, Fifty-sixth session, 7 September 2001, A/56/333

The vast majority of separated children remain within their regions of origin, but a small and increasing number seek sanctuary in Europe. In most cases, it is family members and/or friends who, fearing for the child’s safety and wellbeing,

3 W. Ayotte (2000) *Separated Children Coming to Western Europe: Why they travel and how they arrive*, Save the Children UK

4 Graça Machel (2000) *The Impact of Armed Conflict on Children: A critical review of progress made and obstacles encountered in increasing protection for war-affected children*, Winnipeg

5 G. Lansdown (2001) *Children’s Rights: A Second Chance*, International Save the Children Alliance, full text on www.savethechildren.net/files/new/publicsite/Uploads/secondchance2001.pdf

take on huge debts to buy an airline ticket or to arrange travel with smugglers or traffickers^{6,7}.

The journey often proves traumatic too. This can be because the means of travel – walking huge distances, hiding in lorries, hanging under trains – are difficult and dangerous. Or because they may be abused and exploited en route by adults, and/or they may experience hunger, illness or injury.

How many children are involved?

Around 20,000 separated children seek asylum each year in West and Central Europe. The majority are older boys, for a range of reasons: in some conflict situations boys may be in greater danger than girls, or parents may value the survival of boys more highly than girls, or it is less dangerous for boys than girls to travel unaccompanied⁸. The real extent of movement by separated children is hard to establish but likely to be considerably higher and it has been estimated that up to 100,000 are resident in Europe at any one time. This is because data is incomplete or unavailable in relation to several European countries and narrow definitions are often used⁹.

National practice also differs; for example, in some countries many, if not most, separated children do not claim asylum and will not be counted in the overall figures. Italy is a prime example here, and as can be seen in the table below, no Italian statistics for asylum applications from separated children are available. Nevertheless, statistics are published for Italy on the significant number of separated children who are not asylum-seekers.

The following statistics on arrivals of separated children are based on non-standardised reporting from the members of the Separated Children in Europe (SCE) Programme (see next section for a description of the Programme). The Programme has attempted to make the information comparable, but in some cases the figures cover the number of arrivals, in others only the presented number of asylum applications.

Whilst it is hard to draw robust conclusions for the reasons given above, the figures do show significant differences in the numbers of separated children who are registered in different countries. For example, the Netherlands received the largest number in 2001, however the figures for 2002 show a significant decrease. In 2002, the highest numbers were identified in Spain and the UK.

6 W. Ayotte (2000) *Separated Children Coming to Western Europe: Why they travel and how they arrive*, Save the Children UK

7 The difference between 'smuggling' and 'trafficking' in human beings is clearly set out in the Palermo Protocols, signed in 2000 by more than 80 United Nations member states. Although smugglers and traffickers often use the same routes, and in some cases there are direct links between the networks, those who place themselves in the hands of smugglers do so for lack of a legitimate alternative, whereas those who are trafficked are coerced or duped for the purpose of exploitation.

8 W. Ayotte (2000) *Separated Children Coming to Western Europe: Why they travel and how they arrive*, Save the Children UK

9 UNHCR (2001) *Trends in Unaccompanied and Separated Children Seeking Asylum in Europe, 2000*, www.unhcr.ch

Country	2001	2002	2003 provisional
Austria	1741	2400	–
Belgium	747*	277	–
Croatia	–	227	–
Denmark	–	137	36
Finland	–	70	27
Germany**	–	873	–
Greece	–	147	74
Ireland	600	287	94
Luxembourg	–	–	22
Netherlands	5950	3232	–
Norway***	561	894	464
Portugal	–	8	–
Romania	–	–	4
Slovenia****	–	165	3
Spain*****	–	6329	–
Sweden	–	550	–
UK*****	–	5945	–

Notes

* January – June

** includes only those under the age of 16. Seventy-seven per cent of all separated children are 16–17 years old.

*** figures represent only separated children who have applied for asylum. 2003 figures are up to July

**** including illegal immigrants

*****represents the total entrances in reception centres, not individuals

***** excluding age dispute cases

The Separated Children in Europe Programme

The Separated Children in Europe (SCE) Programme was established in 1997 in response to the desperate circumstances outlined above. The Programme seeks to improve the situation of separated children through networking, research, policy analysis and advocacy at the European and national levels. It is a joint initiative of UNHCR and Save the Children and is based on the complementary mandates and areas of expertise of the two organisations.

The principles underpinning the work of the Programme are set out in a comprehensive ‘Statement of Good Practice’¹⁰ which seeks to ensure a common standard for work with separated children across all countries, principally informed by the 1989 UN Convention on the Rights of the Child (CRC) and UNHCR’s 1997 *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*.

¹⁰ The full ‘Statement of Good Practice’ is available in English, French, German and Spanish on www.separated-children-europe-programme.org

Defining 'Separated Children'

Instead of the habitual term, 'unaccompanied children' the SCE Programme prefers the wider category 'separated children', which highlights that some children, although living with extended family members, still receive insufficient care and face similar risks to unaccompanied children. This definition includes not only asylum seeking children but others who may not apply for asylum, such as children who have been trafficked for exploitation or who have come from conditions of extreme poverty and deprivation. The SCE definition is as follows:

“Separated children” are children under 18 years of age who are outside their country of origin and separated from both parents, or previous/legal customary primary care giver. Some children are totally alone, while others, who are also the concern of the SCE Programme, may be living with extended family members. All such children are separated children and entitled to international protection under a broad range of international and regional instruments. Separated children may be seeking asylum because of fear of persecution or the lack of protection due to human rights violations, armed conflict or disturbances in their own country. They may be the victims of trafficking for sexual or other exploitation, or they may have travelled to Europe to escape conditions of serious deprivation.’

SCE Programme Statement of Good Practice, www.separated-children-europe-programme.org

The Programme includes twenty-eight countries: seventeen in Western Europe¹¹, eight in Central Europe¹² and the three Baltic states¹³. Within these states, member NGOs have now produced reports assessing the policies, practices and laws relevant to separated children that are in force in their territories¹⁴. These are summarised in two reports, *'Separated Children Seeking Asylum in Europe: A Programme for Action'* (Save the Children/UNHCR, 2000), and *'The Situation of Separated Children in Central Europe and the Baltic States'* (Save the Children/UNHCR, 2001).

As well as addressing the needs and rights of separated children who seek asylum, the NGO partners of the Separated Children in Europe Programme increasingly recognise the importance of addressing the needs and rights of other separated children who do not seek asylum, but are still in need of international protection. In practice, this may include trafficked children and also children who migrate to escape conditions such as extreme poverty. This issue is particularly important in states such as Italy, Spain, Greece and Portugal, where such children rarely seek asylum and do not usually come into contact with asylum procedures. The report highlights this reality and seeks to present an initial response, however it is clear that further detailed work is necessary in this area.

11 The fifteen EU Member States, and Norway and Switzerland

12 Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia

13 Estonia, Latvia, Lithuania

14 Individual assessment reports and the summary reports are available on www.separated-children-europe-programme.org

Evidence from the SCE Programme summaries mentioned above and other sources has shown that, across Europe, the support separated children receive upon and after arrival is at best, inadequate, and at worst, potentially very damaging. Given their particular needs, the way in which these children are treated when arriving in Europe requires special attention in terms of both the asylum procedure and interim care. This is especially the case in the present climate of increasingly restrictive asylum and immigration practices in Europe.

In This World is an realistic and hard-hitting film from director Michael Winterbottom, that follows two Afghan separated children as they set out from the Shamshatoo refugee camp in Pakistan, along the smugglers' route known as The Silk Road. Travelling for weeks through Iran, Turkey, Italy, and France, Jamal and his cousin Enayatullah embark on a dangerous journey to apply for asylum in Britain. The two boys are frequently penniless, lack official papers, and are forced to travel long distances in airless and cramped trucks, lorries, and shipping containers – and at great risk from traffickers who care little for safety of their human cargo. In the end, only one of the boys arrives at their destination alive.

2 *Children's rights and the EU agenda*

'To take into consideration the specific situation of groups with special needs, and in particular children, must be a key concern for the development of immigration and asylum policies that are both fair and efficient.'

António Vitorino, Commissioner for Justice and Home Affairs, speech at seminar on 'Children affected by armed conflict and forced displacement', Norrköping, 2 March 2001

The rights of separated children

The international legal framework for providing protection to refugee children and other children of concern is based to a significant extent on the 1989 Convention on the Rights of the Child (CRC) (and its Optional Protocols¹⁵), which has been ratified by all but two countries worldwide. In line with the core principles of the CRC, it is essential to view separated children first and foremost as children with specific rights which states are under an obligation to protect and promote.

Though it is important to bear in mind the holistic nature of the Convention, certain provisions are central to the position of separated children. For example, Article 2 sets out the principle that all rights apply to all children without exception (the 'non-discrimination' clause). Article 3 identifies that all actions concerning children must take full account of their 'best interests'. Article 12 highlights that children have a right to participate in decision-making, and to have their opinion taken into account in matters and procedures relevant to them. Article 22 addresses the particular needs of refugee children, and additional protection relevant to separated children is provided by other specific Articles¹⁶.

15 The Optional Protocol on the Involvement of Children in Armed Conflict (entered into force 12 Feb 2002) and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (entered into force 18 January 2002)

16 These cover rights in relation to, for instance, family (Arts. 5,9,14.2), adoption (Art. 21), health (Art. 24), an adequate standard of living (Art. 27), education (Art. 28), and juvenile justice (Arts. 37 and 40)

Article 2.1

'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, or beliefs of the child's parents, legal guardians, or family members...

Article 3.1

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration...

Article 12.1

'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child...

Article 22.1

'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties'.

Extracts from UN Convention on the Rights of the Child, 1989

In addition to incurring rights as children, separated children are also entitled to rights under international humanitarian law. The 1951 UN Convention on the Status of Refugees (and the 1967 Protocol) set standards that apply to children as well as adults. Therefore a child who has a *'well-founded fear of persecution'* for one of the stated reasons is a *'refugee'*, and a child who holds refugee status cannot be forced to return to the country of origin (the principle of *'non-refoulement'*). Also important is the principle that no distinction is made between children and adults in social welfare and legal rights.

Recognising the growing importance of children's rights globally in the 1980s and 1990s, UNHCR published detailed guidelines on refugee children in 1994¹⁷ and a further set specifically addressing the position of separated children in 1997¹⁸. These were reinforced by the UNHCR 'Agenda for Protection', approved in 2002 following a series of global consultations, which sets out a programme

17 UNHCR (1994) *Refugee Children: Guidelines on Protection and Care*

18 UNHCR (1997) *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*

to strengthen implementation of the 1951 Convention and revitalise the international protection regime; the Agenda includes a specific section on refugee children.

Beyond the rights of separated children who claim asylum, it is also important to acknowledge that children who are separated but do not do claim may fall within the ambit of other Articles or instruments. For example, for trafficked children, Articles 34, 35 and 39 of the CRC are particularly relevant, as is the 'UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children' (2000), which supplements the 'UN Convention Against Transnational Organised Crime' of the same year. For separated children who migrate to work, the 1990 UN Convention on the Rights of Migrant Workers and their Families (adopted in 2003) may prove especially significant, alongside existing ILO Conventions¹⁹. However there is insufficient space here to provide a coherent account of all these provisions.

Towards EU common asylum and immigration policies?

Despite progress mainly in awareness-raising and capacity building, many protection concerns remain. Separated children are still being detained regularly in some countries and deported without necessary safeguards; increasing numbers of separated children disappear either shortly after arrival, during the procedure or after being finally rejected and run a high risk of becoming victims of trafficking and other crime; guardianship systems are inadequate; in several countries specialised reception conditions are still lacking...'

Statement by Mr. Raymond Hall, Director, UNHCR Bureau for Europe, 26th meeting of the Standing Committee, 4–6 March 2003

Building on the recognition in the 1993 Maastricht Treaty of asylum as a matter of common interest to the EU Member States, the 1997 Amsterdam Treaty transferred asylum and immigration into issues of EU, rather than inter-governmental, competence. Article 63 lists core policy areas in which minimum standards are to be agreed²⁰, based on unanimity (although the UK, Denmark and Ireland can decide to opt out of any particular proposal).²¹

19 Independent Labour Organisation (ILO) *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 1999, C182

20 Criteria and mechanisms for determining which Member State is responsible for considering an asylum application submitted by a national of a third country in one of the Member States; Minimum standards on the reception of asylum seekers; Minimum standards with respect to the qualification of nationals of third countries as refugees; Minimum standards on procedures in Member States for granting or withdrawing refugee status; Minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin, and for persons who otherwise need international protection; Promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons

21 The draft for an EU Constitution from the EU 'Convention on the Future of Europe', which was published on 26 May 03, sets out – among other important changes – that Qualified Majority Voting by the Council will be applied in 20 new policy areas, including justice and home affairs (border controls, asylum and immigration). Were this to be agreed by Member States it would have major implications for the development of common asylum and immigration policies.

At a subsequent meeting of the European Council in Tampere in Finland in 1999, Member State Heads of Government reaffirmed in positive terms ‘*absolute respect of the right to seek asylum*’ and agreed to work towards establishing a Common European Asylum system, ‘*based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to face persecution*’. In 2000, a European Refugee Fund of 216 million Euros (until 2004) was established to promote solidarity among the Member States on asylum and support their efforts in dealing with asylum seekers and refugees.

However since then, the overall approach of Member States has become much more conservative, fuelled by concerns about national security (especially in light of the events of September 11th), economic downturn, and rising xenophobia among sections of the population across Europe. Some progress has been made and legislation has been agreed in several areas to meet the Amsterdam target date for the completion of the first stage of harmonisation by 2004²². All of these initiatives have implications for separated children which are considered in detail in Section 3 below.

Overall, many NGOs and other human rights organisations believe the policy priority – led by Justice and Interior Ministries in the Member States – has increasingly been on deterrence, through the enforcement of border controls and the negotiation of readmission agreements for those whose applications have failed. Recent proposals put forward by the UK Government to promote the processing of asylum applications in states outside the EU confirm this trend towards an increasingly restrictive approach.

The knock on impact has been to drive standards down towards ‘lowest common denominator’ policies, undermining access and guarantees of protection for asylum seekers and migrants²³. In several cases, proposals have been watered down in the final stage of agreement in the Council of Ministers (i.e. Member State governments), operating behind closed doors with very little democratic scrutiny.

This process has also affected separated children. For example, the definition of ‘family’ in the Dublin II Regulation was narrowed in the latter stages of the regulation’s passage, which will mean that reunification for a separated child with a family member in another EU state remains very difficult to achieve. Similarly, the definition of ‘family’ in the Directive on Family Reunification has also been restricted during negotiations over the draft.

Alongside the development of a Common Asylum Policy, increasing emphasis is also being placed on the creation of a Common Immigration Policy. Since Tampere, the Commission has adopted a series of communications setting out

22 E.g. Temporary protection directive (adopted 20 July 01); Eurodac (operational 15 January 03); Dublin II regulation (adopted 18 February 03); Reception directive (agreed 27 January 03)

23 European Council on Refugees and Exiles (2001) *The Promise of Protection: Progress towards a European Asylum Policy since the Tampere Summit 1999*; JUSTICE (2002) *Asylum: Changing policy and practice in the UK, EU and selected countries*

its thinking²⁴, prepared a Green Paper and Action Plan on return policy²⁵, and put forward a series of proposals for Directives in a number of key areas²⁶. In addition, a High Level Working Group was set up in 1998 to develop action plans in relation to asylum and migration for selected non-EU countries²⁷, and build capacity so that returnees are safe to return. Whilst not all these measures concern separated children, there is so far little focus on them even in those that should do so. For example, the Action Plan on Returns (see Chapter 3, part IIb) makes only one significant reference to children, and wholly fails to address the range of issues facing separated children.

At the same time, transnational organised crime – including child sexual exploitation, child pornography on the internet, child sex tourism, and child trafficking – is also growing. The Tampere European Council has called for action to tackle trafficking, and the European Commission has since been encouraging harmonisation of national criminal laws and procedures in the Member States²⁸.

The EU agenda and separated children

Whether the EU asylum and immigration agenda takes children into account is related to the question of whether the EU as a whole accords attention to the rights of children. Previous analysis by Euronet (the European Children's Network) has highlighted significant weaknesses in the EU's approach to children²⁹, including low political priority (largely as a result of the EU's predominant 'citizen as worker' focus), lack of overall co-ordination and direction, and restricted opportunities for participation. Although limited EU action has been taken in specific policy areas, such as child sexual exploitation (see above), this is undermined by the fact that the legal bases in the EU Treaties for action in relation to children are relatively limited. A specific reference is provided at present by Article 29 of the 1997 Amsterdam Treaty, but this only covers offences against children³⁰.

24 European Commission, Communication on a Community immigration policy, COM(2000) 757; European Commission, Communication on an open method of coordination for the Community immigration policy, COM(2001) 387; European Commission, Communication on a common policy on illegal immigration, COM(2001) 672; European Commission, Communication on integrating migration issues in the European Union's relations with third countries, COM(2002) 703 final; and Commission Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003) 323 final

25 European Commission, Green Paper on a Community Return Policy on Illegal Residents COM (2002) 175 final; Presidency Proposal for a Return Action Programme, 25/11/02

26 The conditions of entry and residence of third-country nationals for paid employment and self-employed activities (COM(2001) 386); the right to family reunification (COM(2000) 624, amended proposal); the status of third-country nationals who are long-term residents (COM(2001) 127).

27 Initially, plans were developed for Albania, Morocco, Afghanistan, Sri Lanka, Somalia and Iraq.

28 Communication of 21 December 2000 'Combating trafficking in human beings and the sexual exploitation of children; two proposals for framework decisions'. Framework decision on combating trafficking in human beings (July 2002), COM (2000) 854-2; Political agreement on a framework decision on combating the sexual exploitation of children and child pornography (October 2002), COM (2000) 854-2

29 S. Ruxton (1999) *A Children's Policy for 21st Century Europe*, Euronet, available on www.europeanchildrensnetwork.org in English, French, German and Spanish.

30 Article 29 sets out that an area of freedom, security and justice is to be created by 'preventing and combating crime, organised or otherwise, in particular ... trafficking in persons and offences against children'.

Whilst the above weaknesses are generally still evident, recent years have seen growing interest in the development of a clear legal basis for children's rights within the EU Treaties. For example, Article 24 of the EU Charter of Fundamental Rights, agreed at the Nice Summit in 2000, addresses children's rights (see box below). Whilst the Charter represents a considerable step forward, it is weaker in several respects than the text of the CRC³¹. Although the Charter is not legally binding, the European Commission has however made clear that it intends to consider it as such as far as its own actions are concerned³². The fact that the 'best interests' principle, based on Article 3 of the CRC, is referred to in places in the texts of all the EU proposals for legislation on asylum perhaps reflects this commitment.

Article 24 (Chapter III: Equality)

The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Extract from the EU Charter of Fundamental Rights

In relation to separated children in particular, there has only been one EU text which has wholly concentrated on issues concerning them – the EU Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries³³. Although it has no binding force, the Resolution has been an influential reference point for the development of subsequent EU legislation as part of the Common Asylum Policy.

As with other EU instruments concerning children, the standards set out in the Resolution, although they have some positive aspects, are unfortunately relatively weak overall. Whilst the Resolution represents an important political commitment by Member States to realising the rights of separated children, it has also to some extent undermined the practical implementation of high quality standards. For instance, the Resolution indicates that states may refuse separated children leave to enter EU territory without authorised documentation, whereas the 1997 UNHCR Guidelines argue the reverse, recognising that identity papers

31 For example: Article 24 is not quoted exactly from the CRC; the principle of 'non-discrimination' is absent; children 'may' express their views freely rather than having this as a right; and the principle of taking the child as an individual with its own human rights is omitted. See D. Sutton, M. Schuurman, (2002) *Children are European Citizens Too: Children in the EU Treaty*, Euronet, www.europeanchildrensnetwork.org

32 António Vitorino, Commissioner for Justice and Home Affairs, speech at seminar on 'Children affected by armed conflict and forced displacement', Norrköping, 2 March 2001

33 EU Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries Official Journal C 221, 19/07/97

may have been lost, forged, or destroyed – or may never have existed in the first place. Similarly, the Guidelines state that it is particularly important that children seeking asylum (and particularly separated children) are not kept in detention (para 7.6), but the Resolution makes no such commitment. And whereas the Resolution correctly identifies the need for separated children to be represented as soon as possible after arrival, how this is to be done is left to individual Member States.

Overall, the development so far of legislation towards separated children under the Common Asylum Policy has been – as we will see in Chapter 3 – patchy. This is perhaps unsurprising, given that it reflects the wide variation in policy and practice between and within Member States which has existed for some time. In a previous SCE report³⁴, we highlighted that, although examples of positive policy and practice towards separated children can be found within European states, the problems faced by separated children tend to dominate. These include:

- Restrictive definitions of ‘separated child’;
- Refusal of access to EU territory;
- Difficulties establishing the identity and age of a separated child in the face of official disbelief;
- Poor registration and documentation procedures;
- Deprivation of liberty, sometimes in prison environments;
- Lack of awareness and training among officials;
- Absence of sufficient support at all stages of the asylum procedure, from both guardians and legal representatives;
- Failure to undertake family tracing, to establish contact with family, or to provide for reunification;
- Lack of opportunities for children’s views to be considered; and
- Inappropriate, even hostile, determination procedures.

It is unrealistic to expect the process of harmonisation of EU asylum instruments to solve all these wide-ranging issues. Nevertheless it is essential that the development of common policies does more than entrench existing policy and practice failings. In our conclusions at the end of this report, we set out some key challenges that remain – for EU institutions, Member States, and NGOs – to ensure that the end result is an improvement in the opportunities and experiences of separated children.

³⁴ S. Ruxton (2000) *Separated Children Seeking Asylum in Europe: A Programme for Action*, Separated Children in Europe Programme, Save the Children/UNHCR, Save the Children Sweden

3. Key issues and developments

Following the Tampere European Council in 1999, the European Commission has been charged with the duty of preparing a regular review of progress in relation to necessary measures for the creation of an EU area of 'freedom, security and justice'. This 'Scoreboard' is drawn up every six months, and the most recent was published in the form of a Commission 'Communication' on 22 May 2003³⁵.

In relation to the development of a common EU asylum and immigration policy, the table below summarises progress on the key elements affecting separated children which have so far been identified by the Separated Children in Europe Programme.

Legislative measure	State of Play	Transposition
Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons	Adopted by the Council July 2001	Deadline for implementation 31/12/2002
Council Regulation establishing the Eurodac system for the comparison of fingerprints	Adopted by Council December 2000 (and implementing regulation February 2002)	Entered into force 15/1/2003
Council Regulation determining the Member State responsible for examining an asylum application ('Dublin II')	Adopted by Council February 2003	Entered into force 17/3/2003. Applies to applications lodged from 17/09/03
Council Directive on minimum standards for the reception of applicants for asylum in Member States	Adopted by the Council January 2003	Implementation no later than 6/2/2005
Commission Proposal for a Directive on minimum standards for the qualification and status of third country nationals as refugees or as persons who otherwise need international protection	Intended adoption by the Council June 2003 was not achieved, now due by end 2003.	Will be 24 months from date of entry into force.
Commission Proposal for a Directive on adoption of common minimum standards on procedures for granting or withdrawing refugee status	Seville European Council asked the Council to approve by 2003	Will be 24 months from date of entry into force.
Commission Proposal for a Council Directive on family reunification	Adopted September 2003	No later than 3 October 2005
Commission Proposal for a Directive on a residence permit issued to victims of trafficking in human beings	European Parliament opinion adopted October 2002. Currently under negotiation in the Council.	
Commission Green Paper (April 2002) and Communication (October 2002) on development of common minimum standards concerning returns	Draft Directive from Commission due end 2003.	

³⁵ European Commission, *Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union*, COM(2003) 291 final, Brussels 22/05/2003

Not all deadlines have been achieved on time and progress has been somewhat slower than originally envisaged. The Communication of 22 May 2003 referred to above³⁶ therefore urges that the Council should continue ‘to press ahead for the adoption of the proposals which remain on the table and that substantive progress is achieved’. It goes on to warn, however, that:

‘...this positive assessment is somewhat mitigated by the final outcome, in terms of substance, of some of the instruments agreed, by comparison to the initial ambitions described at Tampere and which the Commission has aspired to in presenting its proposals. A clear example is the field of legal immigration. In this and other policy areas, the degree of harmonisation is at risk of being reduced to the lowest common denominator at the expense of the value added by common action at European level.’

In the sections that follow, we set out the background to and main provisions of each measure identified above. A detailed commentary highlights key points and issues of relevance to separated children. Each section concludes with specific recommendations.

For ease of reference, the measures are divided into the two main categories defined by the EU, asylum and immigration policies. The first of these categories is further subdivided into measures adopted, and proposals under discussion.

Part I: Asylum

a) Introduction

Specific provisions are included in relation to separated children in all the main texts of the Common Asylum Policy, according to a definition based on Article 1 of the 1997 EU Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries (97/C 221/03): *‘unaccompanied minors’ means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States.*’ As highlighted in Chapter 1 of this report, the Separated Children in Europe Programme prefers the wider term ‘separated child’.

There are a number of positive references to children and separated children in the texts that have been developed so far. For example, the key CRC principle of the ‘best interests’ of the child is mentioned in most legislation apart from the Eurodac Regulation (although these references could be strengthened and guidance should be developed to assist local and national authorities with practical interpretation). Another welcome inclusion is the reference to the existence of

³⁶ EU Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries Official Journal C 221, 19/07/97

'child specific persecution' in the Refugee Definition Directive, though here again more detailed guidance would be helpful.

However there is also evidence that high quality standards have in some respects been gradually undermined by Member States during negotiations. For instance, Article 12 of the CRC (the child's right to express views) is referred to in the Temporary Protection Directive – the first to be adopted – but not in later directives. Similarly, the importance of guardianship is recognised in the Temporary Protection, Reception, Refugee Definition and Asylum Procedures Directives, but this provision has been weakened in all cases so that a *'representative'* – potentially an individual with insufficient training or knowledge – is deemed adequate rather than a *'legal guardian'*. The most recent draft of the Asylum Procedures Directive suggested that even this provision may be watered down further by reference to certain circumstances in which a representative need not be appointed³⁷.

In other ways, the developing asylum agenda fails to respect the rights and needs of separated children adequately, displaying the same flaws as the 1997 Council of Ministers Resolution on Unaccompanied Children. Contrary to UNHCR Guidelines, there are no provisions to prevent separated children from being detained under the Reception or draft Asylum Procedures Directives, despite evidence of the damage it can do to them. And the draft Asylum Procedures Directive also contains no exemptions for separated children from special procedures (e.g. 'inadmissible applications', 'manifestly unfounded applications', 'safe third country') – again contrary to UNHCR Guidelines which recommend that a separated child is not refused access to the territory.

Sometimes, the needs and rights of children remain relatively invisible. This is the case in relation to the new proposals which have recently emerged to pilot systems for processing of asylum claims beyond EU borders (see section on 'External Processing' below). Although it appears that children will not be included in such systems, this has not been guaranteed, and there has been no systematic consideration of the impact of the plans on children.

In the sections that follow, we expand upon these points in more detail, but overall the evidence set out here suggests that the interests of separated children have so far not been fully mainstreamed into the legislative measures that have been developed towards a Common Asylum Policy.

³⁷ Council of the European Union, Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326 final/2, Brussels, 10 June 2003

b) Measures adopted

Temporary protection

Background

Temporary protection is a short-term solution to situations of mass influx into the EU of displaced people who cannot return to their country of origin. It has its roots in conflicts in former Yugoslavia, and particularly Bosnia and Kosovo, which highlighted the need for special procedures. The intention of the EU Directive is to promote solidarity and responsibility sharing between Member States in instances where standard asylum systems will be unable to cope, and to reduce disparities between the policies of Member States on reception and treatment.

The Temporary Protection Directive³⁸, which defines the decision-making procedure to trigger, extend or end temporary protection, was formally adopted on 20 July 2001 and was the first legally binding protection instrument adopted by the EU after the entry into force of the Treaty of Amsterdam. The Member States had to implement the provisions of the directive by 31 December 2002 (with the exception of Denmark and Ireland).

Main provisions

- Temporary protection (TP) is an exceptional regime and must not undermine Member State responsibilities to recognise refugees under the 1951 Refugee Convention
- A TP regime can be activated by a Council of Ministers ruling by qualified majority, based on a European Commission proposal.
- Those affected will be given residence permits for one year (with possible extension to a maximum of three years)
- They will have access to employment; provision of accommodation, social welfare or means of subsistence
- Access to education for children will be under the same conditions as nationals of the host state;
- Possibilities for families to reunite are envisaged in certain cases
- *‘Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors...’*
- Other specific provisions for separated children are also included (see below for further details)

³⁸ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

Commentary

The Directive makes welcome reference to the needs of children (e.g. in terms of education, and family reunification), recognising that in situations of mass exodus, children may become separated from their families or guardians. It also acknowledges the importance of respect for human rights and fundamental freedoms (Article 3.2), which will include the rights set out in the CRC. Although the Convention is not specifically referred to in this Article, the key principle of the child's 'best interests' is mentioned in relation to family reunion (Article 15.4). The needs of separated children are highlighted in Article 16 in relation to guardianship and placement decisions. The guardianship provision is however weakened by the reference to the acceptability of '*any other appropriate representation*' (as in the 1997 EU Resolution on Unaccompanied Minors); separated children should be supported by a properly qualified guardian (as set out in detail in the Statement of Good Practice). More positively, the reference to taking the child's views into account on placements is particularly noteworthy, recognising the importance of one of the key provisions of the CRC in Article 12.

Article 16

1. The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.
2. During the period of temporary protection Member States shall provide for unaccompanied minors to be placed:
 - (a) with adult relatives;
 - (b) with a foster-family;
 - (c) in reception centres with special provisions for minors, or in other accommodation suitable for minors;
 - (d) with the person who looked after the child when fleeing.

The Member States shall take the necessary steps to enable the placement. Agreement by the adult person or persons concerned shall be established by the Member States. The views of the child shall be taken into account in accordance with the age and maturity of the child.

Recommendations

The European Commission must report to the European Parliament and the Council by December 2004 (at the latest) on the application of the Directive in the Member States and will propose any amendments that are necessary – a procedure to be repeated at least every five years. Given that Member States will have the power to set higher standards than those set out in the directive, a crucial part of this monitoring task will be to ensure that they do not lower existing provisions. The Separated Children in Europe Programme believes that:

- In its report, the European Commission should highlight the extent to which Member States have maintained or reduced existing standards in transposing the Directive into national law.
- Refugee, child care and human rights NGOs have an important role in monitoring Member State transposition at national level, and making this information available to European institutions.
- In the documents issued to those granted temporary protection by Member States under Article 9, separated children should be informed fully about their rights and how to exercise them.
- The reference to '*any other appropriate representation*' in Article 16 should be removed as it potentially undermines high quality support from qualified guardians.
- Before a child is returned to their country of origin, safeguards should be established to ensure the child's safety and that the child will have a caregiver upon return. The 'best interests of the child' should be paramount.

Identification of asylum seekers and irregular migrants – the Eurodac system

Background

Eurodac is a Community-wide information technology system for comparing the fingerprints of asylum seekers and other irregular migrants. It is intended to help Member States to identify asylum applicants and irregular migrants and determine whether they have previously applied for asylum in another Member State. It is regarded as a key mechanism to assist decision-making about which state is responsible for an asylum claim under the Dublin Convention. The *'Council Regulation concerning the establishment of EURODAC for the comparison of fingerprints of applicants for asylum and certain other aliens'*³⁹ was adopted in December 2000 and became operational on 15 January 2003.

Main provisions

- Eurodac lays down harmonised rules for all Member States in relation to the storage, comparison and erasure of fingerprints to be carried out in a central unit at the European Commission.
- In addition to fingerprints, the database records the date of the application, the Member State where the asylum application was filed and the gender of the applicant. These data are collected for any asylum applicant over 14 years of age.
- There is also provision for the fingerprinting of any migrant over 14 years who is apprehended in connection with the irregular crossing of the border of a Member State coming from a third country.
- The procedure for taking fingerprints will be determined by each Member State, *'in accordance with the safeguards laid down in the European Convention on Human Rights and in the United Nations Convention on the Rights of the Child'*.
- Data on asylum-seekers can be kept for up to 10 years unless the individual is granted citizenship of one of the Member States, at which point the data is erased.
- A joint supervisory authority, made up of representatives of supervisory authorities in each Member State, monitors the activities of the central unit in the European Commission so that the rights of data subjects are protected.
- All Member States except Denmark are involved in Eurodac (and Norway and Iceland are also taking part as a result of a co-operation agreement)

³⁹ European Council Regulation 2725/2000, 11.12.00, Official Journal L 316, 15.12.00

Commentary

The need for an effective and workable system to determine the state responsible for processing an asylum claim is widely acknowledged. However concerns remain over the scope of the Regulation, the periods of time for which data can be retained, the rights of access to the database, and arrangements to ensure accountability.

A particular concern when considering the position of children is over the fact that fingerprints can be taken under Eurodac from age 14 upwards. The European Court of Human Rights has consistently held that the taking of fingerprints is an interference with the right to respect for private life provided in Article 8 of the European Convention on Human Rights. It has also indicated that any fingerprinting should be 'necessary in a democratic society': the measure must be proportionate to the aim pursued, and may be used as a last resort only. Similarly, it is also arguable that fingerprinting may infringe Article 16 of the CRC ('The right to protection from interference with privacy...'), especially when considered in conjunction with the principles of 'non-discrimination' (Article 2) and of the 'best interests of the child' (Article 3).

Fingerprinting is also likely to undermine the possibility of establishing the degree of trust necessary between children and the responsible authorities for effective identification to take place. In practice, when they are fingerprinted children often fear that they are being taken into custody. Moreover, there is no evidence that children – and particularly separated children – make multiple applications in Member States, and there is therefore no proven need to fingerprint them.

Recommendations

In principle, the Separated Children in Europe Programme believes that fingerprinting children from age 14 is unjustified and that the age range should be lifted, preferably to the age of majority, as defined by the CRC. In the short-term, we recommend that as part of the evaluation of the operation of the central unit one year after introduction of the Regulation:

- The extent and impact of fingerprinting of children should be examined, and children's views ascertained as to their experiences (in line with Article 12 of the CRC).
- Guidance should be developed by the central unit, working with other key stakeholders (including children's organisations), on how the safeguards of the ECHR and CRC should be applied to fingerprinting procedures in practice. This should involve the presence of an appropriate independent adult to ensure the child can exercise his or her rights.

Allocating responsibility for examining asylum applications in the EU – the ‘Dublin II’ Convention

Background

On 18 February 2003, the EU Council of Ministers adopted the ‘Dublin II’ Regulation (in line with Article 63 of the Amsterdam Treaty) setting out general criteria for allocating responsibility for examining an asylum application to the Member State where the applicant first entered EU territory. That Member State is responsible for examining the application according to its national law and is obliged to take back its applicants from another Member State. The aim of the Regulation, which builds on the existing Dublin Convention, is to avoid situations where refugees are shuttled from one Member State to another, with none accepting responsibility, or to prevent multiple or simultaneous applications.

Despite some improvements on the original Convention, critics argue that the regulation is not workable, and will be unfair to asylum seekers. They suggest that it continues to shift greater responsibility for entry controls to those States with extended land and sea borders (primarily in the South and East of the EU), many of which have the least developed infrastructures for dealing with asylum applications. The knock-on impact is likely to be that border controls will become even tighter and it will be ever more difficult for asylum seekers to enter EU territory to claim asylum.

An alternative approach would be that determination of the Member State responsible should rest on where the applicant has a family member (provided he or she agrees) and where the application is lodged. This would lessen the administrative and resource burden, aid the expeditious examination of claims, and take into account the needs and aspirations of asylum seekers and their families. For these reasons it would clearly benefit separated children. However, some Member States oppose such a system on the grounds that they believe it would result in disproportionately high numbers of applications to their countries.

Main provisions

- Member States undertake to examine the application of any asylum seeker who applies at their border or within their territory
- Responsibility for examining an asylum application is allotted to the Member State which played the most important part in the applicant’s entry or residence in the Union (exceptions apply)
- The Member State responsible will take charge of the applicant throughout this period and take back an applicant who is illegally in another Member State
- Penalties are introduced for Member States that allow the illegal presence of a third country national on their territory for more than two months
- Norway and Iceland (countries not in the EU, but in the European Economic Area) will apply the regulation from its entry into force, however Denmark (an EU Member State) will not until a specific agreement is concluded
- The Regulation applies to applications lodged from 17 September 2003.

Commentary

Perhaps the most significant change from the original Dublin Convention is the improved provision for family reunification. Under Article 2(i) of the regulation, the definition of 'family members' included, in an early draft, not only the spouse or partner, but also the children of the applicant, and *'where appropriate, other persons to whom the applicant is related and who used to live in the same home in the country of origin, provided that one is dependent on the other...'* However this broader definition of family, closer to the concept called for in Paragraph 185 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, was restricted in the final text and the final clause quoted above was deleted. Although the Article still represents an improvement over previous arrangements, this definition will limit protection for a separated child, who will not have the positive option of reuniting with extended family members in another Member State whilst applying for asylum.

Article 6 provides a useful recognition that long periods of separation from family members are detrimental to children. It makes clear that for separated children *'...the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.'* However the weakness identified in Article 2(i) is also relevant here. In addition to the argument set out above, it is also important to acknowledge the CRC principle (Article 20.1) that in creating alternative care solutions for a separated child, *'due regard should be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'*. In practice, these criteria are more likely to be met by an extended family member than by placement with foster parents or a government agency.

Article 7 also limits the extent to which family reunification may take place, as it provides for this when the family member has obtained refugee status in another member state (rather than complementary or temporary status). Article 8 is however more positive, as it provides for the reunification of applicants with family members who are themselves asylum applicants elsewhere in the EU.

The 'Humanitarian clause' set out in Article 15 and retained from the original Dublin Convention, allows a Member State to assume responsibility based on humanitarian grounds, *'including family or cultural considerations'*, provided that the applicant consents. Point 3 goes on to state that: *'If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor'*. Welcome though this clause is, its discretionary nature suggests that, on past experience, it will in practice be very little used.

Recommendations

Very few cases of family reunification of separated children took place under the original Dublin Convention, and it remains to be seen whether the new regulation will improve this situation. In 2006, at the latest, the European Commission will report to the European Parliament and the Council on the application of this Regulation and may propose the necessary amendments. In light of the analysis set out above, the SCE Programme makes the following recommendations:

- The definition of ‘family’ in Article 2(i) should be amended to include extended family members. Prior to reunification, thorough assessment of extended family members should be undertaken to ensure that they are suitable carers.
- Where family unity has not been preserved under Articles 7 and 8 of the Regulation, Member States must be urged to use the ‘family and cultural considerations’ provisions of Article 16, taking into account the diverse and difficult circumstances in which separated children find themselves.
- The Regulation should be amended to incorporate the principle that family tracing for a child’s parents and family should be undertaken as soon as possible after a separated child enters EU territory, if it is in the child’s best interest.
- The child should be informed and consulted about all aspects of the process, in accordance with age and maturity, and in a language he/she understands, as set out in Article 12 of the CRC.
- The UNHCR and NGOs should monitor potential and actual cases of family reunion of separated children under the Regulation to ensure that they are carried out in a ‘*positive, humane and expeditious manner*’ (Article 10.1, CRC), and in line with the ‘best interests’ (Article 3, CRC) of separated children.
- In relation to the ‘Humanitarian Clause’ in the Regulation, it is often difficult in practice for parents (and other family members) to prove that they are related to a child. Acceptable proof should therefore not only include presentation of a birth certificate, but also other methods such as DNA testing.

Minimum standards for the reception of applicants for asylum

Background

The 1997 Amsterdam Treaty (Article 63.1.b) requests the European Council to adopt minimum standards on the reception of asylum-seekers in Member States. The subsequent Directive covers issues such as information, freedom of movement, healthcare, accommodation, education, access to the labour market and vocational training. It requires Member States to ensure a dignified standard of living to all asylum-seekers, and to pay particular attention to the circumstances of applicants with special needs. The Council adopted the Directive on 27 January 2003.

Two main reasons are cited for developing the Directive. First, it is important to provide comparable reception standards as asylum seekers do not have the

right, under the Dublin II Regulation, to choose the Member State that will examine their application. Second, adopting minimum standards will, in theory at least, reduce the movement of asylum seekers between Member States due to differences in reception conditions.

Whilst there are positive elements to the overall proposals, concern has centred on a number of areas – all of which would affect separated children. For example, restrictions on freedom of movement within a particular area of a Member State (as often occurs in Germany) arguably breach the European Convention on Human Rights. The withdrawal or reduction in certain circumstances of the minimum reception conditions which are set out may also contravene international human rights law.

Another contentious issue has been the gradual watering-down of the European Commission's original proposal by the Member States, particularly in the final stages. This has notably resulted in very weak provisions in relation to the right to employment, and the very late addition of a clause to allow Member States to refuse support to an asylum seeker who does not apply '*as soon as reasonably practicable*' after arrival.

Main provisions

- The Directive applies to asylum applications under the 1951 Refugee Convention, however it does not explicitly include applications for other forms of protection in states where there is more than one procedure
- Applicants must be provided with information on established benefits, and obligations they must comply with, within a reasonable time
- Asylum seekers are allowed free movement within states, or particular areas of states, but limits may be set according to certain criteria
- Member States can set their own conditions for access to the labour market
- Member States will provide reception conditions '*to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence*'.
- Applicants will receive, at least, emergency care and essential treatment if ill
- Sanctions can be applied so that subsistence benefits may be withdrawn or removed (e.g. if an applicant disappears; fails to meet reporting conditions; conceals their financial resources)
- '*Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied children...*'
- Denmark and Ireland are not participating in the adoption of the Directive
- Member States must implement the provisions of the Directive before 6 February 2005

Commentary

Several Articles within the Directive guarantee positive provisions for children and separated children. For instance, Article 18 clearly states that the 'best interests' principle is a primary consideration for Member States when implementing provisions of the Directive that involve children. It goes on to guarantee access to rehabilitation services (e.g. for children who have been abused, neglected, exploited, or tortured).

Article 19 is generally welcome, setting out a range of safeguards for separated children, including: representation by legal guardianship; appropriate accommodation; family tracing; and training for those working with separated children. However it does not exclude the possibility of children being held in detention, in spite of the fact that UNHCR's 1997 Guidelines state that: '*Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children*' (paragraph 7.6). In practice detention of separated children continues in several Member States. Detention can be highly traumatic for them – especially in light of the circumstances from which they have often fled. It is also less likely to provide effective protection than effective supervision in an open childcare facility. It appears that detention is often used purely for administrative convenience, in contravention of the 'best interests' principle⁴⁰.

Detention of children in the Member States

In some European countries, detention of children is clearly allowed by the law: from the age of 13 in Greece (for example, if they cannot prove that they are under 18, during age assessments or prior to deportation), from 15 in the Czech republic, and from 16 in The Netherlands. Sometimes, there is absolutely no difference in the law between children and adults – this is the situation in Belgium where cases of the detention of very young separated children (as young as 3 or 4 years old) have been reported. The length of detention varies from one country to another: it is sometimes quite short (e.g. 4 days in France, a few hours in Sweden, with a maximum of two weeks in some cases), and other times it lasts up to 180 days (e.g. in the Czech Republic).

Save the Children/Separated Children in Europe Programme, Statement on the Detention of Separated Children in Europe, June 2003

Another concern is that Article 19 allows Member States to place separated children aged 16 or over in accommodation centres for adult asylum seekers. Although this is in line with the 1997 Council Resolution on Unaccompanied Minors, it is contrary to the spirit of Article 37 of the CRC, which states that '*every child deprived of their liberty shall be separated from adults unless it is considered in the child's best interest not to do so...*

40 S. Ruxton (2000) *Separated Children Seeking Asylum in Europe: A Programme of Action*, Save the Children/ UNHCR, Save the Children Sweden

Article 19 – Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.

2. Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed:

- (a) with adult relatives;
- (b) with a foster-family;
- (c) in accommodation centres with special provisions for minors;
- (d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers.

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

3. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.

4. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work.

Article 10 states that Member States will provide education for children under similar conditions as their own nationals. This positive guarantee is undermined somewhat by an additional clause which allows for access to be postponed for up to three months from the date the asylum application was lodged – however this is still an improvement on the very vague commitment in the 1997 Council Resolution.

Recommendations

The European Commission must report to the European Parliament and the Council by 6 August 2006 on the application of the Directive in the Member States and will propose any amendments that are necessary – a procedure to be repeated at least every five years. The Directive makes clear that *‘It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third-country nationals and stateless persons who ask for international protection from a Member State’*. It is therefore vital to ensure that Member States not only meet the minimum standards, but also strive to go beyond them.

The Separated Children in Europe Programme believes that:

- Refugee, child care and human rights NGOs have an important role in monitoring Member State transposition at national level, and making this information available to European institutions.
- In addition to covering applications for asylum under the 1951 Refugee Convention, the scope of the Directive should be extended to applications for all forms of international protection, especially those of separated children.
- The ‘best interests’ principle in Article 18 should be supplemented by further references to the effect that children should be treated without discrimination, and have the right to participate in decisions that affect them, in line with Articles 2 and 12 of the CRC respectively.
- The detention of a separated child solely by reason of their immigration status should be expressly forbidden in Article 19.
- Article 10 should be amended so that education is made available as soon as possible; it should not be postponed longer than 30 days after the application is lodged.
- Article 14.3 should be amended so that, for separated children, adequate and appropriate temporary accommodation is provided immediately after a child’s arrival.

c) Proposals under discussion

Definition of a refugee and subsidiary forms of protection

Background

‘I believe it is important that governments take into consideration that child-specific forms of human rights violations do exist, and that children may have different ways in communicating their fear of persecution’.

António Vitorino, Commissioner for Justice and Home Affairs, speech at seminar on ‘Children affected by armed conflict and forced displacement’, Norrköping, 2 March 2001

Article 1 of the 1951 Refugee Convention defines the term ‘refugee’⁴¹, but there are at present significant differences in how Member States interpret this – an important potential obstruction to the creation of a Common Asylum Policy. The European Commission therefore put forward a proposal in September 2001 to harmonise the refugee definition. The proposal also covers ‘subsidiary protection’ – perhaps better named ‘complementary protection’ – measures which many Member States have developed to address the circumstances of applicants who do not qualify as refugees but nevertheless need some form of protection owing to a well-founded fear (e.g. of torture, inhuman or degrading treatment, severe violation of their human rights, a threat to their life, safety or freedom as a result of armed conflict or systematic human rights violations)⁴².

In many respects, the proposal on qualification for refugee and subsidiary protection is close to the ‘full and inclusive’ interpretation of the Refugee Convention endorsed by the conclusions of the Tampere Summit in 1999. A noticeable feature is that the draft includes ‘*persecution by non-state agents*’ – which could include, for example, violence or discrimination against minority groups – as grounds for an application. Nevertheless it has proven difficult to finalise the draft Directive, largely because the German Government has entered substantial reservations to particular Articles. The proposal continues to be debated and is likely to be agreed in 2003, though it has already passed the deadline of June 2003 set by the European Council meeting in Seville the year before.

41 Article 1A(2) of the 1951 Convention defines a ‘refugee’ as a person who ‘*owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his(her) nationality and is unable or, owing to such fear, is unwilling to avail himself (herself) of the protection of his(her) country; or who, not having a nationality and being outside the country of his(her) former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*’

42 Subsidiary protection is based on international human rights law, in particular the European Convention on Human Rights (Article 3), the International Covenant on Civil and Political Rights (Article 7), and the UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment.

Main provisions

- Member States may make use of the ‘internal protection’ alternative, allowing them to reject applications if it can be established that effective protection is available in at least part of the country of origin
- ‘Non-State bodies’ can be considered as potential protectors in a similar manner to recognised States when a failed applicant is returned
- Provisions on the minimum rights and benefits to be enjoyed by those entitled to refugee and subsidiary protection status, including: the right to information in a language likely to be understood by the applicant; access to employment and education; the granting of residence permits; freedom of movement within the Member State where they were granted protection; access to appropriate accommodation; and access to health and psychological care
- The rights and benefits attached to both refugee status and subsidiary protection are generally the same. However entitlement to some rights and benefits, such as access to work and integration programmes, is weaker for those with subsidiary status
- Clauses setting out conditions under which a third country national or stateless person will cease to be eligible for, or will be excluded from, refugee status or subsidiary protection
- *‘Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and in determining the content of international protection...’.*
- Provisionally, Member States will bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 1 January 2005.

Commentary

‘The problem of “proof” is great in every refugee status determination. It is compounded in the case of children. For this reason, the decision on a child’s refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child’s story, the burden is not on the child to provide proof, but the child should be given the benefit of the doubt’.

UNHCR (1994) Refugee Children: Guidelines on protection and care, Geneva

UNHCR Guidelines emphasise the important principle of the ‘benefit of the doubt’ being applied to decision-making on children’s cases (see box above). They also highlight several key criteria for making a decision on a child’s case, including: the age and maturity of a child and their stage of development; the possibility that children may manifest their fears differently from adults; the like-

likelihood that children will have limited knowledge of conditions in their country of origin; the existence of child-specific human rights violations (e.g. recruitment of children into armies; trafficking for prostitution; female genital mutilation, and forced labour); and the situation of the child's family in their country of origin and, where known, the wishes of parents⁴³.

Some of these areas appear to be covered under general criteria within the draft Directive, but there is a risk that their particular relevance to separated children may be overlooked. The benefit of the doubt principle is also omitted. Nevertheless, the draft goes on to consider acts of a '*gender-specific or child-specific nature*' as '*persecution*'. No detail is given, but this is still a welcome recognition of the fact that child-specific persecution is significant – and an improvement on the formulation set out in the 1997 Council Resolution on Unaccompanied Minors.

In relation to Article 10, Save the Children believes there would be very few, if any, circumstances where internal protection is in the best interest of a child separated from its parents or normal/customary caregiver. It argues that children returned in this way could be further exploited by those who had persecuted them originally causing them to flee from their family and community. This is particularly likely for example in the case of children who have been trafficked and who are therefore extremely vulnerable to being re-trafficked or rejected by their family and community⁴⁴.

Article 27.3 is welcome, setting out that Member States '*shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict and ensure that appropriate mental health care is developed and qualified counselling is provided when needed*'. This wording is now identical to that of Article 18 in the Reception Directive.

Article 28 in the draft Definition Directive specifically refers to the circumstances of separated children seeking refugee status, concluding with a reference to the 'best interests' principle of the CRC. However the reference to representation by legal guardianship is undermined (as in the Reception Directive) by the option of representation by '*an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation*'; without a legal basis to his or her role, a representative may find it difficult to authorise medical treatment, obtain necessary documents, or even gain access to the child.

Recommendations

Subject to the Directive being adopted by the Council of Ministers in the near future, it is envisaged that at the latest, the Commission will report to the European Parliament and the Council on the application of the Directive in the Member States and will propose any amendments that are necessary by 1 January

⁴³ See in particular paragraphs 8.6, 8.7, 8.8, and 8.10 of UNHCR (1997) *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children*, Geneva

⁴⁴ Save the Children Comments on the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 20 May 2003

2007. Subsequent reports will be made every five years. The Separated Children in Europe Programme recommends that:

- Member States should resist any attempt to lower standards within existing proposals in the final stages before adoption of this Directive. In particular the reference to ‘non-state agents of persecution’ must remain in the text; this could be relevant to the application of a separated child.
- Whilst there are welcome references to the CRC ‘best interests’ principle at several points in the draft, the right to participate in decision-making (Article 12, CRC) and the right to non-discrimination (Article 2, CRC) are not specifically addressed. The text should be amended to include such references to these principles.
- In line with the principle that Member States may introduce or retain more favourable standards, they should seek to apply additional positive criteria to the determination of children’s cases, as highlighted in UNHCR Guidelines above. This should include application of the ‘benefit of the doubt’ to decisions.
- Article 10 of the draft Directive should be strengthened by an additional clause which states that in cases of unaccompanied minors, Member States may return the child only if it is in his/her best interests and only if adequate reception and care are available.
- Article 26 should refer to the specific social welfare needs of separated children and require that access to social welfare should be under the same conditions as nationals of Member States.
- References to representation, both in this draft Directive (Article 28) and elsewhere (e.g. Article 19 of the Reception Directive, and the Asylum Procedures Directive), should acknowledge a preference for a legal guardian, with other representation being considered only if the former proves impossible to arrange.
- Paragraph 3 of Article 28 should be amended to state that an unaccompanied minor should never be detained for reason of his/her application for refugee or subsidiary protection status.
- Once adopted, NGOs should monitor transposition and implementation of this Directive by Member States and make submissions based on this evidence to Member State governments and EU institutions.

Asylum procedures

Background

The objective of harmonising minimum standards for Member States' procedures for granting and withdrawing refugee status is central to the development of the Common Asylum Policy. The idea of establishing minimum standards in this area is welcomed by governments as they believe it will discourage 'secondary movement' (i.e. asylum seekers travelling to countries where they believe conditions will be more favourable to them).

Based on a working document in 1999⁴⁵, the European Commission presented an initial proposal for a Council directive⁴⁶ in 2000, however progress towards agreement was very slow owing to the wide disparities between Member State systems. It was also felt by the Council of Ministers that the standards were too complex and prescriptive. As a result, the Commission has drafted and redrafted proposals for a directive⁴⁷ which is due to be adopted by the end of 2003. However the proposals have again been the subject of considerable disagreement and it remains uncertain whether the existing timetable will be met.

NGOs fear that, as with other directives, the drive to reach agreement is leading to a lowering of standards – which already represent a reduction on the provisions of the first draft. There is serious concern, for example, at the trend to reduce and undermine well-established principles of international refugee protection (such as 'non-refoulement'). The fact that the proposal also provides Member States wide discretionary power to retain or even introduce national legislation at lower levels is also worrying⁴⁸.

45 European Commission (1999) *Towards common standards for asylum procedures*, COM(2000) 755, 22/11/00

46 European Commission, Proposal for a Directive on common minimum standards on procedures for granting and withdrawing refugee status, COM(2000)578, 20/09/00

47 European Commission, Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status Brussels, 18.6.2002 COM(2002) 326 final. The most recent drafts are: Outcome of Proceedings 5/6 June 2003 JHA Council Meeting of 10 June 2003 (Asile 35) dealing with Articles 1–22, and the compromise text drafted by the Italian Presidency of 24 June 2003 and Outcome of Asylum Working Party meeting of 16–17 September 2003 (Asile 48) – both dealing with Articles 23–47.

48 ECRE Statement on EU Asylum Policies at the end of the Greek Presidency Justice and Home Affairs Council 5–6 June

Main Provisions

- The draft Directive is binding in relation to applications for refugee status; the provisions can be applied to persons who are ‘in need of international protection’, but this is not automatic procedural guarantees for applicants for asylum, including access to the procedure, and the right to stay in a Member State pending the examination of the application (although this does not apply to the whole procedure), and requirements for the examination of applications.
- Applicants have the opportunity to be interviewed before a decision is taken, with certain exceptions
- The right to appeal against a decision is guaranteed, though proposed changes still under negotiation may allow Member States to derogate from this where national security or public order preclude the applicant for asylum from remaining on the territory
- Article 15 sets out a range of guarantees for separated children (see commentary below)
- Under certain conditions, the principle of the ‘benefit of the doubt’ will be applied to establishing the facts of each case
- Applicants may be detained if ‘*objectively necessary for an efficient examination of the application*’, or there is ‘*a strong likelihood of his absconding*’, or there are grounds for believing that ‘*the restriction on his freedom of movement is necessary for a quick decision to be made*’.
- common standards for the application of certain concepts (‘inadmissible applications’, ‘manifestly unfounded applications’, ‘safe third country’ and ‘safe country of origin’)
- Providing minimum standards does not bar Member States from enacting more favourable national provisions
- Every two years, the European Commission will report to the European Parliament and the Council of Ministers on the application of the directive.

The definition of a ‘representative’ for a separated child (Article 2i) is weakened by the reference to ‘any other appropriate representation’ – as in the Temporary Protection directive and the Commission proposal for a Directive on the refugee definition.

The requirements for a personal interview are set out in Articles 10, 11, 14 and 15. Unfortunately recent drafts have considerably weakened these provisions. In the June 2003 version, previous welcome references under Article 10, allowing for children under a certain age not to have to be interviewed and for their representatives to speak on their behalf, have been removed. Moreover, Article 14 now includes provisions allowing Member States to require the presence of an applicant at interview; to require them to respond in person at interview;

and to conduct an interview in the absence of the representative of an applicant. Guarantees under Article 15 for unaccompanied minors do not exempt them from these provisions, stating that: *‘Member States may require the presence of the unaccompanied minor at the personal interview even if the representative is present’*. (Art 15 (1))

In Article 11, appointing interviewers and interpreters to take account *‘of the personal or general circumstances surrounding the application’*, such as culture and vulnerability is important, however mention should also be made of gender and age here.

Article 15 is the most relevant to separated children, setting out procedures in relation to representation, interviewing and medical examination. This recognition of the special needs of separated children is welcome, however the current draft text is relatively weak, and has gradually been watered down from the first version of the draft Directive. For example, in Clause 1, the stipulation that a *‘legal guardian or adviser’* must be appointed has been replaced by the guarantee to grant a *‘representative’*.

The latest draft has also inserted a worrying new paragraph in Article 15(2) allowing Member States to refrain from appointing a representative where the minor:

- (a) will in all likelihood reach the age of maturity before a decision at first instance is taken or
- (b) can avail himself, free of charge, of a legal adviser or other counsellor ... or
- (c) is married or has been married.

Save the Children has argued⁴⁹ that this new paragraph is extremely discriminatory to 17 year olds, and not in line with Member States’ obligations to treat all young people under 18 as children (as defined by the CRC). Furthermore, *‘The wording is too ambiguous – how will the ‘likelihood’ be assessed when decision times are still so varied between Member States and target timeframes for decisions still not being reached by Member States? The current treatment of 17 year olds, who rarely get granted refugee status but instead temporary status to take them up to the age of 18, indicates that Member States would use this provision to start treating 17 year olds differently during the asylum application process too’*.

SCF goes on to argue that there is *‘no justifiable reason why an unaccompanied asylum seeker under 18 who is or has been married should not be treated in the same way as other unaccompanied minors this is a highly discriminatory provision. In practice it would particularly discriminate against young girls from cultures where it may be normal to marry before the age of 18 or where this may even be required of them. Such an unaccompanied minor is no less vulnerable and therefore in no less need of a representative’*.

In Clause 3, the original guarantee that a personal interview would be conducted *‘by an official trained with regard to the specific needs of unaccompanied minors’* has been replaced by the looser formulation that it should be conducted *‘by a person who has the necessary knowledge of the special needs of minors’* (although the resultant decision must be taken by a trained person).

49 Save the Children Briefing on EU Asylum Procedures Directive, September 2003

The changes to Clause 4 also cause some concern. In line with UNHCR Guidelines, the first draft included a sub-section setting out that authorities that carry out medical examinations to determine the age of separated children must use *'methods that are safe and respect human dignity'*. This recognises the widespread concern that unnecessary X-rays are being carried out, and that intrusive bodily examinations are also being conducted – and that neither method provides conclusive evidence of age. However this safeguard has been completely erased from the later version. The right of separated children to be informed *'in a language which they understand'* about the possibility of medical examination has been replaced by the weaker reference to *'a language which they may reasonably be supposed to understand'*.

Nevertheless, two positive amendments have been added. Clause 4(b) now states that Member States shall ensure that: *'...unaccompanied minors and/or their representatives consent to carry out an examination to determine the age of minors'* and Clause 5 states that the best interests of the child shall be the primary consideration. Welcome though they are, it remains to be seen how these amendments, if they remain in the final text, are implemented.

Although Article 17 clarifies the grounds upon which asylum seekers may be detained, it provides insufficient guarantees for separated children, leaving them subject to the same detention criteria as adults. The SCE Programme believes that detention is highly damaging for separated children – especially considering the situations from which they have fled – and may represent a breach of the 1997 UNHCR Guidelines and the 'best interests' principle of the CRC (see box below).

Articles 23–31 on accelerated procedures and other special procedures (e.g. 'inadmissible applications', 'manifestly unfounded applications', 'safe third country') also fail to include exemptions for separated children. The 1997 Council of Ministers Resolution on Unaccompanied Minors allows Member States to refuse admission at the frontier to separated children, and to keep them at the border until a decision on their admission is taken and practice varies between States⁵⁰. However the 1997 UNHCR Guidelines recommend that *'an unaccompanied child seeking asylum should not be refused access to the territory and his/her claim should always be considered under the normal refugee determination procedure'*.

Articles 35 and 35A on border procedures give Member States a lot of room to apply their own rules as to whether they accept an application at the border or refuse access to the territory. There is a new specific reference to unaccompanied minors in 35(1); although it enshrines the safeguard of ensuring they have a representative, in reality it specifically allows for them not to be exempt from such procedures⁵¹.

50 S. Ruxton (2000) *Separated Children Seeking Asylum in Europe: A Programme for Action, Save the Children/ UNHCR*

51 Save the Children Briefing on EU Asylum Procedures Directive, September 2003

‘A young five year old, Tabita, arrived in Belgium in September 2002; she was travelling with her uncle who wanted to take her to her mother living in Canada. Because her papers were false, she was stopped in Brussels while her uncle, who was legally living in The Netherlands, had to continue on his way. Tabita was forced to apply for asylum, even though this procedure did not suit her situation at all, in order to avoid immediate return. During this procedure, she was kept for two months in a detention centre at the border (in the transit zone of the airport). In this centre, she was living with families and adults, ... it was a totally inappropriate place for a child alone. Her asylum application was refused and she was sent back to her country. She travelled alone and nobody was waiting for her at her arrival.’

Save the Children/Separated Children in Europe Programme, Statement on the Detention of Separated Children in Europe, June 2003

Recommendations

Negotiations on this vital Directive have been slow, however it is still expected they will conclude during 2003. As indicated in the Commentary above, there is evidence that provisions relating to separated children have been weakened during the process. The SCE Programme believes that:

- The CRC principles of the ‘best interests’ of the child and the right to participate in decisions should be integrated throughout the text.
- References to ‘representatives’ in the draft should be amended to ensure that this is interpreted to mean guardians and advisers who are legally trained, and supported. In particular, Article 15.3(a) should be amended so that interviews are conducted by ‘A person who has the *necessary training in and* knowledge of the special needs of minors’.
- Age assessment should be judged in line with paragraph 5.11 of the 1997 UNHCR Guidelines and children should be ‘given the benefit of the doubt if the exact age is uncertain’.
- The statement in Article 15(1) that Member States may require the presence of an unaccompanied minor at the personal interview should be deleted and the previous safeguards under Article 10 reinstated.
- Article 15(2) should be deleted as it is discriminatory and appears to breach the standards set out in the CRC.
- The reference in the original draft Directive to methods which are safe and respect human dignity should be reinserted in Article 15.4. Article 15.4 should be amended so that refusal by a separated child to undergo medical examination should have no bearing on the substantive decision regarding his or her application.
- Children should be exempt from detention – whether at the border, in international zones, in detention centres, in police cells, in prisons – for reasons relating to their immigration status. This should apply to all categories of

children, including asylum seekers, victims of trafficking and all other migrant children.

- Children should always go through the normal procedures and should be exempt from all special procedures including those related to 'safe third country', 'manifestly unfounded' and 'safe country of origin'. Children's cases should be prioritised, but not via accelerated procedures which may undermine a fair hearing. The specific reference to unaccompanied minors in Article 35 on border procedures should also be deleted so that unaccompanied minors are exempt from border procedures providing for removal.
- Family tracing should be included within the scope of the directive, and should be initiated on arrival of a separated child in a Member State.

External processing of applications

Background

A recent initiative from the British Government to cut the numbers of asylum applications is its 'New Vision' plan, under which all asylum applicants would be automatically removed from the UK shortly after arrival to processing centres overseas. The plan envisages the setting up of 'transit processing centres' (TPCs) in countries bordering the EU, such as Albania, Bulgaria or Romania which are on major transit routes for potential immigrants. Asylum seekers entering EU territory from these areas would have their applications for refugee status examined in TPCs. Successful applicants would enjoy resettlement in the UK or another EU country, and rejected cases would be returned to their country of origin. Other asylum seekers would be removed to 'regional protection areas' (RPAs) in their regions of origin; if they travelled to the UK or any other EU country independently, they would be returned to the most appropriate regional protection areas, such as Turkey, Iran, Iraqi Kurdistan, northern Somalia and Morocco.

There are some possible advantages to such plans. For example, asylum seekers would no longer have to undertake long and dangerous journeys to arrive in the EU, and could avoid paying such large amounts to people smugglers. But NGOs have argued there is also a danger the UK proposals would: further shift the responsibility for refugee processing onto poor communities in less developed countries; undermine adequate protection for asylum seekers and refugees; and create new protracted refugee situations in those regions affected⁵².

In its response, UNHCR has insisted that the processing of spontaneous arrivals in EU states must continue and has expressed a number of protection concerns. Nevertheless it has expressed a commitment to helping the UK and the EU Commission to develop the proposals "*as long as refugee protection and durable solutions remain a central focus and the end product*". It has also proposed an alternative multi-pronged strategy which would involve:

52 British Refugee Council, Briefing: Unsafe havens, unworkable solutions, May 2003

- EU-based processing of asylum applications, through jointly established EU regional processing centres within, but close to, the external borders of an expanded post-2004 EU
- limited “off-territory processing” for persons intercepted *en route* and seeking international protection, including a smaller resettlement scheme, accompanied with shared responsibility and joint efforts by the EU and Member States to ensure readmission and return for persons who are found not to be in need of international protection
- strengthening protection capacities in host countries through the targeting of financial and technical assistance to reduce (the need for) secondary onward movements
- and adjustments to domestic asylum systems

In June 2003, the European Commission adopted a Communication⁵³ setting out its approach to the UK proposals and UNHCR’s response and to external processing more generally. Whilst expressing agreement with the UK’s analysis of the problem, the Communication suggests that various legal, financial and practical questions remain to be resolved with regard to the solutions being put forward. It argues that any new approaches should be underpinned by ten basic principles:

- the need to fully respect international legal obligations
- reducing the need for refugee movements by addressing the root causes of forced migration
- access to legal immigration channels
- continuing to combat illegal immigration
- full partnership with and between countries of origin, transit, first asylum and destination
- improvement of the quality of decisions in the EU, consolidation of protection capacities in the region of origin, and treatment of protection requests as close as possible to needs
- any new approach should be complementary to the Common European Asylum System
- discussions on new approaches should not result in delaying present negotiations on asylum directives
- any new proposals should be in line with UNHCR’s Agenda for Protection and Convention Plus initiatives
- the need to respect the current financial perspective

⁵³ Communication from the Commission to the Council and the European Parliament, *Towards more accessible, equitable and managed asylum systems*, COM(2003) 315 final, 3 June 2003

The Communication concludes by considering three specific but complementary policy objectives: a) the orderly and managed arrival of persons in need of international protection in the EU from the region of origin; b) burden and responsibility sharing within the EU as well as with regions of origin, enabling them to provide effective protection as soon as possible and as closely as possible to the needs of persons in need of international protection; and c) the development of an integrated approach to efficient and enforceable asylum decision-making and return procedures.

As a result of intensive discussions, the Conclusions of the Presidency at the subsequent European Council meeting in Thessaloniki on 19–20 June 2003 set out that the Commission should *'explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection'*, and should *'examine ways and means to enhance the protection capacity of regions of origin'* and asked for a comprehensive report before June 2004 suggesting measures to be taken, including legal implications. Whilst it did not go as far as to endorse an EU-wide initiative, the Presidency noted that a number of Member States (the UK, Netherlands, Denmark and Austria) plan to pilot ways of providing better protection for the refugees in their region of origin, in conjunction with UNHCR.

Commentary

Children are currently exempt from the UK proposals, but the details are as yet unknown. There are very strong grounds for arguing that children – and separated children in particular – should be excluded from any regional processing systems of this kind.

Forcible removal to processing centres would be very likely to breach the 'best interests' principle of the CRC (Article 3) and would undermine a range of standards set out in international and EU law. Several important safeguards for separated children would also be damaged. For example:

- children might not stay long enough on EU territory for proper identification and age assessment to take place and/or family tracing to begin.
- children would not feel safe enough, or have the time they might need, to tell their stories to the authorities.
- guardianship procedures would be disrupted and trust between children and guardians might not have time to develop, and as a result it would almost certainly not be feasible to develop or maintain the vital protection role of guardians.
- children would face increased risks in camps, including the possibilities of sexual violence, forced recruitment as child soldiers, and exploitation by traffickers.
- if children were to stay in camps for protracted periods, their particular vulnerabilities would be easily overlooked and their educational, health and social care needs ignored.

- it would be unlikely that sufficient numbers of appropriately trained staff would be available on site to assist children.
- safeguards in relation to return could not be adequately ensured.

Recommendations

The Separated Children in Europe Programme believes that it is essential that separated children (and children in families) should not, in any circumstances, be sent to regional processing centres. Concrete safeguards should be put in place to ensure this, in line with international standards.

Part II: Immigration

a) Introduction: the EU agenda

The objective of the EU Common Immigration Policy is to manage migration flows by a coordinated approach which takes into account the economic and demographic situation of the EU. This reflects the widely acknowledged failings of restrictive national immigration policies since the 1970s, and increasing recognition of the needs of European employers for additional workers in certain sectors and regions and the pressures of an ageing population. Alongside this, increasing resources have been mobilised to fight illegal migration, and in particular to combat trafficking and smuggling.

The Tampere European Council in October 1999 agreed on the components for an EU Immigration Policy, including (in addition to a Common Asylum Policy) a comprehensive approach to the management of migratory flows, fair treatment for third-country nationals, and the development of partnerships with countries of origin. The common EU immigration policy does not apply to the United Kingdom, Ireland and Denmark, however, the UK and Ireland can decide on a case-by-case basis to join the other Member States.

In February 2003 after three years of difficult negotiations, political agreement was reached by the Council of Ministers on a Directive on Family Reunification (see section in Part IIb below) – the first ever instrument at EU level on legal migration. In June 2003, political agreement was also reached on another European Commission proposal for a Directive concerning the status of third-country nationals who are long-term residents⁵⁴, which proposes that after five years residence in a Member State third-country nationals (excluding refugees) will be entitled to permanent residence. The Commission has – inter alia – also put forward a series of proposals for:

- A Directive on the admission of third-country nationals for purposes of employment⁵⁵; which aims to provide a single national application procedure leading to one combined title for both residence and work permits;
- A Directive on the conditions for entry and residence for the purposes of studies, vocational training and voluntary services⁵⁶, covering non-employment related purposes of stay; and
- A Programme of cooperation with third countries in the area of migration.

At the European Council in Thessaloniki in June 2003, the Commission presented a report on progress since the 2001 Commission Communication on illegal

54 Commission Proposal for a Council directive concerning the status of third-country nationals who are long-term residents, COM(2001)127 final, 13/03/2001

55 Commission Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386 final, 11/07/2001

56 Draft Council Directive on the conditions of entry and residence of third-country nationals for the purposes of studies, vocational training or voluntary service, COM (2002) 548, 07/10/02

migration⁵⁷, and a Communication on immigration, integration and employment⁵⁸. The former highlighted the fight against smuggling and trafficking of human beings, including a proposal of 11th February 2002 on a short-term residence permit issued to victims of smuggling or trafficking who co-operate with the competent authorities (see section in Part IIb below).

Following a Communication of December 2002 on integrating migration issues into the EU's relation with third countries⁵⁹, on 11 July 2003 the Commission adopted a proposal for a Regulation establishing a programme for financial and technical assistance to third countries in the area of migration and asylum⁶⁰. It contains a multiannual programme for 2004 to 2008, with an overall expenditure of 250 million euro.

In September 2003, the Italian Presidency put forward proposals to introduce EU-wide quotas for legal immigration which would be followed up by negotiating agreements on returning illegal immigrants to their countries of origin. The Commission is expected to prepare a feasibility study of the Presidency's plan by the beginning of 2004.

At the end of 2003, the Commission is planning to present a proposal for a Directive on minimum standards for return procedures, building on the Green Paper and Action Plan of the year before (see section in Part IIb below).

Relevance to Separated Children

Although there are welcome aspects to the development of an EU Immigration Policy (e.g. the attempt to establish legal channels for migration), concern has focused on the likelihood that such a policy will prioritise the needs of European labour markets over those of developing countries and migrants themselves. This view is reinforced by the fact that no EU Member State has as yet ratified the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which came into force on 1 July 2003; the Convention recognises that migrant workers and their families lack protection in many states; extends basic human rights to documented and undocumented migrants; seeks to play a role in eliminating their exploitation; and attempts to establish minimum standards.

This emphasis on meeting labour market needs has also served to downgrade attention on those outside the labour market, such as children – and separated children in particular. Indeed it is noteworthy that, of the proposals set out above, only the Directives relating to family reunification and short-term permits for the victims of trafficking and smuggling make specific reference to children.

57 Communication from the Commission to the European Parliament and the Council, in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents COM(2003) 323 final, 03/06/2003

58 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment, COM (2003) 336 final, 03/06/2003

59 Communication from the Commission to the Council and European Parliament on integrating migration issues into the EU's relation with third countries, 3 December 2002, COM(2002)703 final

60 Regulation of the European Parliament and the Council establishing a Programme for financial and technical assistance to third countries in the area of migration and asylum, COM (2003) 355 final

The SCE Programme has recently revised its Statement of Good Practice to include issues relating to separated children who are not asylum seekers. This important initiative responds to the reality that many separated children, particularly those who arrive in the EU territory to work illegally and/or through being trafficked or smuggled, do not come into contact with asylum systems and make no claim under the 1951 Refugee Convention (even though some may have grounds for an application, as a result of, for example, ‘child specific forms of persecution’). For these children – and especially separated children living without family support – conditions are often extremely hard, as they lack any form of status or protection. In the most extreme cases, they may have been trafficked for the purpose of exploitation in the sex industry, and may face considerable dangers day-to-day.

Although they do not apply for protection, or are not covered by the instruments that are available, the needs of such children are in practice very similar to those who claim asylum. They need access to the territory, so that they are not confined to border waiting zones and summarily returned to the conditions from which they have fled. Further information is required here on an anti-trafficking initiative of the Italian Presidency (announced August 2003) to draft a standard questionnaire for border guards to use when interviewing children and any accompanying adults entering the EU.

Access to basic social and economic rights, such as good quality health care, housing, and education, are also essential. They need access to fair procedures, legal advice and support, and some form of protection status, and should be entitled to make an asylum application and/or an application for residence.

The SCE Programme believes that the attention accorded to non asylum seeking separated children within the development of the Common Immigration Policy has so far been wholly insufficient – particularly in comparison with the efforts which have been made to integrate children’s interests into the Common Asylum Policy through, for instance, repeated references in texts to the ‘best interests of the child’.

Below we analyse three areas – family reunion, short-term permits for the victims of trafficking, and returns – which are of critical importance to separated children. Whilst the needs of children are highlighted in the first two of these instruments, the protection standards accorded to them are relatively weak. In relation to the key issue of returns, the interests of children are as yet virtually invisible in documents drawn up so far.

Overall, the SCE Programme concludes that the consideration given to separated children within EU immigration policy is simply insufficient to meet the scale of the problems they face. For this reason, it is essential to return to and integrate first principles in any legislation that is developed, as elaborated in the SCE Statement of Good Practice. At their heart are the core principles of the CRC:

- ‘non discrimination’, so that separated children are entitled to the same rights as national children (Article 2);
- ‘best interests’ of the child as a primary consideration in decision-making (Article 3); and

- the child's right to participate and express views whenever decisions affecting them are being made (Article 12).

In addition, it also means according attention to issues such as: cultural needs, suitable interpretation, confidentiality, access to information about entitlements, services, and processes, organisational cooperation, staff training, durability, and timely decision-making.

b) Proposals under discussion

Family reunification

Background

Over the past 20–30 years, family reunification of non-EU nationals has provided a means for the latter to access EU territory. In order to meet their legal obligations at international and European level, Member States have developed a range of procedures to reunite families resident in different states. Harmonisation of common rules relating to the right to family reunification have therefore been seen by the Council of Ministers as an important part of the development of Common EU Immigration and Asylum Policies.

On 27 February 2003, political agreement was reached by the Council on a draft Directive on the right of third country nationals legally established in a European Union member state to family reunification⁶¹, and final adoption of the directive has just taken place. This follows an extended process of negotiation on two versions of the original proposals⁶².

NGOs are concerned that the first drafts of this proposal, which they generally welcomed, have been seriously weakened by the Member States⁶³. For example, there is a risk that the standards contained in the current Directive may lead to violations of international law, especially regarding the right to respect for family life set out in Article 8 of the European Convention on Human Rights. The latest version of the Directive also specifically excludes from its scope those enjoying complementary protection. And in contrast to the original, the draft now allows Member States a significant degree of flexibility in implementation, which could ultimately undermine standards.

61 Council Directive of 27 February 2003 on the right to family reunification, COM (2002) 225 final

62 Commission Proposal for a Council Directive on the right to family reunification, COM (1999) 638 final and Commission Proposal for a Council Directive on the right to family reunification, COM (2000) 264

63 Comments from the European Council on Refugees and Exiles on the Amended Proposal for a Council Directive on the right to family reunification, September 2002; Caritas Europa/CCME/COMECE/ICMC/JRS/QCEA, Position on the Amended EU Commission Proposal for a Council Directive on the right to family reunification

Main provisions

- The proposal entitles third-country nationals who hold a residence permit valid for at least one year, or refugees, to be reunited with their families
- Those who are eligible are the applicant's spouse and legitimate, natural and adopted children of the couple
- Member states may authorise the reunification of an unmarried partner, or adult dependant children, as well as dependant ascendants.
- Member States can restrict family reunification rights for children if they apply after the age of fifteen, and a member State may refuse to allow the entry of a separated child over the age of twelve
- The right to family reunification is subject to mandatory respect for public order and public security.
- Member States can demand that the third-country national be legally resident in the country for a certain period of time before they are authorised to bring over members of their family, but this period cannot exceed two years
- Member States may choose to impose other conditions within the limits set by the proposed directive: they may require the third-country national to have adequate accommodation, sufficient resources and sickness insurance and may impose a qualifying period of no more than one year.
- Polygamy is not recognised, only one spouse and his or her children can benefit from the right to family reunification
- Once in the European Union, eligible family members receive a residence permit and obtain access to education, employment and to vocational training
- Rules are set out to protect vulnerable categories of persons who are in a particularly difficult situation in the event of a traumatic break in the family links due to domestic violence, repudiation and the like.

Commentary

Article 9 of the CRC enshrines the child's right to live with their parents unless incompatible with their best interests and the child's right to maintain contact with both parents if separated from them. Article 10 goes on to establish the right to family reunification, and highlights that applications must be dealt with in a *'positive, humane, and expeditious manner'*. UNHCR Guidelines similarly emphasise that every effort should be made to reunite a child with their parents in another asylum country at an early stage and before status determination takes place.

It is therefore disturbing that Article 4.1 of the Directive (see box below) allows Member States – on the insistence of the German Government – to derogate from the principle that 'child' should be defined as up to the age of 18 years (as in Article 1 of the CRC). There is a real danger here of breaching international

law. Subjecting children, in addition, to a vague ‘integration test’ which they may fear or which they may not comprehend, is not likely to represent a ‘humane’ approach.

Article 4.1 ... (extract)

‘By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.’

The general provision in Article 3.1 that the Directive should apply to those who hold a residence permit for one year or more who have ‘*reasonable prospects of obtaining the right of permanent residence*’ is very restricting. This provision allows for considerable discretion by individual Member States regarding the interpretation of what constitutes ‘*reasonable prospects*’. And emphasising the importance of a one year permit undermines the principle in Article 3.3 of the 1997 Council of Ministers Resolution on Unaccompanied Children and paragraphs 5.17 and 10.5 of the 1997 UNHCR Guidelines that family tracing should begin as soon as possible.

The draft also adopts a narrow concept of the family unit, comprising only of spouses and minor children, leaving issues relating to unmarried partners and their children, and of ascending relatives and adult children to the discretion of Member States. For the very few separated children who are recognised refugees, Article 10.3(a) authorises the entry and residence of first-degree relatives in the direct ascending line, and Article 10.3(b) sets out that Member States may authorise the entry and residence of a legal guardian or ‘*any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced*’. However this latter formulation – and in particular the phrase ‘*may authorise*’ – again provides a wide degree of discretion to Member States. It is important to note that outside Europe, the notion of extended family is much more common and that in many countries, as a result of factors such as conflict and AIDS, children are often brought up by families who are not their own.

Article 5.5 contains a reference to the ‘best interests’ principle, which must be taken into account by Member States ‘*when examining an application*’. Welcome though this is, it appears to suggest that the best interests principle is only relevant to the way applications are processed, rather than being a significant factor in itself in reaching decisions about cases. Moreover, beyond the one-line reference to the child’s best interests, this section on the submission and examination of applications makes no specific reference to the presence of a guardian or legal representative to support the child in such a process. It also fails to address the child’s right to have their views taken into account when decisions affecting their lives are being made, as set out in Article 12 of the CRC.

Recommendations

Member States must transpose the Directive into national law within two years of its entry into force in September 2003. The Commission will report to the European Parliament and the Council of Ministers on application of the directive two years after this, and will propose amendments if necessary – in particular in relation to Articles 3, 4, 7, 8 and 13. In light of the serious weaknesses in the draft Directive outlined above, the Separated Children in Europe Programme believes that:

- when Member States are transposing the Directive into national law, NGOs should remind them that it specifically states that they are able to adopt or retain more favourable provisions.
- following transposition, NGOs should monitor the application of the Directive and submit such information to the European Commission to assist preparation of the latter's report.
- the possibility under Article 4.1 of the current draft that Member States may derogate from the principle that 'child' should be defined as up to the age of 18 years should be removed from the Directive at the earliest possible opportunity. Given that all Member States have ratified the CRC, this may represent a breach of Article 1 of the Convention. The notion of an ill-defined 'integration test' should also be reviewed.
- the circumstances of separated children who are granted a complementary form of status are usually very similar to those who are granted refugee status; the former category should therefore also be covered by the scope of the directive.
- Separated children should be exempted from the need to hold a residence permit for one year or more before they can apply for family reunification as this would inhibit applications being dealt with in the *'positive, humane, and expeditious manner'* demanded by CRC Article 10.
- Article 10.3(b) should be amended so that Member States **shall** authorise the entry and residence of a legal guardian or *'any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced'*.
- The welcome reference in Article 5.5 to the 'best interests' principle (Article 3, CRC) should be extended to cover not only the examination, but also the decision, in relation to an application. Article 5 should also specifically mention the importance of a guardian or legal representative being appointed to support the child, and the child's right to have their views taken into account when decisions affecting their lives are being made, as set out in Article 12 of the CRC.

Child trafficking – EU short term residence permits for victims

Background

‘The traffickers can be very cruel. I know people who have been cut with knives and hurt to make them work better. People are frightened of the traffickers, they threaten to kill us and our families. If a trafficker says he wants 20 000 drachma, you have to earn it or he beats you, sometimes with sticks. Lots of them are drunk. They are bad.’

(Ela, age 14. Her mother sold her sister, age 13, for prostitution to Italy. She also sold her baby girl). Quoted in Renton, D. (2001) Child Trafficking in Albania, Save the Children

A Chinese girl lost her parents and only sister in an earthquake. She was taken away from her home town by female traffickers and brought to Moscow. The girl was raped and locked up in an hotel room. The traffickers brought the girl to the Netherlands in the trunk of a car. She eventually managed to escape and applied for asylum in the Netherlands.

A. Wolthuis, M. Blaak (2001) Trafficking in children for sexual purposes from Eastern Europe to Western Europe, Amsterdam

Article 29 of the Amsterdam Treaty set out the Union’s objective of, among other things, preventing and combating ‘trafficking in persons and offences against children’. In October 1999, the Tampere European Council went on to confirm that ‘the rights of the victims of such activities shall be secured with special emphasis on the problems of women and children’. A number of initiatives have followed, including the adoption of a framework decision on combating trafficking in human beings (July 2002) and political agreement on a framework decision on combating the sexual exploitation of children and child pornography (October 2002)⁶⁴. These are intended to ensure common definitions, penalties and criminal procedures in the Member States in these areas.

Within the framework of the EU immigration agenda, only the proposed Directive for a residence permit for victims who co-operate with the authorities⁶⁵ seeks to address the particular circumstances of child victims. Several Member States (e.g. Belgium, Italy, Netherlands, Spain) have already adopted provisions similar to those in the Commission’s draft, however support is not universal; in Greece, for example, a new law will prevent victims from staying at shelters and securing residence and work permits (even though this was foreseen when the legislation was originally being drafted). Critics fear that this will lead to trafficked children and women falling prey once again to traffickers on being returned to countries of origin in the Balkans and former Soviet Union, and the cycle of exploitation will continue.

⁶⁴ Framework decision on combating trafficking in human beings (July 2002), COM (2000) 854-2; Political agreement on a framework decision on combating the sexual exploitation of children and child pornography (October 2002), COM (2000) 854-2

⁶⁵ Proposal for a Council directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, COM (2002) 71 final

So far the Commission proposal has made little progress towards adoption since it was published. According to the draft, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive no later than 30 June 2003. It is clear that this timetable was far too optimistic, however the Italian Presidency are seeking to make adoption of the directive a priority before the end of 2003.

The recent film 'Lilja 4-Ever', by Swedish director Lukas Moodysson, provides a powerful illustration of how separated children are often trafficked for the purpose of sexual exploitation. Lilja is a teenage girl living in a bleak housing estate in the former Soviet Union. She is abandoned by her mother, who takes off with her boyfriend for America. Lilja ekes out an existence in a run-down flat without heat or light, and is then duped into flying to Sweden with the promise of a job and a new life. When she gets there, she is forced to become a prostitute, her passport is removed by a pimp, she is locked up, and beaten when she tries to escape...

Main provisions

- The introduction of a special 6-month residence permit to encourage victims to co-operate with the authorities, subject to certain conditions to prevent abuse of the system. It will be renewed as long as the conditions continue to be met
- In addition to taking into account the circumstances of the victim, Member States will decide whether the three conditions for issuing a residence permit are met: the presence of the victim must serve a useful purpose; the victim must demonstrate a clear intention to co-operate; and she must sever all links with the presumed criminals
- The Directive sets out minimum standards; Member States are allowed to provide more favourable conditions for victims if compatible with the proposed Directive
- The procedure will be in three stages. The first stage will consist of providing information to victims, including the possibility of their obtaining a residence permit. Victims must then take the initial step of severing all links with the traffickers, whereupon they will be granted a 30 day waiting period to allow them to decide whether to cooperate. Finally authorities will have an extra 10 days to rule on whether a short-term residence permit will be granted.
- During the waiting period, victims will have access to care and assistance and will be protected from deportation. Member State retain the option of invoking grounds of public order or national security to terminate the waiting period
- By issuing a residence permit the Member States authorise access to their labour market, vocational training, education, and primary health care
- The proposed Directive is aimed primarily at adult victims, however it makes special provision for Member States wishing to extend the scheme to children
- The Proposal will not apply to the United Kingdom or Ireland (unless these States decide otherwise), or Denmark
- The proposed Directive sets out that the Commission will report to the European Parliament and the Council on the application of this Directive in the Member States and propose any amendments that are necessary no later than 30 June 2007

Commentary

The Explanatory Memorandum states that the purpose of the proposed Directive is to introduce a residence permit and that it *'is not concerned with protection of either witnesses or victims. This is neither its aim nor its legal basis. Victim protection and witness protection are matters of ordinary national or European law.'* Whilst the SCE programme acknowledges the limitations of the legal base underlying this

proposal, we believe that the primary focus on instituting criminal proceedings should not be at the expense of witness protection. In practice, many children who are trafficked are too fearful of retribution from the traffickers, or unaware of their legal rights, to support a prosecution if insufficient protection measures are available. This will therefore inevitably undermine coherent EU cooperation to tackle trafficking.

The Explanatory Memorandum also sets out in relation to Article 3 that the intended Directive is *'in the first instance concerned with adults'*. But it goes on to identify that Member States can issue residence permits on humanitarian (or other) grounds to child victims, and may also decide to extend the application of the provisions of the Directive to children who fulfil the conditions laid down in their own national law. It concludes that *'it is for the Member States to decide at what age victims who are minors are sufficiently mature on the one hand properly to understand the risks they run in cooperating and on the other hand actually to cooperate'*. This procedure is set out in Article 14 (see box below).

This adherence to the principle of subsidiarity will however introduce a precedent that trafficked children arriving in different member states may be treated differently. There is also a danger that in Member States which exclude children from the proposal, traffickers will be more likely to target children as they will not benefit from short-term permits.

Article 14 – Victims who are minors

If Member States take advantage of the option provided in Article 3(2), the following provisions shall apply:

- a) Member States shall take due account of the best interests of the child when applying the provisions of this Directive. They shall ensure that the procedure is appropriate to the age and maturity of the child. In particular, if they consider that it is in the best interest of the child, they may extend the reflection period.
- b) Member States shall ensure that minors have access to the educational system under the same conditions as nationals. Member States may stipulate that such access must be limited to the public education system.
- c) Besides, in the case of victims who are unaccompanied minors, Member States shall take the necessary steps to establish their identity and the fact that they are unaccompanied. They shall make every effort to locate their families as quickly as possible and take the necessary steps immediately to ensure legal representation, including representation in criminal proceedings, if necessary.

Recommendations

The SCE Programme welcomes in principle the willingness of the Commission and Member States to take action in relation to trafficking, and to take into account the rights of children in the proposed directive. However, we believe that it is most likely to be in the best interests of the child to be granted a permit

of stay *without* having to testify against traffickers – this approach would put the safety of children first. We also regret that the Directive sets no guidance or minimum criteria on conditions that must be fulfilled for children to benefit from the residence permit. Nor does it set a sufficient level of minimum provisions to be applied by all Member States in the case of a child cooperating, but leaves this entirely to states' criteria laid down in their domestic law. More specifically:

- Whilst the reference to the 'best interests' principle (Article 3, CRC) in Article 14 of the Directive is welcome, this principle should underpin the whole directive. It would be strengthened by additional reference to the right of children to participate in decisions that affect them (Article 12, CRC) and to protection from sexual exploitation (Article 34, CRC).
- Although there is provision in Article 14 (a) of the Directive for the reflection period to be extended, in our view all children should be given six months for a reflection period. Building sufficient trust and confidence in children – particularly separated children – to testify against traffickers who they are often terrified of is likely to take more than three months.
- Because of their fears of retribution, it is often extremely hard for children to break away from the coercive power of traffickers. Children therefore sometimes do seek to renew contact with them. In these circumstances children need assistance not punishment, and we do not believe that the reflection period should be terminated for this reason.
- Child victims of trafficking – and in particular separated children – need support, protection and rehabilitation from advisers experienced in working with children. This is so they can make informed choices about the circumstances they face (including the potential implications of testifying against traffickers), and so they can be supported through the process and in dealing with the potentially adverse consequences of co-operating. A reference to this effect should be added to the Directive.
- The emphasis in Article 14 on family reunification is laudable, however it is essential to recognise the importance of taking the child's views into account and of providing appropriate support – many fear immediate return owing to the fact that families may not want them back, or that they will be re-trafficked.
- A provision should be added to the text to guarantee that a child is never detained in order to be protected from traffickers, but is placed in appropriate accommodation such as a safe house.
- The possibility that the Directive introduces of children acting as witnesses means that their protection needs as vulnerable witnesses have to be addressed in the directive too rather than left to Member State policy and procedure.

Return policy

Background

‘Some of the challenges facing those who seek to return can be summarised as: the loss of friends and the adopted culture; the second culture shock of being treated as different by local compatriots; the rejection by the home country of “Western” behaviour – this is particularly acute for girls; the identity problems associated with moving between two cultures; the lack of understanding by locals of the problems arising from exile in the West; the lack of support for reintegration to one’s home country; the failure to live up to parental expectations; i.e. to carry out missions or to bring money and gifts; the poor health and education services and the significant differences between educational systems in the West and the developing world; ongoing political instability, unemployment and poverty’.

W.Ayotte (2002) Separated Children, Exile and Home-Country Links: The Example of Somali Children in the Nordic Countries, Save the Children Denmark

On 28 November 2002, the EU Council of Ministers adopted a Return Action Programme⁶⁶, building upon prior proposals set out in a European Commission Green Paper⁶⁷ in April the same year, and a subsequent Communication⁶⁸ that October. In June 2003 the Commission published another Communication highlighting priorities in relation to returns policy, and other related policies on illegal immigration⁶⁹. The Return Programme outlines short, medium, and long-term steps towards the development of common EU-wide minimum standards for return procedures in relation to third-country nationals without a legal status or grounds enabling them to stay in the EU, either on a permanent or a temporary basis. It also envisages increased operational co-operation between Member States, country specific return programmes, financial assistance, and intensification of co-operation with third countries.

The EU documents above rightly prioritise voluntary return as the most humane, efficient and cost-effective approach. But they also argue strongly that in some cases forced return is necessary to ensure the integrity of admission procedures and the rule of law, and to send a clear message to potential migrants that illegal entry and residence are unacceptable.

NGOs have welcomed the development of a Return Programme, if it provides safeguards against ‘refoulement’ and allows returns to take place in safety and dignity, respecting fundamental human rights. They also believe that a prerequisite to a returns policy is the prior development of effective asylum procedures

66 Presidency Proposal for a Return Action Programme, 25/11/02

67 European Commission, Green Paper on a Community Return Policy on Illegal Residents, COM (2002) 175 final

68 European Commission, Communication on a Community Return Policy on Illegal Residents, COM (2002) 564

69 European Commission, Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003) 323 final

with fair access to protection. In contrast to the EU's approach, NGOs stress that deterrence should not be a major aim of a return policy⁷⁰.

Main provisions

- The Return Action Programme covers both forced and voluntary return of third country nationals. However, *'the major obstacles experienced by Member States in the field of return occur in relation to forced returns. Therefore the programme to a large extent focus on measures facilitating forced returns.'*
- The return of third country nationals must be performed in accordance with all relevant international obligations and human rights instruments (e.g. Article 3 of the European Convention on Human Rights, the 1951 Refugee Convention). Furthermore, *'in all actions regarding children, the 1989 UN Convention on the Rights of the Child prescribes, that the child's best interest must be a primary consideration.'*
- Enhanced practical co-operation, including exchange of information and best practices, common training, mutual assistance by immigration officers and joint return operations
- Common minimum standards for return are envisaged in the short, medium or long term covering removal; transit arrangements; preconditions for expulsion decisions; mutual recognition of expulsion decisions; and proof of exit and re-entry
- Country specific programmes are to be established, building on the model of the return programme to Afghanistan
- Intensified co-operation with third countries on return will be promoted. The Commission is currently negotiating readmission agreements with eleven third countries, and an agreement has been signed with Hong Kong (with progress well advanced towards further agreements with Macao, Sri Lanka, Russia, Morocco and Ukraine).

Commentary

Returns policies are relevant to a range of separated children, including those whose asylum claims have been turned down, those who are economic migrants, and those who have been trafficked. The circumstances of each of these groups raises particular issues; for trafficked children, for example, there is a real danger that they will be rejected by their families on return, and then re-trafficked. In practice, however, few separated children are actually returned to their country of origin before they attain the age of 18. Most remain in the country of asylum, often with indeterminate status and lacking longer-term security.

In all the EU documents highlighted above, the issues facing separated children receive very little specific consideration. Unlike other EU legislative initiatives considered in this report, there is no mention of the 1997 Council Resolution on Unaccompanied Minors, which sets out safeguards against inappropriate return:

⁷⁰ ECRE (2002) *Comments on the Commission Green Paper on a Community Return Policy on illegal residents*

‘Article 5 – Return of unaccompanied minors

1. Where a minor is not allowed to prolong his stay in a Member State, the Member State concerned may only return the minor to his country of origin or a third country prepared to accept him, if on arrival therein – depending on his needs and in the light of age and degree of independence – adequate reception and care are available. This can be provided by parents or other adults who take care of the child, or by governmental or non-governmental bodies.

2. As long as return under these conditions is not possible, Member States should in principle make it possible for the minor to remain in their territory...’.

Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries

These safeguards are reinforced by the criteria set out in section 9 of the 1997 UNHCR Guidelines, which refer in addition to the importance of family tracing, appropriate assessment of the options, and counselling for the child.

The only significant reference in the Return Action Programme (see box above) is to the importance of the ‘best interests’ principle in making decisions relating to return; whilst this is a critical consideration, this reference alone is an insufficient response to the range of issues return policy raises for separated children.

The Commission’s recent proposal for a Regulation establishing a programme for financial and technical assistance to third countries in the area of migration and asylum⁷¹ is also highly relevant here. The Regulation states that the funding available under this programme (250 million euro for 2004–2008) will be used *‘to stimulate third countries readiness to conclude readmission agreements and assisting them in coping with the consequences of such agreements’*. This approach is flawed, as it allows the use of development aid as a political instrument of the EU. There are also serious concerns akin to those outlined elsewhere in this section about the consequences of readmission agreements for separated children.

Ultimately, the best way for family reunification and returns of separated children to take place is on a voluntary basis. There are emerging models of good practice in Europe – for example, the Save the Children projects in Denmark and Sweden linking separated children with their families in Somalia⁷² – which should be replicated more widely.

‘Best practice on return of separated children needs to start at the point of arrival. The way in which children are treated from the outset will affect the quality of any future decisions that are taken regarding their possible return home’.

Save the Children Sweden (1998) *Separated Children and Voluntary Return: Ways of Surviving*, Seminar Report.

71 Regulation of the European Parliament and the Council establishing a Programme for financial and technical assistance to third countries in the area of migration and asylum, COM (2003) 355 final

72 W. Ayotte (2002) *Separated Children, Exile and Home-Country Links: The Example of Somali Children in the Nordic Countries*, Save the Children Denmark

Recommendations

At the end of 2003 the European Commission is planning to present a proposal for a Directive on minimum standards for return procedures. The Commission is also exploring financial possibilities for supporting the development of a return programme. The Separated Children in Europe Programme recommends that:

- EU legislative initiative should encourage Member States to put in place procedures to determine the ‘best interests’ of separated children in place, in line with Section 9 of the 1997 UNHCR Guidelines. The ‘best interests’ principle of Article 3 of the CRC should be explored in conjunction with other relevant Articles (e.g. the preservation of family and nationality [Article 8]; continuity of culture and language [Article 20]; and the child’s own desires, considered according to age and maturity [Article 12])
- Specific guidance on the return of separated children should be set out in the forthcoming draft Directive on returns, and developed in a Guide to Good Practice. This should be based on the principles set out in Section 12 of the SCE Statement of Good Practice, including:
 - it is safe to return the child to his or her home country
 - the child’s carer and guardian/adviser in the host country agree it is in the child’s best interest to return
 - a careful assessment is made of the family situation in the home country
 - this investigation should be carried out by a professional and independent organisation (that is different from the body or person(s) making the initial determination) and should be objective, non-political and take into consideration the best interests of the child in each case.
 - The child’s parents, relatives and other adult carer or government child care agency agree to provide immediate and long term care upon arrival in the country of origin
 - the child is fully informed at all stages and is provided with appropriate counselling and support
 - prior to the return contact between the child and his or her family is facilitated
 - the child should be listened to and due weight given to her or his views in accordance with his or her age and maturity in the choice between return or remaining in the host country
- The Commission Communication of October 2002 suggests that separated children (along with other groups such as the elderly, pregnant women, and people with serious disabilities) should not be subject to pre-deportation detention; this principle should be adhered to in the directive on returns
- Programmes to assist the reintegration of returned children should be supported by Member States and EU institutions, based on the primary principle of voluntary return and in line with the principles in UNHCR Guidelines and the SCE Statement of Good Practice (see recommendation 2 above). NGOs should seek to exchange good practice through networking and seminars.

- EU readmission agreements with third countries should set out specific provisions for separated children, in accordance with safeguards highlighted in UNHCR and SCE Guidelines. All readmission agreements should include a specific clause on respect for the ‘best interests’ of the child and on family tracing in cases of return. Assessment of whether the necessary safeguards are in place should include protection for trafficked children.

4. The impact of EU enlargement

Accession and the Asylum and Immigration ‘Acquis’

In March 2003 an Accession Treaty was agreed so that ten new countries in Central, Eastern and Southern Europe (Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) can join the EU on 1 May 2004⁷³. In order to join the EU, states need to fulfil the ‘Copenhagen criteria’, according to which they must: be a stable democracy, respecting human rights, the rule of law, and the protection of minorities; have a functioning market economy; and adopt the common rules, standards and policies that make up the body of EU law (the ‘acquis’).

In relation to asylum and immigration, acceding countries will implement the acquis from 1 May 2004. However the lifting of internal border controls will not happen upon accession, but later following a separate decision by the European Council. The asylum and immigration acquis includes a range of Conventions and legal instruments, including the Eurodac and Dublin II Regulations, the Directive on minimum standards for temporary protection, and other agreed EU instruments. Compliance with EU conditions will be closely monitored for three years after enlargement and incur penalties if not respected properly.

Although all acceding countries are already signatories to the 1951 UN Convention on Refugees (the last to have signed up having been the three Baltic States in 1997) there are many serious gaps between them and EU states in protection standards. These include arbitrary detention, and lack of access to asylum procedures, to interpretation, to legal advice and to social assistance.

Separated Children in Accession States

‘Dropping out of school often leads to the child starting to live in the streets, and becoming involved in criminality or prostitution. Another problem is that many children are stateless or non-nationals of the country in which they reside. Therefore, they are sometimes excluded from exercising their rights. The growing number of children working as prostitutes and sexual trafficking of children is very alarming. The phenomenon of placing children in institutions, on the pretext that this is the best alternative for the child, has been a widespread practice in Central and Eastern Europe. The conditions under which many children, often with disabilities, live in institutions are equally very upsetting’.

Save the Children Sweden (2001) *Unfinished Business: EU Enlargement and child rights*, Sweden

73 Bulgaria and Romania, and Turkey have also applied

The situation of refugee and displaced children has been raised as cause for concern by the Committee on the Rights of the Child in its Concluding Observations on Romania, Czech Republic, Hungary and Slovenia. Some of the issues include arbitrary detention, slow processing of claims and of allocation of legal representatives, lack of access to education, and lack of adequate housing. In addition, it appears that many children who are in need of protection do not as yet come into contact with established asylum systems.

Whilst basic data is limited, it appears the number of separated children in accession states is relatively small. However, the overall picture is changing. In Hungary for example the number of separated children arriving over the last few years has been soaring – according to UNHCR 658 in 2002 alone.

Although the picture is not uniform, the conditions facing separated children in accession states (and particularly in other neighbouring states not currently applying for EU membership, such as Russia) can be severe, and they reflect the difficulties faced by children in general in several of these countries (see box above).

NGOs believe that, in general, transposing EU measures to accession states will have an overall positive impact on the protection of refugees, however there are also risks involved – especially of enshrining weak standards⁷⁴. In relation to separated children, for example, the acquis involves accession states adhering to the 1997 Council Resolution on unaccompanied minors who are nationals of third countries. As has been argued elsewhere in this report, although it provides some political momentum, this Resolution has serious flaws and falls short of international standards and best practice.

Concern also remains that the overriding emphasis of EU institutions and accession governments in the field of asylum and migration has been on the enforcement of border controls, and especially measures to deter ‘abusive’ asylum applications. There are dangers for separated children in such an approach. The report from one recent meeting on separated children in the Baltic Sea States concluded that:

‘...increased border control alone puts children at more risk of exploitation, as it tends to raise the price of “assistance” in crossing national borders. The price, well documented through interviews and police investigations, may be paid in cash or, when cash is a problem, in kind. Thus the child finds him/herself in debt to the smugglers or traffickers. A debt paid off by an increasingly violent exploitation both sexually and in other brutal forms.’⁷⁵

A related problem is that children – and separated children among them – may be returned to their country of origin without adequate preparations being made for their safe return. This underlines the importance of consideration of the child’s ‘best interests’ and views, and proper prior assessment of country conditions and family circumstances.

⁷⁴ ECRE (1998) *Position on the Enlargement of the European Union in relation to Asylum*

⁷⁵ Chairman’s Conclusions, Report from the meeting ‘Unaccompanied Children from the Region of the Baltic Sea States’, Stockholm, February 10th – 11th 2003

A report on asylum systems by the SCE Programme based on NGO assessments in eleven Central Europe and Baltic states⁷⁶ concluded in 2001 that:

*'In general, and despite some significant gaps, national legislation in the countries of Central Europe and the Baltic States includes many of the necessary provisions for the care of the relatively small number of cases of separated children encountered. Still, practice often falls short of the standards set out in the (SCE) Statement of Good Practice.'*⁷⁷

In recent years, a number of initiatives have been set up to tackle the problems facing separated children. In Hungary, for example, where the lack of a clear procedure for separated children has been of considerable concern to many NGOs, a centre for separated children is being set up, and similar facilities are being planned for the Czech and Slovak Republics. Yet adequate reception facilities are far from being widely available and there is a continuing phenomenon of separated children 'disappearing' from reception centres.

In February 2003, the Council of the Baltic Sea States held a conference in Stockholm for senior officials from a wide range of countries in the region⁷⁸ highlighting the problems experienced by separated children, and committing participants to further co-operation measures in response.

It is essential to ensure that nascent initiatives such as these are sustained and developed, and that NGOs within the region are enabled to participate fully in the development of effective asylum and migration systems which take into account the needs and rights of separated children.

76 Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia

77 W. Spindler (2001) *The Situation of Separated Children in Central Europe and the Baltic States*, Separated Children in Europe Programme, SCF/UNHCR

78 Belarus, Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Moldova, Norway, Poland, Russian Federation, Sweden and Ukraine

5. Conclusion and recommendations

The evidence of the enormous dangers and difficulties faced by separated children both in transit to, and on arrival in, Europe underlines the importance of Member States according them special protection. The extent to which the rights of separated children – some of the most vulnerable children in our societies - are met, represents a small but significant benchmark in assessing the response of the EU to children as a whole.

The analysis of specific initiatives set out in Chapters 3 and 4 above highlights some broader common conclusions. Overall, the SCE Programme believes that some progress has been made in advancing the rights of separated children within the Common Asylum Policy. And given the significant political pressure from Member States to downgrade standards generally as a result of their increasing security concerns, this achievement must be regarded as significant.

The SCE Programme also welcomes the fact that the European Commission recently established a focal point within Directorate General 'Justice and Home Affairs' to monitor issues relating to separated children horizontally across all asylum and immigration Directives, in recognition of the fact that this is an issue of concern. However the resources underpinning this initiative are very limited in comparison to the scale of the problem. Nonetheless, as we have identified earlier in the text, serious shortcomings exist in the EU's current approach to separated children which should be remedied. For example:

- **Limited legal framework:** Key reference documents upon which the EU is developing its approach appear to be the 1997 Council Resolution on Unaccompanied Minors who are Nationals of Third Countries and the EU Charter of Fundamental Rights. Although they provide some degree of protection, both of these texts reflect a partial understanding of and commitment to the principles of the CRC, as identified in Chapter 2 above. An important result of the weak legal framework is that the developing EU asylum and immigration legislation does not comply with the definition of the child as in Article 1 of the CRC, or incorporate the principle of the 'best interests' of the individual child (Article 3, CRC) throughout all texts. References to other core Articles (e.g. 2 on 'non-discrimination' and 12 on the right to participate in decisions) are also missing.
- **Lack of access to EU territory:** The evidence suggests that in several European states, separated children seeking protection face great difficulty in gaining access to the territory⁷⁹. An important reason for this is the establishment by states in recent years of a growing range of measures which make it more difficult to enter the EU, including visa regimes, gate and pre-boarding checks, and carrier liability legislation. In line with the 1997 UNHCR Guidelines and the SCEP Statement of Good Practice, separated children should never be refused entry or returned at the point of entry.

⁷⁹ S. Ruxton (2000) *Separated Children Seeking Asylum in Europe: A Programme for Action*, Separated Children in Europe Programme, Save the Children/UNHCR, Save the Children Sweden

- **Gaps in the protection framework:** There is evidence of some incoherence between Directives which will result in gaps in protection. For example, under the draft Refugee Definition Directive rights to subsidiary protection are set out, but these are more restrictive than for recognised refugees. On the other hand, the Reception Directive and the draft Asylum Procedures directives allow States to apply its provisions to cover applicants for other forms of international protection, but do not require it.
- **Failure to address issues concerning separated children who are not asylum seekers:** There are many separated children who travel to Europe for reasons other than seeking refugee status under the 1951 Refugee Convention. For example, they may be seeking to escape situations of extreme poverty or they may have been trafficked for the purpose of exploitation. Within EU Immigration policy, separated children have only been considered within the Family Reunification Directive and the *Proposal for a Council directive on the short-term residence permit to victims of trafficking*.⁸⁰ As there are few, if any, alternative instruments enabling separated children to migrate to the EU legitimately, such children often apply for asylum; many others exist on the margins of society, remaining invisible to the authorities and lack any form of status. The SCE Programme believes that it is important to develop protection instruments that meet the needs and rights of these children.
- **Lack of consideration of separated children in EU Enlargement:** There has been little attention to the issues involved in relation to accession negotiations, although the extent of migration (and in particular child trafficking) is significant. There is also a risk that weak standards, such as the 1997 Council Resolution on Unaccompanied Minors, will be enshrined in the law of accession countries. The Council of the Baltic Sea States recently called for the elaboration of a 'Plan of Action Regarding Unaccompanied Children' in the region by end 2003, and the main elements proposed should be applied to all accession states (and would also be of benefit to existing Member States). This would involve continued co-operation to: establish national and regional focal points to initiate and monitor activities and co-ordinate resources; build competence and capacity (especially through training for law enforcement and migration authorities on how to work with separated children); and foster the involvement of all key sectors, and in particular NGOs.
- **Children as a 'vulnerable group':** Throughout the development of policies to harmonise EU asylum and immigration policies, the tendency has been to regard children (and especially separated children) as a 'vulnerable' group. This emphasis reinforces a traditional image of children as purely 'dependent', an unproductive drain on resources. This should be balanced with the knowledge that many separated children confront and overcome enormous obstacles and risks in their lives, and usually prove highly adaptable to a new country and its language and mores. With the necessary support, separated children are able

⁸⁰ Proposal for a Council directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities, COM (2002) 71 final

and willing to learn new skills and to contribute to host countries, and should be given the opportunity to demonstrate this.

- **Poor information base:** In 2001, a brief study by UNHCR of trends in separated children seeking asylum in Europe⁸¹ revealed: ‘...significant differences in national definitions for unaccompanied and separated children seeking asylum, jeopardising a basic analysis of the problem at the international level.’ The European Commission recently adopted a welcome Communication to present an Action Plan for the collection and analysis of EU Statistics in the field of migration⁸². The Action Plan will introduce legislation to define the statistical information that needs to be supplied by national authorities, which will then be compiled and published by the EU’s statistical agency Eurostat. In relation to separated children, however, Annex II of the Communication lists ‘asylum applications by unaccompanied minors by citizenship and type’ as a data set already available. The SCE Programme remains concerned that such information is likely to be incomplete, and that it is not readily available publicly.
- **Lack of engagement with separated children and children’s organisations:** There is little practical evidence of Member State governments making particular efforts to engage with separated children or the organisations which represent them during the process of drawing up EU legislation. Indeed, the reverse has been the norm, with the final decisions being taken behind closed doors with minimal external consultation or involvement. One effect of this has perhaps been the watering down of the positive aspects of some policy proposals.

Recommendations

Rooted in the provisions of the CRC, positive statements exist – most notably the 1997 UNHCR Guidelines and the SCE Statement of Good Practice – upon which progressive policy and practice towards separated children could be developed. Yet although there are echoes of these documents in EU asylum and (to a lesser extent) immigration policies, the EU’s general approach is not based on coherent child rights principles. The SCE Programme makes the following general recommendations, supplementing the specific recommendations set out in Section 3 of the report.

1. Promoting the ‘best interests’ of the child

The ‘best interests’ principle, derived from Article 3.1 of the CRC, should be integrated as a primary consideration within all EU and Member State asylum and immigration policies. It should also inform decisions on the cases of individual children. Specific guidance should be developed by the EU to assist Member States interpret this

81 UNHCR (2001) *Trends in Unaccompanied and Separated Children Seeking Asylum in Europe*, 2000, Geneva, www.unhcr.ch

82 Communication from the Commission to the Council and the European Parliament to present an Action Plan for the collection and analysis of Community Statistics in the field of migration, COM(2003) 179 final Brussels, 15/4/2003

key principle, and mechanisms should be established for monitoring and evaluating implementation.⁸³

2. Addressing the child's right to participate in decisions

The child's right to participate in decisions affecting him or her (Article 12, CRC) should be addressed at all stages of the asylum and immigration process and integrated throughout relevant legislation. States should also fulfil their positive duty to assist children to express their views. To facilitate child participation, consideration should be given to: the early appointment of guardians and legal representatives; the availability of skilled interpreters; access to education; and child-friendly environments.

3. Strengthening children's rights within the Common Asylum Policy

In developing the Common Asylum Policy, the EU institutions should ensure that the safeguards set out in the 1997 Council of Ministers Resolution on Unaccompanied Minors are strengthened, where these are incorporated into EU or national law. Member States should also resist any pressure to lower standards within existing proposals under discussion. Specific recommendations are set out in Chapter 3, however the following are particularly important:

- separated children should never be refused entry to EU territory.
- the use of detention in relation to immigration status should be forbidden for all separated children.
- all children under 18 should be assisted by a legal guardian or adviser at all stages of the asylum process and in relation to durable solutions.
- refusal by a separated child to undergo medical examination should have no bearing on the substantive decision regarding his or her application.

4. Addressing the rights of children in Immigration Policy

Some separated children travel on their own as migrants seeking relief from situations of poverty, deprivation and hardship. *Such separated children should be entitled to make an asylum application and/or an application for residence, and should have access to child welfare protection, education and health services. The safeguards set out in Recommendation 3 above are also relevant to separated child migrants. And EU immigration policy should set out minimum standards for returns procedures that safeguard the rights of separated children, as highlighted in the SCE Statement of Good Practice. For example:*

⁸³ In 2000, the Ombudsman for Children in Sweden published a report (Barnets bästa i asylärenden, *en studie av Migrationsverkets praxis i asylärenden med barnfamiljer*, 26 September 2000) on how the 'best interests' principle should be applied to asylum applications, and listed the following criteria for assessing a child's 'best interests': the child's need to be with its parents; the child's need for health care including medical care and rehabilitation; the child's relationship to its parents including their ability to give emotional and material support; the child's need to develop; and the child's attachment to the country of asylum.

- a child should be returned only if it is in his/her best interests and taking into account his/her views, and must never be returned if it is not safe or adequate reception and care is not available.
- separated children should not be subject to pre-deportation detention.
- return programmes and readmission agreements with third countries should set out specific provisions for separated children.

5. Tackling child trafficking

Trafficking in children for the purposes of prostitution, the production of child pornography and other forms of exploitation is a serious problem in Europe. Children are exploited both by those who traffic them and by those who use their services in the country of destination. *All measures taken by states to prevent and eradicate trafficking (e.g. by sharing information with other states) and to provide treatment for child victims should be motivated by child protection principles, rather than solely migration or crime control measures. The views and wishes of child victims of trafficking must be sought and taken into account whenever decisions affecting them are being made. In relation to the proposed Directive for a short-term residence permit for victims, child victims of trafficking should be granted a permit of stay without having to testify against traffickers, though they should be enabled to testify if they so wish.*

6. Ensuring coherence in EU legislation

The protection for separated children that could be afforded by asylum and immigration legislation is clearly significant. However in practice many separated children are likely to remain in the country of arrival with an indeterminate status and lacking long-term security. This is especially true for migrant children who are not asylum seekers, who could benefit from comparable provisions, but do not have access to them. *There is a role for the European Commission (and in particular the focal point monitoring issues relating to children horizontally across all asylum and immigration Directives), in ensuring that inconsistencies in the drafting of legislation are addressed.*

7. Transposing and implementing legislation in the Member States

If the Common Asylum Policy is to be more than a purely rhetorical commitment by Member States, agreed measures must be implemented fully, and according to the designated timescales. *It is essential for Member States to transpose and meet the minimum standards laid out in EU legislation, however there is leeway for individual states to offer more generous provision. Where better provisions already exist for separated children Member States should maintain them, and other states should be encouraged to develop them. Ideally they should seek to meet the more comprehensive standards set out in the 1997 UNHCR Guidelines and SCE Statement of Good Practice.*

8. Monitoring Member State implementation

NGOs have a key role to play in monitoring the extent to which Member State governments have transposed and met the minimum standards set out in EU legislation in relation to separated children. The Separated Children in Europe Programme will also seek to report regularly to the European Commission on progress across Member States.

9. Meeting the needs and rights of separated children within the enlargement process

The SCE Programme endorses the recent call by the Council of the Baltic Sea States for the elaboration of a 'Plan of Action Regarding Unaccompanied Children' in the region by end 2003, and believes the plan should be extended to other states in Central and Eastern Europe and supported by the EU institutions. Whilst progress is being made in developing asylum systems within accession states, there has been very little specific focus on the needs and rights of separated children. Taking on the 'acquis' in relation to asylum and immigration should not just result in the replication in accession states of EU standards (some of which fall short of international standards); it also provides an opportunity to go beyond minimum standards and establish good practice models.

10. Improving statistical information

In order to monitor and address the particular needs and rights of separated children, it is essential that the European Commission Action Plan to collect and analyse migration statistics makes it mandatory for Member States to provide more comprehensive disaggregated data on this group. This should include, as a minimum, the total number of applications in each country as well as key characteristics, such as the country of origin, sex and age group (e.g. under 5, 5 to 9 years, 10 to 14 years, and 15 to 18 years). Monitoring should also be undertaken of the determination of claims, as well as the processing of applications.