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Protection and assistance for separated children seeking asylum

Report
Committee on Migration, Refugees and Population
Rapporteur: Mr Ed van Thijn, Netherlands, Socialist Group

Summary

Children are vulnerable and among them the most vulnerable category is represented by those who are in a foreign country seeking asylum and separated from their parents or legal caregivers. Separated children seeking asylum make up approximately 4 per cent of the number of asylum applicants in Europe; in some member states, including countries in which immigration is a relatively new phenomenon, this proportion rises to 10 per cent.

In co-operation and co-ordination with the United Nations High Commissioner for Refugees (UNHCR), the Save the Children Alliance and the Separated Children in Europe Programme, the Council of Europe should take immediate action to rationalise its activities in this field and assist member states in meeting the threefold protection needs of this group: as children, as children without parents or legal caregivers and as children in the asylum process.

I. Draft recommendation

1. Half of the world's refugees and displaced persons are children. They have fled their home to escape persecutions, human rights violations, exploitation, abuse or natural disaster. More than two million of them have been killed in conflicts during the past decade; thousands have lost their lives in the recent tsunami in South-East Asia while those who survive are traumatised and confused, at risk of falling prey to unscrupulous traffickers.

2. Children are vulnerable and among them the most vulnerable group is represented by those who are in a foreign country seeking asylum and separated from their parents or legal or customary primary care-givers. Separated children seeking asylum make up approximately 4 per cent of the number of asylum applicants in Europe; in some member states, including countries where immigration is a relatively new phenomenon, this proportion rises to 10 per cent.

3. The Parliamentary Assembly considers the situation of separated children seeking asylum in Council of Europe member states a matter of urgent concern. National legislative policies and practices fail to address in a coherent manner the threefold protection needs of this group: as children, as children without parents or legal care-givers and as children in the asylum process.

4. Even if all Council of Europe member states are parties to the United Nations Convention on the Rights of the Child, a number of provisions laid down therein are often neglected by states in the elaboration and implementation of asylum measures. This is the case for the principle of the best interest of the child (Article 3), which in the wording of the Convention should be given primary consideration; the principle of non-discrimination, including on nationality grounds (Article 2); the facilitation of family reunion (Article 10); the right for the child to be consulted on matters that may affect him or her (Article 12); and the right to special protection for refugee children or children seeking refugee status (Article 22).

5. As they are without their parents or legal or customary primary care-givers, separated children seeking asylum should benefit from the prompt appointment of a legal guardian to defend their interests and ensure their well-being and they should also be placed in care at reception structures in keeping with their age and maturity. By contrast, the legislation of Council of Europe member states often does not provide for an appropriate system of guardianship on behalf of foreign children. Even when an adequate legal framework is in place, administrative delays pose a serious threat to the safety of children, leaving them more exposed to a risk of trafficking or other abuses. Besides, the detention of separated children in the asylum process is a widespread practice in the vast majority of Council of Europe member states, in open disregard of the obligation to provide care and reception in structures suitable for children and in violation of Article 37 of the UN Convention on the Rights of the Child which states that detention shall only be used as a measure of last resort and for the shortest appropriate period of time.

6. As regards the asylum system, the Assembly regrets that separated children are often prevented from having access to effective protection against *refoulement*, due to the applicable legislation: at procedural level, in most Council of Europe member states, children can be denied access to the territory on the grounds that they travelled via a safe country where they could have applied for asylum; their asylum application can be processed under an accelerated admissibility procedure; they may not benefit from the appointment of a legal representative; at substantive level, most Council of Europe member states do not recognise child-specific forms of persecution, such as forced recruitment in armed forces, forced labour, female genital mutilation or forced marriages or pregnancies, as persecution under the terms of the 1951 Geneva Convention on the Status of Refugees.

7. Various specialised agencies and bodies have adopted recommendations and guidelines to enhance the protection of separated children seeking asylum, including the Committee on the Rights of the Child, the United Nations High Commissioner for Refugees (UNHCR) and the Separated Children in Europe Programme. The Assembly believes that the Council of Europe should urge its member states to comply with the standards recommended by such agencies and bodies.

8. Moreover, the Council of Europe should complement these standards by adopting a single coherent instrument on the issue of separated children seeking asylum. Such an instrument should restate previous recommendations of the Assembly and the Committee of Ministers regarding specific aspects affecting refugee children and try to fill protection gaps.

9. The Assembly therefore recommends that the Committee of Ministers:

i. instruct one or more of the specialised committees to conduct in-depth studies on access to the territory and to the asylum procedure for separated children seeking asylum in Council of Europe member states, as well as on the availability of a system of legal guardianship;

ii. instruct one or more of the specialised committees to conduct a study to review the practice of member states as regards child-specific forms of persecution;

iii. in co-operation and co-ordination with UNHCR, the Save the Children Alliance and the Separated Children in Europe Programme, draw up a recommendation urging member states to:

a. recognise the primacy of the principle of the best interests of the child in asylum or immigration decisions, procedures, practices or legislative measures affecting minors;

b. recognise and fully implement in practice the principle of non-discrimination ensuring that all rights apply to all children on their territory or within their jurisdiction without exception;

c. refrain from refusing entry to their territories to separated children, on any grounds;

d. amend their legislation and remove any administrative obstacle so as to ensure that separated children can have a legal guardian and a legal representative appointed as a matter of urgency and not later than 2 weeks of their presence coming to the knowledge of the authorities;

e. ensure that separated children are heard in the context of the asylum procedure either directly or through their legal guardian, and that they are questioned in a manner keeping with their age, maturity and psychological situation;

f. amend their legislation so as to exempt separated children from accelerated admissibility asylum procedures;

g. recognize child-specific forms of persecution as persecution within the meaning of the 1951 Geneva Convention on the Status of Refugees;

h. grant special or humanitarian residence permits to children who have been subjected to child-specific forms of persecution and who are not recognised as refugees;

i. facilitate family reunion on behalf of separated children, as indicated in Assembly Recommendation 1596 (2003) on the situation of young migrants in Europe;

- j. allow the detention of separated children only as a last resort and for the shortest possible time, as indicated in Recommendation (2003) 5 of the Committee of Ministers member states on measures of detention of asylum seekers;
- k. ensure that the return of separated children to their country of origin is implemented only if this is in the best interest of the child and in compliance with the safeguards set out in Assembly Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity and Recommendation 1596 (2003) on the situation of young migrants in Europe;
- iv. support the organisation and delivery of specific training for lawyers as well as officials and other professionals dealing with separated children during the asylum procedure and in the context of anti-trafficking policy and law;
- v. urge member states to comply with the guidelines adopted by the UNHCR, the Save the Children Alliance and the Separated Children in Europe Programme, in particular the revised Statement of Good Practice on Separated Children Seeking Asylum;
- vi. call on member states to continue their co-operation with the UNHCR and the Separated Children in Europe Programme in order to:
 - a. introduce a uniform format for registering information on separated children as regards age, gender and country of origin, with a view to facilitating identification, family tracing and the comparability of information;
 - b. introduce common standards for assessing the age of separated children;
 - c. harmonise the collection of statistical data relating to separated children seeking asylum as regards gender, age, country of origin and decision on asylum and to communicate such information to the UNHCR and other relevant organisations.

II. Explanatory memorandum by Mr van Thijn

1. Introduction

1. *"The child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding"*. This is the Preamble of the 1989 UN Convention on the Rights of the Child, an instrument which has been ratified by all Council of Europe member states. These inspired words sound as wishful thinking when we consider that children represent half of the world's refugees and displaced persons and often endure the same persecutions as adults. More than two million children have been killed in conflicts around the world during the past decade.

2. It is particularly in the context of conflicts and natural disasters that the vulnerability of children to violence and abuse becomes most apparent: it is an outrageous and harsh reality that traumatised children having survived the Tsunami in south-east Asia are now at risk of falling prey to the most shameful trade of all, trafficking in children.

3. Despite numerous legal and political commitments, we are far from ensuring an atmosphere of happiness, love and understanding for children. As the expression of the conscience of the peoples of the whole of Europe, the Assembly must take a strong stance to call for the improvement of the protection of children and in particular separated children in the asylum process, as a category which is three times vulnerable: as asylum seekers, as children and as children without their parents.

4. For some years the Committee on Migration, Refugees and Population has devoted special attention to the situation of young people affected by voluntary or forced migratory movements: in November 2001 its Sub-Committee on Migration and the European Youth Centre of Budapest held a pan-European debate on the situation of young migrants in Europe, with the participation of some 30 young people from 27 European countries. This gathering inspired the report on the situation of young migrants in Europe¹ (Mr Yáñez-Barnuevo, Spain, SOC) as well as Assembly Recommendation 1596 (2003) on the same topic. The fruitful co-operation between the Committee on Migration, Refugees and Population and the Youth Centre of Budapest continued the following year with the organisation of a hearing on the situation of young refugees in Europe (17-18 December 2002), in partnership with the United Nations High Commissioner for Refugees (UNHCR).

5. The touching contribution in this event of F.H., a 16 year-old boy from Afghanistan who arrived in Hungary alone and applied for asylum led Mrs Vermot-Mangold (Switzerland, SOC) current Chair of the sub-Committee on Refugees, to take the initiative of a motion specifically addressing the situation of separated children seeking asylum in Europe.

2. A portrayal of separated children seeking asylum in Europe

a. *A phenomenon giving rise to serious concerns*

6. The phenomenon of separated children seeking asylum is not new: throughout the 20th century a significant number of separated children have reached European countries as a result of wars and armed conflicts. In the '90s, there was a steady rise in their number, which culminated in thousands of separated children fleeing the conflict in former Yugoslavia. Since then, unaccompanied and separated children have represented a considerable proportion of asylum seekers.

¹ Doc. 9645.

7. To respond to the new dimension of the phenomenon, in 1997 UNHCR initiated partnership with some members of the International Save the Children Alliance to establish special programme to improve the situation of this group, the "Separated Children in Europe Programme"². In order to promote changes in policies and practices affecting separated children the programme has set up a network of NGOs operating in 28 European countries and who devotes its resources to research, advocacy, reporting and training, at national and international level. Since its creation, the Separated Children in Europe Programme has proposed guidelines and models of best practice which, if complied with, would harmonise and enhance reception and protection standards for this particularly vulnerable category of young people.

8. The vast majority of separated children remain within their region of origin, but a small number seek asylum in Europe. According to UNHCR, in the last two years the number of separated children who submitted asylum applications in Europe has remained steady both in absolute number (between 15 000 and 16 000) and in the percentage (4%) of total asylum seekers. The refugee organisation, however, warns that the extent of the problem is difficult to determine due to the lack of accurate data. Whatever the figures, separated children whose presence in the host country is registered by the authorities of the host country represent a tiny portion of the number of children forced to leave their countries because of violence.

b. Definition of "separated children"

9. Probably one of the most important achievements of the Children in Europe Programme is the clarification of the notion of "separated children" as "*children under 18 years of age who are outside their country of origin and separated from both parents or their legal/customary primary caregivers*".

10. Not all Council of Europe member states make use of the notion of "separated children" as indicated above. Most states use the expression "unaccompanied minors", which is used where children are accompanied by someone who is unwilling, unsuitable or unable to provide the child with appropriate care. In Germany a child is considered to be unaccompanied unless s/he is accompanied by someone who has been given parental custody by court decision. Other states consider a minor to be accompanied by reason of the very fact that s/he is in the company of a relative. Differences can be also observed within the same country: it seems that in the United Kingdom the interpretation of the notion of "unaccompanied" may vary according to different local authorities.

c. Some figures³

11. There are no accurate statistics on the number of separated children seeking asylum in Europe every year: differences in definitions and recording practices among European countries pose a serious challenge to the comparability of data. The vast majority of separated children remain within their region of origin. A small – but significant – number seek asylum in Europe.

12. According to estimates, in 2003 some 12,800 unaccompanied and separated children applied for asylum in 28 industrialised countries. The major receiving countries were the United Kingdom (2,800), Austria (2,050), Switzerland (1,330), the Netherlands (1,220), Germany (98) and Norway (920). Together, these six countries accounted for 73% of all claims lodged by unaccompanied and separated children. For a comparison, in 2002 there were 6,329 separated children seeking asylum in Spain, 5,945 in the United Kingdom, 3,232 in the Netherlands and 2,400 in Austria. In Eastern Europe, Hungary was the country with the highest number of separated children seeking asylum in 2002.

² <http://www.separated-children-europe-programme.org>

³ All the figures provided in this section are drawn from UNHCR, Trends in unaccompanied and separated children seeking asylum in industrialized countries, 2001-2003.

13. While the absolute number of claims lodged by unaccompanied and separated children appears to be relatively high in some countries, their overall share in the total number of asylum applications is limited. For instance, in 2003 in the United Kingdom separated children represented only 5.7% of all asylum applicants; in Germany they represented only 1.9% and the Czech Republic 1.1%. In relative terms, in 2003 the countries which received the high proportion of separated children seeking asylum were Bulgaria (10%), the Netherlands (9%), Hungary (8%) and Slovakia (7%).

14. The number of unaccompanied and separated children seeking asylum peaked in 2000. Among the 21 countries for which data are available since 2000, the annual level fell by 11% from 2001 to 2002, and an additional sharp drop of 40% was recorded from 2002 to 2003. According to UNHCR the decline in the number of separated children seeking asylum is a reflection of the drop in asylum applications in general: in fact, since 2000 the share of unaccompanied and separated children seeking asylum in the total number of applications has declined only slightly.

15. Although the overall proportion of unaccompanied and separated children seeking asylum in Europe has remained fairly stable, asylum flows to individual asylum countries have changed in the period 2000-2003. In 2000, unaccompanied and separated children accounted for 15% of all claims submitted in the Netherlands and Hungary. Following an increase to 21% in Hungary and 18% in the Netherlands during 2001, the proportion of unaccompanied and separated children fell to less than 10% in 2003. At the same time, the United Kingdom and Switzerland recorded an increase in the proportion of unaccompanied and separated children seeking asylum from around 3.5-4% in 2000 to some 6% in 2003.

16. UNHCR has observed that the main countries of origin of unaccompanied minors/separated children are quite different from the main countries of origin of asylum seekers in general. During 2001-2003, Afghanistan was the main country of origin of separated and unaccompanied children applying for asylum in 20 European countries (13%). Afghanistan, however, was not the main source of all asylum applications: in the same 20 countries the total number of Afghans applying for asylum accounted only for 7% of all claims. Another example is Angola: whereas unaccompanied and separated children from Angola were the second largest nationality claiming asylum (10%), Angolans represented only 2% of all asylum seekers.

17. A country-by-country analysis further illustrates the differences in asylum flows between asylum seekers in general and unaccompanied and separated children seeking asylum. Poland, unaccompanied and separated children from Afghanistan constituted 40% of unaccompanied and separated children seeking asylum during 2001-2003, whereas the share of Afghan nationals in the total number of asylum claims was 8%.

18. It should also be kept in mind that the main countries of origin of unaccompanied minors/separated children vary over time. In the past few years main countries of origin have been: for Africa, the Democratic Republic of Congo, Rwanda, Burundi, Sierra Leone, Somalia and Morocco, Angola; for Asia, Afghanistan, Sri Lanka, Iran, Iraq and China; for Europe, Albania and Russia (notably Chechnya).

19. While essential to devise an effective response to protection and assistance needs of children, data on the gender and age of unaccompanied and separated children seeking asylum is less widely available than information on their countries of origin. As regards age, the analysis is hindered by differences in reporting formats among different states (by year of birth, by age in various age groups) as well as by difficulties in the age assessment. UNHCR, however, estimates that in 2003 about one-third of unaccompanied/separated children were below 15 years of age, whereas two-thirds were 16 or 17 years.

20. As to gender, available data suggest that the vast majority of unaccompanied and separated children seeking asylum are male. Only 27% of unaccompanied minors/separated children seeking asylum in 2002 were girls (28% in 2003). This pattern is generally in line with the gender composition of asylum seekers in general. Notable exceptions are Ireland, where girls lodged 33 to 54% of all claims submitted by unaccompanied and separated children since 2000; Finland (32-28%) and Sweden (30-35%).

d. Reasons for leaving

21. Separated children flee for the same reasons as adults: from war and armed conflict situations, persecution or severe poverty and deprivation. Others flee for reasons specific to being children: forced recruitment, female genital mutilation, forced child labour, sexual exploitation, forced marriage and pregnancies. Some children flee family abuse, neglect or other family problems. Many are victims of trafficking.

3. An age-specific perspective in all policies affecting refugees and asylum seekers

22. As the UNHCR Guidelines on protection and care for refugee children say, "*children are vulnerable. They are susceptible to disease, malnutrition and physical injury. Children are dependent. They need the support of adults, not only for physical survival, particularly in the early years of childhood, but also for their psychological and social well-being. Children are developing. They grow in developmental sequences, like a tower of bricks, each layer depending on or below it. Serious delays interrupting these sequences can severely disrupt development.*"

23. This passage explains very well why separated children as such should receive special attention and care. Even more so, when they may have suffered trauma due to persecution, neglect or ill-treatment. Your Rapporteur believes that to respond to the particular needs of such a group, it is necessary to introduce an age-specific perspective in all policies affecting refugees and asylum seekers: for instance, during all interviews relating to their immigration status, separated children should be questioned in a manner which is in keeping with their age; the decision over their asylum claim should take into account child-specific forms of persecution during their entire stay in a Council of Europe member state, separated children seeking asylum should be placed in suitable care, either with foster families or in reception centres or institutions specifically for minors.

24. On the other hand, asylum and immigration rules should not be the exclusive focus for separated children, though subjected to immigration rules, are first and foremost *children* and should benefit from the same protection and assistance which is afforded to national children who are in a similar situation of separation from care-givers.

4. Separated children in the asylum process

a. access to the territory

25. The first difficulty that separated children face when trying to find protection in a Council of Europe member state is gaining access to its territory. It is a widespread practice for states to refuse entry to their territories to aliens who have travelled via safe third countries and could have applied for asylum protection there (so-called principles of the safe third country and of the first asylum country). These principles are sometimes implemented through the immediate return of the person concerned to the safe country, often without any possibility for the returnee to appeal against the return decision and without any explicit undertaking from the safe third country that such a person will be admitted to an asylum procedure left alone to its territory.

26. This practice has been criticised by a number of refugee organisations and the Parliamentary Assembly itself as a possible violation of the principle of *non-refoulement*. When it is applied to separated children, moreover, it is even more likely to put their life and safety in serious danger.

27. As said above, separated children seeking asylum are first and foremost vulnerable children, and states have an obligation to give them protection as such. No separated child should be refused entry to the territory of a Council of Europe member state. On the contrary, upon coming into contact with a separated child, the authorities should take immediate measures to identify the minor, trace his/her family and ascertain the reasons why s/he tried to seek entry into a Council of Europe member state. Likewise, prompt steps should be taken to appoint a legal guardian and place the minor in suitable care and reception structures, as it happens (or should happen) for national children who are in the same situation.

b. age assessment⁴

28. Young asylum seekers may understate their age, in the hope of receiving a more favourable treatment; they may also declare to be older, to avoid being placed in centres or institutions for minors. The importance of age-assessment is twofold: on the one hand, it ensures that an asylum seeker is subjected to the immigration rules and provisions applicable to his/her age group; on the other, it ensures that children receive specific care and protection in keeping with their age.

29. As the Separated Children in Europe Programme has observed, some countries do not have sufficiently clear rules on age assessment and it is believed that a number of cases of separated children are not treated as such by the immigration authorities. Especially in eastern European countries, where the phenomenon of street children or separated migrant children is recent, often lack the legal or technical instruments to conduct age assessment. In Ireland no age assessment is carried out.

30. In most Council of Europe member states age assessment is compulsory where there are doubts as to the age of the child or where children do not have proof of their age (for instance Belgium, the Netherlands, Romania, and the United Kingdom), while others do not have an official system of age assessment even if age assessment can be conducted at the request of the state authorities (Bulgaria and Hungary).

31. Age assessment often consists of anthropometrical, dental and radiological exams. The assessment never gives precise scientific results but only an estimate with a certain margin of error. The radiological test, in particular, has been criticised as unreliable, since the bone development for children of the same age varies greatly depending on their ethnic origin. In Germany and Austria age assessment used to be undertaken with x-rays but the current practice consists in a meeting/interview with government officials, either from the health sector (Austria) or the Aliens authority (Germany).

32. There are no common European standards on the way in which the age assessment should be conducted. UNHCR and the Separated Children in Europe Programme have recommended some guidelines and actively advocate for their incorporation into national law and practice: first of all, age-assessment should take place only when the age of the child is uncertain; it should be carried out by an independent paediatrician with appropriate expertise and familiar with the child's ethnic/cultural background; examinations should be culturally appropriate and respect human dignity; since age assessment is not an exact science and a considerable margin

⁴ The information provided in this paragraph has been drawn from: Kate Halvorsen, Separated children in Europe Programme, Report on the workshop of age assessment and identification (Bucharest, 20-22 May 2003)

of error is always possible, the benefit of the doubt should be given where the exact age is uncertain.

33. Your Rapporteur recommends that Council of Europe member states endorse the above mentioned guidelines. In addition, your Rapporteur believes that the consent of the child or his/her legal guardian should be given before age assessment can take place. Besides, the minor or his/her legal guardian should have the possibility of disputing the results of the test before the courts.

c. access to the ordinary asylum procedure

34. In all Council of Europe member states separated children who have entered the territory may have, according to the law, access to the asylum procedure, directly or through their legal guardian. In practice, however, a number of children never gain access to the asylum procedure due to practical or legal hurdles.

35. For instance, they might not be properly informed about how to apply for asylum; they might not be in the right place to apply for asylum; they might not do so in time; they might be advised not to apply as they are considered to be sufficiently protected within the child-welfare system or they may not have a legal guardian to act on their behalf, due to either administrative delays or lack of appropriate legislation.

36. An additional obstacle to effective protection is that, in most Council of Europe member states asylum applications from minors, including separated children, can be subjected to accelerated or admissibility procedures. For instance, in many countries, the asylum application submitted by a separated minor from a country considered as "safe" can be treated under an accelerated procedure. The same could happen when the minor has come via a safe third country. An application from a minor can fail the admissibility test on various grounds, including the lack of credibility of the claim. Children, however, are not always able to describe facts and events with the same logics or precision as adults, and their claim could be mistakenly considered as inadmissible.

37. Your Rapporteur believes that separated children should be given the opportunity of explaining the reasons why they are seeking protection, and they should be enabled to do so in a manner in keeping with their age. It is important, therefore, that their claim is treated in the ordinary procedure, where the merits are fully considered. Furthermore those in charge of interviewing them should receive special training to deal with children.

38. Likewise, your Rapporteur considers it inappropriate and even dangerous that in many Council of Europe member states asylum applications from separated children can be treated under procedures offering limited or no rights of appeal.

39. Finally, as it will be argued further in this memorandum, governments should acknowledge the existence of child-specific forms of persecution and revise the concept of "safe country". Is it possible to draft a list of countries where children are safe from trafficking, forced marriages, slavery or female genital mutilation? Maybe it is, but this list does not necessarily coincide with the list of safe countries currently in use. This consideration applies both to countries of origin and third countries: as the country reports of the Separated Children in Europe Programme show, lack of coherence or gaps are present in the legislation of most Council of Europe member states regarding foreign minors, for instance as far as the appointment of a legal guardian is concerned, or the placement in specialised centres, or the criminalisation of trafficking. A country could therefore be suitable to provide protection from persecution to an adult refugee and at the same time unsuitable to provide protection to refugee children due to the specific needs in terms of assistance, legal guardianship and trafficking prevention.

d. examination of the asylum claim

40. The recognition rate for separated children is considerably lower than for the general asylum seeking population. UNHCR estimates that during the past few years on average between 1-3 percent have been recognized as refugees, while the average has been 13-15 percent for asylum seekers in general in western Europe. It is important to note, however, that most separated children whose asylum application is rejected obtain permission to stay temporarily or permanently on humanitarian or other grounds.

41. Among the possible explanations of such a low refugee recognition rate, UNHCR has highlighted that this is mostly due to the fact that a number of claims are considered as "lacking credibility". Unfortunately, this may be the result of inadequate interviewing techniques, as it is rare for immigration authorities to train staff to interview children. Your Rapporteur encourages UNHCR to conduct in-depth research into the reasons behind such a low recognition rate for children asylum seekers.

42. It is important to recall that children should be given the opportunity of expressing their views and be heard in the asylum process, either directly or through a representative. Ensuring this is an obligation on Council of Europe member states stemming from Article 12 of the Convention on the Rights of the Child.

43. Your Rapporteur shares UNHCR's recommendations that, when making a decision about a separated child's asylum claim, the relevant authorities should give due consideration to:

- the age and maturity of a child and their stage of development;
- the possibility that children may manifest their fears differently from adults;
- the likelihood that children will have limited knowledge of conditions in their countries of origin;
- child-specific forms of persecution, such as domestic violence, recruitment of children into armies, trafficking for prostitution, organ trading, female genital mutilation and forced labour;
- the situation of the child's family in their country of origin and, where known, the wishes of parents who have sent a child out of the country in order to protect her or him.

44. As pointed out by the Separated Children in Europe Programme and the Dutch branch of Defence for Children International, the lengthy duration of the asylum procedure can be very detrimental in the case of children, since it delays the possibility of finding a durable solution to their situation. Asylum applications from separated children should therefore be given high priority and dealt with in a reasonable lapse of time.

45. Furthermore, your Rapporteur wishes to draw the attention of the Parliamentary Assembly to the ever-changing meaning of persecution and the need to combat and eradicate all forms of abuse and ill-treatment against children. Your Rapporteur believes that child-specific forms of persecution, such as domestic violence, recruitment into armies, trafficking for the purposes of prostitution, organ trading, female genital mutilation and forced labour, should also be considered as persecution under the terms of the 1951 Refugee Convention and that children who are at risk of facing such a treatment if returned to their countries of origin should be granted refugee status.

46. Finally, reiterating a previous stand of the Parliamentary Assembly of the Council of Europe as regards victims of trafficking in general, your Rapporteur recommends that member states grant special residence permits to children who have been victims of trafficking or forced labour and who are not recognised as refugees or given a complementary form of protection.

irrespective of their role in court proceedings against traffickers⁵. In this context your Rapporteur recalls that the current draft Convention on Trafficking of the Council of Europe⁶ – still und preparation – says that residence permits *may* be issued to victims of trafficking – includi children – when this is "*necessary owing to their personal situation*". In addition, the Dr Convention states that such residence permits will be issued in accordance with the principle the best interests of the child. Your Rapporteur strongly urges member states to give fu application to such a principle and provide child victims of trafficking with a residence permit in circumstances, since the abuse and exploitation they have been subjected to cannot but he provoked serious trauma.

e. legal advice and representation

47. The issue of the appointment of a legal representative to assist with the asylum clai should be kept separate from the appointment of a legal guardian, whose task should providing parental-like guidance to the child and represent his/her best interests. The provision appropriate legal advice and representation throughout the asylum procedure is essential ensure that separated children receive a fair treatment of their claim. In most Council of Euroq member states, however, legal representatives are not appointed systematically in the case separated children seeking asylum. In some countries they are only appointed at the appea stage and often not free of charge.

48. An additional problem related to legal representation is its quality. Sometimes the lawye who are appointed have no prior experience in representing a separated child. They may n know how to communicate with the child, how to take correct instructions, or they might not kn the specific guidelines and rights of children in the asylum procedure.

49. Your Rapporteur believes that at all stages of the asylum process, including appeals judicial reviews, separated children should have a legal representative who will provide leg advice and representation. Legal representatives should be available at no cost to the child an in addition to possessing expertise on the asylum process, they should be skilled in representii children and be aware of child-specific forms of persecution.

f. return of failed asylum seekers

50. According to UNHCR, the majority of separated children who are not granted refuge status are granted another form of protection. Despite this, there have been cases whe separated children have been returned. In this respect your Rapporteur wishes to reiterate tl recommendations expressed in Recommendation 1596 (2003) on the situation of young migrar in Europe, namely that:

"- states should make sure that return is not in breach of their international obligations under t 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, or i European Convention on Human Rights and other relevant instruments;
- return should not be possible before a legal guardian for the child has been appointed;
- before taking the decision to return a separated child, states should demand and take in consideration the opinion of the child's legal guardian as to whether return would be in the be interests of the child;
- return should be conditional upon the findings of a careful assessment of the family situati that the child would find upon return, and of whether the child's family would be able to provi appropriate care. In the absence of parents or other family members, the suitability of childca agencies in the country of return should be investigated. The assessment should be conduct by a professional and independent organisation or person and should be objective, non-politi and aimed at ensuring the respect of the principle of the best interests of the child;

⁵ See Resolution 1337(2003) on migration connected with trafficking in women and prostitution.

⁶ CM(2004)222 Addendum (restricted), 14 December 2004.

- prior to return, states should obtain an explicit and formal undertaking from the child's parents, relatives, other adult carer or any existing childcare agency in the country of return that they will provide immediate and long-term care upon the child's arrival;
- the decision to return a separated child should be reasoned and notified to the child and his/her legal guardian in writing, together with information on how to appeal against it;
- the child and/or his or her legal guardian should have the right to lodge an appeal before a court against the decision to return. Such an appeal should have suspensive effect and be extended to the lawfulness and the merits of the decision;
- during return, the child should be accompanied and treated in a manner in keeping with his/her age;
- the well-being of the child following return should be monitored by appropriate authorities/agencies on the spot, who should liaise with, and report to, the authorities of the country from which the child has been returned;
- migrants who arrived in a host country as separated children but who have reached the age 18 at the time of return should be treated as vulnerable cases and consulted on the conditions required for successful reintegration into their country of origin.⁷

51. These recommendations echo a study conducted by the Separated Children in Europe Programme, which underlines that in order to assess whether return is in the best interest of the child a number of interrelated factors should be considered and balanced against each other including: safety upon return, family reunification, the child's and the legal guardian's views, the child's human rights as well as the socio-economic situation in the country of origin and, finally, the age and maturity of the child⁷.

52. In this context, the study refers to the Italian legislation as an example of good practice. Separated children can be returned from Italy to their countries of origin only by means of "assisted repatriation". Prior to return, 6 NGOs are charged with making an assessment of whether the country of origin is safe for the child to return and tracing the child's family. The child should be consulted during the procedure. Finally, reintegration programmes are offered to returned children.

5. Care and other assistance for separated children

a. freedom from detention

53. Your Rapporteur regrets that the detention of children seeking asylum is lawful in a number of Council of Europe member states: for instance, in Greece it is possible from the age of 13, in the Czech Republic from the age of 15, and from 16 in the Netherlands. Sometimes the law does not make any difference between children and adults: for instance in Belgium there have been cases where children as young as three have been detained. The detention of children occurs relatively rarely in Ireland, Italy or Denmark, whilst it is used more widely in other countries such as Austria, the United Kingdom and Germany. The length of time during which a minor can be detained also varies greatly: from a maximum of 72 hours in Sweden to up to 6 months in Germany and as long as the conditions for detention remain in the United Kingdom.

54. A number of NGOs, Ombudspersons and other monitoring bodies have expressed serious concerns about the detention of children, including HM Prisons Inspector Anne Owe who has criticized detention conditions of children at the Oakington centre for asylum seekers near Cambridge, in the United Kingdom. In addition, the Committee on the Rights of the Child, the UN body monitoring the compliance of State parties to the Convention on the Rights of the Child, has repeatedly addressed specific recommendations to State parties in its periodic concluding observations. Among these, the recommendation that when children seeking asylum are placed in detention they should not be held together with juvenile offenders.

⁷ Save the Children and The Separated Children in Europe Programme, Position paper on Returns of Separated Children, September 2004.

55. Your Rapporteur recalls Recommendation (2003)5 of the Committee of Ministers of the Council of Europe to member states on measures of detention of asylum seekers, which contain specific provisions applicable to minors: "20. As a rule, minors should not be detained unless as a measure of last resort and for the shortest possible time. 21. Minors should not be separated from their parents against their will, nor from other adults responsible for them whether by law or custom. 22. If minors are detained, they must not be held under prison-like conditions. Every effort must be made to release them from detention as quickly as possible and place them in other accommodation. If this proves impossible, special arrangements must be made which are suitable for children and their families. 23. For unaccompanied minor asylum seekers, alternative and non-custodial care arrangements, such as residential homes or foster placements, should be arranged and, where provided for by national legislation, legal guardians should be appointed within the shortest possible time".

56. It can never be in a child's best interests to be detained. Your Rapporteur strongly believes that separated children should never be detained for reasons related to their immigration status. This should include detention at the border and detention pending deportation in, for example, international zones, detention centres, police cells, prisons or in any other special centres. This position is in compliance with UNHCR recommended standards. It is also important to mention Article 37 of the Convention on the Rights of the Child, which reads: "b. No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period".

b. the placement in – and disappearance from - reception structures

57. There are different models for the reception of separated children. As the Separate Children in Europe Programme points out, however, governments seem to be more interested "controlling" the presence of separated minors rather than providing facilities and services geared to their specific needs.

58. Even if the main objective of governments seems to ensure the presence of minors, this is not easily achieved. As a recent report from the NGO Child Focus has indicated, at the end of February 2002, 311 files on disappearances of unaccompanied minors were being processed in Belgium.

59. In general, cases of disappearance of separated children fall under three categories: some of them are supposed to reach by themselves the institution or centre allocated by the authorities but never do so; others provide the authorities with a private address or are sent to that private address by the social services, but never go there; finally a third category includes those who disappear from an institution, centre or foster family after a certain time.

60. A number of children who disappear are runaways but many others are probably intercepted or abducted by smugglers or traffickers. In both cases they are at risk of deprivation and ill-treatment. Police and judicial authorities are often powerless when trying to trace these young people: in most cases nobody is able to give a precise description of the child, there are no pictures available, nobody knows the child's personality, his/her habits or friends.

61. All European countries seem to privilege the placement of separated children in centres rather than foster families.

62. In central Europe, where there have not been many cases of separated children until very recently, specialized care for separated minors is still lacking. The first reception centre specifically devoted to separated children seeking asylum was opened in Békéscsaba (Hungary) in June 2003. This facility can accommodate up to 28 children, provides them with legal and psychological counselling as well as education opportunities that they are unlikely to get in

standard asylum seekers' home, where separated children often mingle with adults. The centre financed jointly by UNHCR, Hungary, the US Government, the Swiss Government and private donors.

63. Your Rapporteur believes that Council of Europe member states should devote more financial resources to establishing reception structures for separated children seeking asylum. These structures should be able to provide the services that residents need in their capacity as asylum seekers (legal counselling, information on social care and benefits, presence of cultural mediators) as well as those they require as children in a vulnerable situation (psychological counselling, education advisors, etc.). Separated children should be accompanied to the reception centre or other foster structure to which they are assigned. They should be registered by the authorities as soon as their presence is known and photographs should be taken of them to allow their prompt identification. The staff working in such centres should be specifically trained to deal with children from different cultures and children suffering from trauma.

c. the appointment of a legal guardian⁸

64. Most Council of Europe member states lack a system for the automatic appointment of guardians for separated children. In some countries such as Italy and the Netherlands, this can be done only through courts or special judges for minors and often takes a long time. Luxembourg and Norway seem to be the only countries where there is a system for a prompt appointment of a guardian to represent the child's best interests.

65. Recently, some Council of Europe member states such as France, Italy and Portugal have introduced changes in their legislation on guardianship. In Denmark, since April 2003, a guardian holding the same rights as a biological parent is appointed for all separated children from the outset of the asylum procedure. The new system has been subjected to criticism by Save the Children: guardians are not paid or reimbursed for their work, which prevents some people from undertaking the role; besides legal guardians are appointed only for a short time and are not necessarily until the child reaches adulthood.

66. Also Belgium has introduced a new system, by which a guardianship body for separated children is established to guarantee the protection and representation of children and contribute to finding durable solutions for them. Some NGOs are concerned that the budget for this initiative will be insufficient for the service to be of good quality.

67. In the Netherlands, the previous legislation made a distinction between children who were accompanied by a relative (other than their parents) and minors who were not accompanied at all. Only the latter could benefit from the appointment of a guardian. In 2003, however, the Council of State decided that this distinction was not justified and that all separated children should have the same rights. All of them should be provided with a legal guardian and have the right to apply for asylum. Unfortunately this new policy has not been implemented yet.

68. As for eastern European countries, a variety of systems are in use. In Bulgaria the provisions for the appointment of guardians exist but are rarely applied; in Croatia social workers from the local social services are appointed within 24 hours to act as guardians; in Poland a guardian can be appointed only after a separated child has been granted refugee status; in Slovakia the appointment of a guardian takes place in 2-3 days, in close co-operation with the National Refugee Officer and NGOs.

69. Even when states have guardianship systems, major concerns remain as regards the time-limit to make the appointment, the role of the guardian and his/her training. Your Rapporteur therefore recommends that:

⁸ The information provided in this paragraph is largely based on: Separated Children in Europe Programme, Separated Children in Europe: Policies and practices in European Union Member states, 2003.

- all separated children whose presence is known to the authorities should have guardians appointed;
- the appointment should take place within a two-week period from the presence of the child being known to the authorities;
- guardians should receive specific training and their role and tasks should be subjected to common European guidelines.

d. family reunion as a priority

70. Your Rapporteur believes that one of the first actions to be taken on behalf of a separated child seeking asylum should be tracing family members and exploring the possibility of family reunification. Family is the best environment for the development of a child and family reunification should be encouraged also during the asylum procedure – including with family members other than parents –, unless it is clear that this is not in the best interest of the child.

71. Your Rapporteur regrets that family reunification in EU countries has hardly ever occurred under the Dublin Convention on the state responsible for processing asylum applications (1990). Likewise, Council Regulation (EC) No. 343/2003 of 18 February 2003 – also called Dublin I – allows the reunion of a separated child seeking asylum with family members in other EU countries, but provides a narrow definition of "family". A broader definition, which would include the spouse, partner, the applicant's children 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*" was discarded during negotiations. Besides, as it was already the case for the Dublin Convention, reunification may take place only when the other family member has obtained refugee status in another member state – and not a temporary or complementary form of protection or other residence status.

72. Dublin II also refers to the specific situation of separated children saying 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 child*". This was also possible under Dublin I, but the relevant provision had been applied very rarely.

73. Your Rapporteur urges Council of Europe member states to use a liberal approach to family reunification on behalf of separated children seeking asylum, pursuant to the primacy of the principle of the best interests of the child. Along the lines of the already mentioned Recommendation 1596 (2003) on the situation of young migrants in Europe, member states should:

- *facilitate the family reunification of separated children with their parents in other member states, even when parents do not have permanent residence status or are asylum seekers, in compliance with the principle of the best interests of the child;*
- *consider favourably requests for family reunification between separated children and family members other than parents who have a legal title to reside in the member state, are over 18 years of age and are willing and able to support them;*
- *facilitate the family reunification of separated young people with mental or physical disabilities, including those who are over 18 years of age, with their parents or other adult family members upon whom they were dependant in the country of origin or the country of habitual residence and who are legally residing in another member state.*

74. In this respect, your Rapporteur also recalls Assembly Recommendation 1686 (2004) on Human mobility and the right to family reunion.

6. Conclusions and Recommendations

75. Your Rapporteur believes that Council of Europe member states should take immediate and coherent actions to improve the situation of separated children seeking asylum and ensure that they are protected and assisted as both children and asylum seekers.

76. UNHCR and Save the Children, through the Separated Children in Europe Programme, have set up a valuable and reliable system to monitor developments in many Council of Europe member states. In addition, a specialised body such as the Committee on the Rights of the Child reviews the practice and the legislation of all Council of Europe member states on a regular basis, making appropriate and specific recommendations. The Council of Europe, on the other hand, has produced several recommendations which are relevant for the question of separated children seeking asylum but has never addressed such an issue in a comprehensive manner.

77. In the light of these reasons, the Committee of Ministers, through its specialised committees, should start working on a comprehensive study on the issue of separated children seeking asylum and on this basis adopt a recommendation calling on member states, among others, to:

- i. recognize child-specific forms of persecution as persecution within the meaning of the 1951 Geneva Convention on Refugee status, and grant refugee status to children with a well-founded fear of being subjected to child-specific persecution upon return;
- ii. grant special or humanitarian residence permits to children who have been subjected to child-specific forms of persecution and who are not recognised as refugees;
- iii. refrain from returning or refusing entry to separated children at border points;
- iv. amend their legislation so to exempt separated children from accelerated or inadmissible asylum procedures.

78. As a final remark, your Rapporteur expresses regret that the principle of the best interests of the child does not have overarching importance in all Council of Europe member states and that the protection which should be accorded to children on account of international obligations is often undermined by strict immigration policy considerations. The Assembly should work to put a remedy to this state of affairs.

Reporting Committee: Committee on Migration, Refugees and Population

Reference to Committee: Doc. 10109 rev., Reference No. 2947 of 26 April 2004

Draft recommendation unanimously adopted by the Committee on 2 March 2005

Mr John **Wilkinson** (Chairperson), Mrs Tana **de Zulueta** (1st Vice-Chairperson), Mr Dor Christodoulides (2nd Vice-Chairperson), Mr Jean-Guy Branger (3rd Vice-Chairperson), Ms Manuela **Aguiar**, Mr Pedro **Agramunt**, Mrs Lale Akgün, Mr Gulamhuseyn Alibeyli, Mr Jo: **Banáš**, Mr Akhmed Bilalov, Ms Oksana Bilozir, Mrs Mimount **Bousakla**, Mr Paul Bradford, Ivan Brajovic, Mr Márton **Braun**, Mr Christian Brunhart, Mr Mevlüt **Çavusoglu**, Mr Bori **Cilevics**, Mrs Minodora Cliveti, Mrs Elvira **Cortajarena**, Mr Franco Danieli (alternate: Mr Achi **Occhetto**), Mr Joseph Debono Grech, Mr Taulant Dedja, Mr Nikolaos **Dendias**, Mr K Donabauer, Mrs Lydie Err, Mr Mats Einarsson, Mr Valeriy **Fedorov**, Mrs Daniela Filipiová, Mr Karl Theodor Freiherr von und zu Guttenberg, Mr Andrzej Grzesik, Mr Andrzej Grzyb, Mr Ali Ri: **Gülçiçek**, Mr Michael Hagberg, Mr Michael Hancock, Mrs Jelena Hoffmann, Mr Ilie **Ilaşcu**, Tadeusz Iwinski, Mrs Corien W.A. Jonker (alternate: Mr Ed **van Thijn**), Lord Judd (alternate: Mr Bill **Etherington**), Mr Oleksandr Karpov, Mrs Eleonora **Katseli**, Mr Evgeni Kirilov, Mr Dimitri **Kovacic**, Mr André **Kvakkestad**, Mr Petr Lachnit, Mr Geert Lambert, Mr Jean-Marie Le Guen, Mr Younal Loutfi, Mr Tito Masi, Mr Jean-Pierre Masseret (alternate: Mr Rudy **Salles**), Ms Nóra Naç Mr Giuseppe Naro, Mr Pasquale Nessa, Mr Xhevdet Nasufi, Mr Kalevi Olin, Mr Ibrahim **Özal**, Gheorghe Popa, Mr Virgil Popa, Mr Gabino **Puche**, Mr Milorad Pupovac, Mr Martin Raguž, Mr Anatoliy Rakhansky, Mr Marc Reymann, Mr Branko Ružic, Ms Katrin Saks, Mrs Na Shakhtaktinskaya, Mr Össur Skarphéðinsson, Mr Søren Søndergaard, Mr Luzi Stamm, Mr Terezija Stoisits, Mr Michael Stübgen, Mrs Elene Tevdoradze, Mr Tigran Torosyan, Mr José Ve Jardim, Mrs Ruth-Gaby Vermot-Mangold, Mr Arno Visser, Mr James **Wray**, Mr Akhmar Zavgay (alternate: Mr Alexey **Aleksandrov**), Mr Emanuelis Zingeris, Mr Vladimir Zhirinovskiy (alternate: Mrs Vera **Oskina**).

N.B. The names of those members present at the meeting are printed in bold

Secretariat of the Committee: Mr Halvor Lervik, Mr Mark Neville, Mrs Olga Kostenko, Mr Dav Cupina