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« MIGRATION OF UNACCOMPANIED MINORS:
ACTING IN THE BEST INTERESTS OF THE CHILD »

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EUROPEAN UNION POLICY TOWARDS UNACCOMPANIED MINOR
MIGRANTS

Mrs Annick GOEMINNE

EU Commission, DG Justice, Freedom and Security
Immigration and Asylum

1. Children's current rights in EU Asylum and Migration policy

In general terms, all immigration- and asylum related EU legal instruments state that MS shall have due regard to the **best interest of the child**.

Immigration and asylum instruments have specific provisions addressing the situation of minors and, in particular, unaccompanied minors.

“Minors” are generally referred to as persons “below the age of majority set by the law of the MS concerned and not married”

“**Unaccompanied minors**” are in all instruments defined as “third country nationals or stateless persons below the age of 18, who arrive on the territory of the MS unaccompanied by an adult responsible by law or by custom, and for as long as they are not effectively taken into care of such a person. It includes minors who are left unaccompanied after they entered the territory of the Member States.”

1. Council Directive 2003/86/EC of 22.9.2003 on “Family reunification”¹. (had to be implemented by 3 October 2005)

This directive determines the conditions for exercising the right to family reunification by third-country nationals residing lawfully in the territory of the MS.

This directive – which also applies to **refugees** – contains specific provisions in case the refugee is an **unaccompanied minor**: in this case the Member States

- shall authorize the entry and residence of his/her first-degree relatives in the direct ascending line and
- may authorize the entry and residence of his/her legal guardian or any other member of the family, if the refugee has no relatives in the direct ascending line or they cannot be traced.

2. Council Directive 2003/109/EC of 25.10.2003 on “Long-term residents”². (to be implemented by 23 January 2006)

This directive determines

- the terms for conferring and withdrawing long-term resident status granted by a MS to third country nationals legally residing on its territory and the rights pertaining thereto; and
- the terms of residence in a MS other than the one which conferred long-term resident status

This directive does not contain specific provisions for unaccompanied minors and it is unclear whether a minor could be entitled to the long-term resident status (requirement of stable and regular resources). However, some provisions could apply also to minors, such as the right to equal treatment with nationals on a number of rights, in particular as regards education.

¹ O.J. L 251/12 of 3.10.2003

² O.J. L 16/44 of 23.01.2004

3. Council Directive 2004/81/EC of 29.04.2004: “Victims of trafficking”³. (to be implemented by 6 August 2006)

This directive defines the conditions for granting residence permits of limited duration to third-country nationals who cooperate in the fight against trafficking in human beings or against actions to facilitate illegal immigration

This directive applies to third country nationals having reached the aged of majority. But Member States may decide to apply this directive also to minors who are or have been victims of offences related to the trafficking in human beings or who have been subject of an action to facilitate illegal immigration. In this case, specific provisions apply: Article 10 stresses that the best interests of the child must be taken in due account and that minors must have access to the educational system. In case of **unaccompanied minors**, Member States shall take the necessary steps to establish their identity and nationality, shall ensure legal representation if necessary and shall make every effort to locate their families as quickly as possible.

4. Proposal for a Directive of the EP and of the Council on “return”

This directive will set out common standards and procedures to be applied in MS for returning illegally staying third-country nationals.

A provision prohibits MS to remove an **unaccompanied minor** as long as there is no assurance that he / she can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return. It is also proposed that minors shall not be kept in temporary custody in common prison accommodation and that unaccompanied minors shall be separated from adults, unless it is considered in the child’s best interest not to do so.

5. Council Directive 2001/55/EC of 20 July 2001 on “Temporary Protection”

This directive establishes minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between MS in receiving and bearing consequences of receiving such persons.

Besides specific provisions relating to minors, such as the access to education and the right to family unity, particular attention is given to **unaccompanied minors**: the directive requests that MS provide for the necessary medical care or other assistance for persons with special needs, such as unaccompanied minors. MS shall also take measures, as soon as possible, 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. During the period of temporary protection MS shall ensure that unaccompanied minors be placed with adult relatives, a foster-family, in reception centres with special provisions for minors, or with the person who looked after the child when fleeing. This article specifies that the views of the child shall be taken into account in accordance with his / her age and maturity.

³ O.J. L 261/19 of 6.08.2004

6. Council Directive 2003/9/EC of 27 January 2003 on “Reception conditions”⁴ (had to be implemented before 6.2.2005)

This directive lays down minimum standards for the reception of asylum seekers in Member States.

This directive deals with the right for schooling and education for minors, with the respect of family unity as well as with access to rehabilitation services, included appropriate mental health care, for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts.

As regards **unaccompanied minors**, the directive has similar provisions as those stated under the directive on “Temporary protection”, notably:

MS shall take measures, as soon as possible, 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. Additionally, regular assessments shall be made by the appropriate authorities. From the moment that an unaccompanied minor who makes an application for asylum is admitted on the territory to the moment he is obliged to leave, the host MS shall ensure the minor is placed with adult relatives, a foster-family or in reception centres with special provisions for minors. MS may, however, place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers.

The provision further specifies that as far as possible, siblings shall be kept together, taking into account the best interest of the minor concerned and, in particular, his / her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum. The directive further encourages MS to trace the family members as soon as possible with due regard fore his/her safety. Finally, those working with unaccompanied minors shall have had or receive the appropriate training.

7. Council Regulation 343/2003 of 18 February 2003: “Dublin II”⁵

This regulation lays down the criteria and mechanisms for determining the MS responsible for examining an application for asylum lodged in one of the MS by a third country national.

Family unity is an essential criterion for determining the MS responsible. But it is even preceded by a criterion related to the situation of an **unaccompanied minor** asylum seeker. In this case, it is the MS where a member of his/her family is legally present which is responsible for examining the application, provided that it is in the best interest of the minor. In the absence of a family member, it is the MS where the minor lodged his/her application which is responsible.

⁴ O.J. L31/10 of 6.2.2003

⁵ O.J. L50/1 of 25.2.2003

8. Council Directive 2004/83/EC of 29 April 2004 on “Qualification for refugee”⁶ (to be implemented before 10.10.2006)

This directive lays down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

As far as the content of the protection granted is concerned, this directive also has some provisions addressing the specific situation of minors, such as the right to education and to family unity. It has a specific Article dedicated to the protection granted to **unaccompanied minors**, similar to the protection which he would have when falling under the directive for Temporary Protection:

1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship 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.

2. 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.

3. Member States shall ensure that unaccompanied minors are placed either:

- (a) with adult relatives; or
- (b) with a foster family; or
- (c) in centres specialised in accommodation for minors; or
- (d) 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.

4. 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.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of the minor's 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.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

9. Proposal for a Council Directive (not yet adopted) on “Asylum Procedures”

The purpose of this directive is to establish minimum standards on procedures in MS for granting or withdrawing refugee status.

Besides specific provisions relating to minors, such as on the possibilities for interviewing a minor, this directive also deals with the necessary legal representation of the **unaccompanied minor**. However, under this directive, MS may refrain from appointing a representative under certain conditions, f.i. when the minor will in all likelihood reach the age of maturity before a decision at first instance is taken; or where he / she is 16 or older, unless he / she is unable to pursue his / her application without a representative. The draft directive also insists on the

⁶ O.J. L304/12 of 30.9.2004

appropriate skills for persons dealing with minors; it has a provision on the use of medical examinations to determine the age of an unaccompanied minor.

10. Proposal for a Regulation of the Council and the EP on Community Statistics on Migration and International Protection

This Regulation will set the obligation for the Member States to transmit annual figures on applicants for international protection who are considered to be unaccompanied minors. Moreover, for all data categories (migration, illegal immigration, asylum, returns, etc, there is an obligation to give the age of the person concerned. The application of this Regulation is foreseen for 2007

11. Financial solidarity programmes

The Commission is managing several **financial solidarity programmes** in the field of asylum, immigration, visas and borders: the **European Refugee Fund, INTI, ARGO**, which may include as priority action the protection of children and, in particular, unaccompanied minors.

Background:

- **The European Refugee Fund (ERF)** co-finances actions in the field of reception conditions of asylum seekers and asylum procedures, integration of refugees and voluntary returns. One of the guiding general principle is that actions take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, etc. The ERF is managed on the one hand via centralized management for co-financing trans-national projects via the so-called Community Actions. In the past, a few projects related to children (either asylum seekers, either refugees) were selected. On the other hand, each Member State beneficiary of the Fund receives a share to be managed on a national basis (shared management). The Commission designs general strategic guidelines within which Member States do their own programming.

The Work Program 2005 for Community Actions is still in preparation internally. One of the priorities could easily be linked to children situation. The strategic guidelines for the national programming includes a guideline relating to children and unaccompanied minors, with a higher (60%) co-financing possibility than the 50% rule.

- **INTI (Integration of third-country nationals)** is a European Union (EU) funding programme for preparatory actions promoting the integration in the EU member states of people who are not citizens of the EU. Its aim is also to promote dialogue with civil society, develop integration models, seek out and evaluate best practices in the integration field and set up networks at European level. It amounts to €5.000.000 for the 25 Member States for 2005. In 2003 and 2004, a few projects selected related to children such as a project called "Inside the Outsiders: deviant immigrant minors and integration strategies in European justice systems" or another one dealing with specific cartoons to be dispatched in schools.
- **ARGO (Programme for administrative cooperation in the field of asylum, immigration, visas and borders)** supports administrative cooperation between Member States for asylum, external borders, visas and immigration. The programme's objectives are to promote cooperation between national administrations responsible for implementing Community rules and to ensure that proper account is taken of the Community dimension in their actions, to promote the uniform application of Community law, to encourage transparency of actions taken by the national authorities

and to improve the overall efficiency of national administrations in their tasks. Activities to be supported are training actions, staff exchanges, actions promoting the computerised handling of files and electronic data exchange, the setting up of common operative centres and of teams composed of staff drawn from two or more Member States, studies, research, conferences and seminars and finally Member States' activities in third countries.

12. The Constitutional Treaty

The Constitutional Treaty sets up as one of the objectives of the European Union the promotion and the protection of the rights of the child.

Firstly the Charter of Fundamental Rights has become an integral part of the Constitutional Treaty, which makes it legally binding. Art. 24 of the Charter includes the principle of “the best interest of the child”; other articles include right to education, on equality and non-discrimination etc.

Furthermore, other parts of the Constitutional Treaty are dedicated to the protection of Children’s rights.

The inclusion of children’s rights in the internal and external objectives of the Union does not create a new competence for children at European level and it does not take away the national competences in the areas of children’s rights. But it ensures that in the areas where the EU is allowed to legislate the rights of the child can be taken into account.

13. Communication on fighting trafficking in human beings

The Commission adopted on 18 October a communication on fighting trafficking in human beings. An important chapter deals with specific groups, especially women and children, as victims or potential victims of trafficking in human beings. The communication stresses that the EU anti trafficking policy should reflect a child rights approach, based on globally recognised principles, in particular the UN Convention on the Rights of the Child; and that particular attention should be paid to **unaccompanied minors** or children travelling without an immediate family member.

2. Follow-up

Vice-President Frattini has initiated a **Children Strategy**: on the basis of a comprehensive overview of the Commission’s actions on the protection of the children, he proposes developing a coherent EU policy on the protection of the rights of the child. A first step of this strategy will be the issuance of a Communication to the Council and the European Parliament on the protection of the rights of the child, beginning of 2006.

The Strategy will touch upon a number of areas under DG JLS responsibility. One of them relates to asylum and immigration. Actions which the Commission will take in this area are i.a., the evaluation of the implementation of the first phase instruments of the Common European Asylum System, with a particular attention to the situation of minors, and even more unaccompanied minors, in view of ensuring full protection of their interest and, if necessary, preparing proposals for amending the existing legislation. Also the financing programmes ERF, INT and ARGO could emphasise the protection of minors in their respective work programmes.