

Unaccompanied Minors in the EU

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Looking around in the world, in our smaller or wider environment, we have to face the fact that more and more minor children have to flee their home, their country. We are responsible for searching for answers and find the right way to solve the problem in a short time. The fear of persecution, breaches of human rights, armed struggle and disturbances, sexual and other exploitation, domestic violence or abuse and dodging military service are all part of the main reasons for flight. Most of the children are motivated by the hope for new opportunities or the chance to meet their family members who are living in Europe already. Their situation is regulated by several European immigration and asylum directives. In this paper – which is the outcome from a more complex and larger research – the most important documents are analyzed related to the reception-regulation of these children.

Key words: unaccompanied minors, reception conditions, asylum procedure, determination of age, children care center

Separated Children –Unaccompanied Minor

The English-language literature uses terms: separated children and unaccompanied minors.

Separated children “are children, as defined in article 1 of the Convention, who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.”¹ And “(...) a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”² Among them there are those who remain all alone and there are people who live with distant relatives. Unaccompanied children (also called unaccompanied minors) are “children, as defined in article 1 of the Convention, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.”³

1 General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their country of origin Art. 8.

2 Convention on the Rights of the Child, 20 November 1989. Art. 1.

3 Council directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Art. 2. (h and) General Comment No. 6 Art. 7. (2005) Treatment of unaccompanied and separated children outside their country of origin Art. 8.

Representative means “(...) a person acting on behalf of an organisation representing an unaccompanied minor as legal guardian, a person acting on behalf of a national organisation which is responsible for the care and well-being of minors, or any other appropriate representation appointed to ensure his/her best interests.”⁴

There are significant differences between Member States in their handling of the issue. In some states everybody claiming to be an unaccompanied minor appears in the statistics, that is, even before determining their age, while in other countries only a competent authority needs to recognise them as such.⁵

The EU asylum and immigration legislation offers provisions to deal with their situation. The European Convention on Human Rights (ECHR)⁶ does not contain explicit provisions about unaccompanied minors, but their treatment can be tested on the basis of a number of provisions such as Article 5 on the right to liberty and security; Article 8 on the right to respect for private and family life or Article 2 of Protocol No. 1 on the right to education. The ECHR considers that it is the responsibility of states to provide for unaccompanied minors not leaving them alone when released from custody.

In all cases, the decision on children should be based on the United Nations Convention on the Rights of the Child, which was ratified by all states except Somalia and the United States of America.⁷

The Convention states the human rights of children, which must be applied to immigrants as well. The UN Committee on the Rights of the Child in No.6 of the General Comment gives further guidance for the protection and care for unaccompanied children underlining the principle of the child’s best interests.⁸ It expresses that authorities should always bear this principle in mind when dealing with children. Unlike in the EU Fundamental Rights Charta there is no mention of this principle in the ECHR, it is clearly reflected in case law. The principle is also confirmed by specific provisions of EU legislation concerning unaccompanied minors.

The European Social Charter (ESC) mentions separated children in Article 17 (1) c). The European Committee of Social Rights (ECSR) notes that States, while trying to suppress attempts to circumvent immigration rules, should not deprive foreign minors, in particular unaccompanied minors, of protection status. This also means that the the state’s immigration policies should be harmonized with the protection of fundamental rights and all restrictions should be defined and practiced in this context. It is important to note that according to ECSR, Defence for Children International v

4 Council directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Art. 2. (i)

5 Asylum and Migration Glossary 3.0 a tool for better comparability produced by the European Migration Network October 2014 http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/docs/emn-glossary-en-version.pdf (accessed: 04.12.2014.)

6 Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950.

7 Convention on the Rights of the Child, 20 November 1989.

8 General Comment No. 6. (2005) Treatment of unaccompanied and separated children outside their country of origin.

Netherlands, No. 47/2008. complaint (20 October 2009), the Committee was of the view that on the basis of the ESC Article 31 (2) unaccompanied minors have the right to asylum.⁹

The main reasons why unaccompanied minors leave their homes are fear of persecution, human rights violations, armed conflicts and civil unrest, sexual exploitation, domestic violence, abuse, severe deprivation, gender-based discrimination, forced military service, search for new opportunities, the intention of joining the family already staying in Europe.

The Separated Children in Europe Programme

One of the most important steps in recent years was the release of the Separated Children in Europe Programme's (SCEP) proposal about Good Practice in Copenhagen in 2009. The significance of this proposal is that it establishes the essential theoretical and practical grounding. The Separated Children in Europe Programme is a joint initiative of the International Save the Children Alliance and the United Nations High Commissioner for Refugees (UNHCR). The SCEP is an European NGO Network of 33 organizations from 28 European countries.

The main purpose of SCEP is the protection of the rights of all separated children entering or travelling across Europe. The vision of the programme is that children will be protected, their well-being and development will be promoted and they will have opportunities to develop their full potential. The other main vision is that they will participate in the development of policies and practices that impact upon their lives. Therefore, SCEP establishes cooperative arrangements with European organizations and institutions dealing with separated children.¹⁰

Legal Background

The two basic documents on the topic are the UN Convention on the Rights of the Child (CRC) and two other documents: UNCRC General Comment No 6, on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (2005) and UNHCR's Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum of February (1997).

The UN Convention on the Rights of the Child states that "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."¹¹ And a child "(...) temporarily or permanently

9 https://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47SummaryMerits_en.pdf (accessed: 09.01.2015.)

10 Statement of Good Practice. Separated Children in Europe Programme. 2009. <http://www.separated-children-europe-programme.org/> (Download: 09.01.2015.)

11 Convention on the Rights of the Child, 20 November 1989 Art 3. (1)

deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”¹²

Directive 2013/33/EU¹³ and the Return Directive 2008/115/EC¹⁴ define such people as vulnerable. According to both directives the following persons are considered vulnerable: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Reception and Treatment

States have a duty to assess the special needs of vulnerable persons.¹⁵ Directive 2013/32/EU called on states to assess the needs of asylum seekers in relation to the specific procedural safeguards, and to provide them with adequate support during the asylum procedure.¹⁶

People in the refugees’ countries of origin are not familiar with the European Asylum System, therefore it is of particular importance that the arriving children get thorough information adjusted to their age. Furthermore, the use of language, the content and the wording play a crucial role in understanding and interpreting the information they are being provided.

It is especially important that children as quickly as possible, preferably immediately upon arrival are given clear information about their right to apply for asylum in any of the EU countries. Almost all European Union Member States are required by law to inform immigrants about their right to apply for asylum. This is especially important if refugees are being detained. In practice, however, the official legal information mostly means a unified text, without being specified and age-adjusted, meaning that a seven year old child receives the same information as an adult. It is, therefore, not surprising that children in many cases do not understand what is happening to them. Hence, it would be essential in all EU countries to establish special rules and procedures customized for children.

A good example could be Sweden, where a document about the asylum procedure for asylum-seeking children was created by the migration board. Also in Sweden, a common practice was introduced that the Red Cross organizes asylum workshops in

12 Convention on the Rights of the Child, 20 November 1989 Art 20. (1)

13 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Art 17.

14 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country national Art 3. (9)

15 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection Art 22.

16 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection Art. 24.

youth centers - which serves as homes for unaccompanied children - where children are free to ask questions about the asylum procedure.¹⁷

Most importantly, the state is responsible for processing the asylum application. According to the Dublin regulation the unaccompanied minor's request is administered by the responsible Member State, which has to decide if the minor has any family members, siblings or relatives residing legally in the EU.¹⁸ If there is no family member, sister, relative, the Member State where the child has applied for asylum is responsible for the minor, if it is in line with the child's best interest. Art. 6. states that a representative must be provided for the unaccompanied minor who has to provide guidance on the best interests of the child.

According to Directive 2013/32/EU¹⁹ and Directive 2013/33/EU²⁰ a representative must be designated for unaccompanied minor asylum seekers when they submit their asylum application. However, it does not speak to the guidelines that they should have already determined the representative when they discover unaccompanied minors by the authorities. It is already the states to decide, during the asylum procedure is to represent the interests of the child protection and the application process the same or a different person appointed. During each hearings, where the person is a child, the special needs of unaccompanied minors, who has knowledge of the subject of unaccompanied has to be presented.²¹

According to the Asylum Procedures Directive, the member states can order the investigation procedures to be executed expedited/at the border/in the transit zone.²²

In addition, the Reception Conditions Directive establishes that Member States should take measures as soon as possible to ensure that unaccompanied minors are represented and supported by representatives. Unaccompanied minors shall be promptly informed of the appointment of a representative.²³ The representative should perform their duties in accordance with the principle of the best interests of the child, and must have the appropriate expertise. In order to ensure the development and social well-being of the child, the representative could only be removed when necessary. Organisations or individuals which/whose interests are or may be

17 A kísérő nélküli kiskorúak menedékhez való jogának érvényesülése az EU-ban. France terre d'asile. Párizs. 2012.

18 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. Art. 8.

19 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. Art 25.

20 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Art 24.

21 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. Art 25.

22 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. Art 8.

23 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Art 24.

in conflict with the interests of unaccompanied minors, non-elected representative. Competent authorities shall undertake regular assessments, including also the need for a minor representation of unaccompanied tools are available.²⁴

“Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed: with adult relatives, with a foster family, in accommodation centres with special provisions for minors, in other accommodation suitable for minors. Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult applicants, if it is in their best interests. 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.”²⁵

According to the revised Qualification Directive (2011/95/EU) “as soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order. Member States shall ensure that the minor’s needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments. Member States shall ensure that unaccompanied minors are placed either: with adult relatives; or with a foster family; or in centres specialised in accommodation for minors; or in other accommodation suitable for minors. In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity. 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. If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor’s best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate.”²⁶

24 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Art 23.

25 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. Art 24.

26 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted Art. 31.

“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.”²⁷

Determination of age

If they are unsure Member States will determine the age of unaccompanied minors by medical examination relating to the asylum application. If this takes place, the Member States shall ensure that unaccompanied minors are informed about this in advance, and must seek their agreement of the testing. However, many dispute the definition of the age issue throughout Europe. In many cases many of the people entering the Union territory without papers, documents claim that are not yet 18 years old, therefore it may have to be decided by medical examination if that is indeed so.

The results of the examination are important because they affect their application for asylum and social welfare services. The medical examination can be performed only by qualified medical personnel, carry the least possible interference, respecting the dignity of the person under investigation. The Directive does not specify what the appropriate medical examination, so there are a variety of solutions.²⁸

Hungarian Background

In 2011 12.225 unaccompanied children filed an application for asylum in the European Union. This number is about the same as in previous years. However, there are estimates according to which many more children arrive illegally.

In 2012 2156 asylum-seekers arrived in Hungary. This signifies a 27 percent increase compared to the previous year. In 2012 87 asylum-seekers got refugee status, 328 people subsidiary protection, and 47 people got admission status. Most of the asylum applications, 880 were from Afghans, while there were 327 Pakistanis, 226 Kosovars, 145 Syrians and 69 Somalis. These children were mostly boys between the ages of 14 and 18, but there was one 5-year-old child as well.

According to Hungarian National Police statistics 875 unaccompanied minors were captured in 2012, of whom 615 were Afghanistan, 76 from Pakistan, 34 from Algeria, 27 from Kosovo, 21 from Somalia, 18 from Morocco, 13 unknown, 11 from Syria, 11 from Bangladesh, 8 from Serbia and 7 Libya. Altogether from 28 countries.²⁹

27 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country national Art 10.

28 Kézikönyv a menekültügyre, határookra és bevándorlásra vonatkozó európai jogról. Az Európai Unió Alapjogi Ügynöksége, 2014. 235.

29 Iván Júlia: Kinek kellenek ők? A kísérő nélküli kiskorú külföldiek helyzete Magyarországon – A Magyar Helsinki Bizottság tapasztalatai, Fundamentum. Budapest. XVII. — 2013/2

The practice of expulsion of unaccompanied minors was examined by the study No 2731/2012 of the Commissioner for Fundamental Rights. The report says that in 2012 the number of unaccompanied minors entering Hungary increased significantly compared to the previous year. Between 01 January and 30 September 2012 700 unaccompanied minors who crossed the border illegally were caught by the police. The study showed that in the year preceding the examination hundreds of foreign children disappeared from the authorities. The report indicates that in the first nine months of 2012 a total of 141 unaccompanied minors were handed over to the Serbian authorities, while 480 of those caught disappeared. Despite the police warrants their whereabouts are unknown to the immigration authorities or child support agencies, although they should ensure their placement and boarding in Hungary.³⁰

The refugee or alien policing authority will place the unaccompanied minor without parental monitoring at a children's institution temporarily. The Guardian's Office of Budapest District V. must be notified of the temporary placement of foreign children and the placing organisation ensures the transport of the children to the place of temporary care.³¹

Asylum seeking unaccompanied minors and unaccompanied minors recognised as refugees or protected people are placed in a separate building in Károlyi István Children's Home in Fót, which is suitable to accommodate 32 unaccompanied minors and 50 unaccompanied minors entitled to aftercare. Non-asylum seeking unaccompanied minors, unaccompanied minors illegally entering the border and victims of human trafficking are placed in Szent Ágota Children's Home in Hódmezővásárhely, the capacity of which is 18 persons. This children's home is run by the Catholic Church according to the contract concluded with the state. Because of the small capacity other children's homes also receive unaccompanied minors seeking asylum occasionally (Kunfehértó, Szeged, Makó Ópusztaszer, Szentes).³²

The child protection includes the following: learning the Hungarian language, helping to choose a school career or training. The Children's Centre staff accept the cultural, religious differences in the children's lifestyle. They also promote mutual acceptance and a seamless integration. They help to process any physical, psychological and sexual traumas. They try to find relatives or other relations of the cared children, encouraging the children to make contact with them and - if there's a realistic opportunity that also serves the interests of the minor - initiate family reunion. The experience of the Károlyi István Children Care Centre shows that Hungary is not the final destination for many of the hosted unaccompanied minors; they consider our country as a temporary transit station. This also means that they are not motivated to

30 Iván Júlia: Kinek kellenek ők? A kísérő nélküli kiskorú külföldiek helyzete Magyarországon – A Magyar Helsinki Bizottság tapasztalatai, Fundamentum. Budapest. XVII. — 2013/2

31 Haraszti Margit Katalin: Kísérő nélküli kiskorúak a menekültjogban és a gyermekvédelemben: árnyak a Paradicsomban. Családi Jog 2014. (12. évfolyam) 4. szám page 7-21.

32 Kísérő nélküli kiskorúakkal kapcsolatos szakpolitikák, gyakorlatok és adatok (2014). Tagállam: Magyarország. page 17. Available at: <http://ec.europa.eu/dgs/home-affairs/what-we-> (accessed 10 August, 2015)

integrate into the Children Home's community and the Hungarian society in general. Young adults after coming of age receive aftercare services within the institutional frameworks or receive help with the assistance of a caregiver to be able to start an independent life.³³

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33 <http://www.wp.kigyk.hu/az-intezmeny-tortenete/> (accessed: 09.01.2015.)

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