

Putting children's rights at the heart of decision-making in cases involving children on the move: gathering momentum in Europe



Reflections from the European Child Rights Helpdesk

Putting children's rights at the heart of decision-making in cases involving children on the move: gathering momentum in Europe

World Children's Day November 20, 2020

Introduction to the European
Child Rights Helpdesk

Introduction to the European Child Rights Helpdesk

With growing awareness of the importance of the rights of all children across Europe, no matter their circumstances, the European Child Rights Helpdesk aims to provide both concrete and strategic support to fulfilling these rights in their daily life.

The European Child Rights Helpdesk brings together non-governmental organisations providing legal information and assistance to children on the move in seven different countries in the European Union (EU), ranging across countries of entry, transit and destination for children and their families.

Its core aim is to ensure children's rights are at the heart of decision making in cases involving these children. Through capacity-building and training activities, the Helpdesk works to strengthen the knowledge of legal professionals and practitioners in partner organisations on the Convention on the Rights of the Child (CRC), the European Convention on Human Rights (ECHR) and EU law. The Helpdesk also facilitates information sharing on priority emerging issues and case law and exchange of good practices in providing legal support and assistance to children on the move.

Contributing to changes in law, policy and practice through EU advocacy

The Helpdesk aims to share its experience with policymakers and stakeholders across Europe to support:

- **Increasing access to child-friendly justice so children on the move can effectively claim their rights:** Access to justice must be made easier for children on the move and lawyers should not face the challenges they currently do to represent their child clients effectively.

- **Translating case law into improvements for all children on the move:** Case law should be translated into changes in law, policy or practice so as to ensure that migrant and refugee children's rights are respected.

- **Promoting Helpdesks to support children on the move:** Practical support is needed to help legal assistance providers bring children's rights into the heart of cases involving migrant children.

The European Child Rights Helpdesk partners include organizations providing legal information and assistance in Belgium (Vluchtelingenwerk Vlaanderen), Greece (Greek Council for Refugees, ARSIS- Association for the Social Support of Youth, European Lawyers in Lesvos), Ireland (Irish Refugee Council), Italy (Defence for Children Italy), the Netherlands (Defence for Children - ECPAT Netherlands), Poland (Association for Legal Intervention - SIP), Sweden (Swedish Refugee Law Centre) as well as Child Circle, a centre of expertise on child rights and EU child protection measures.

The European Child Rights Helpdesk benefits from funding from Dutch National Postcode Lottery and is coordinated by Defence for Children - ECPAT Netherlands.

Acknowledgements:

The development of the European Child Rights Helpdesk Reflection Paper has been led by Rebecca O' Donnell (Child Circle) with substantial contributions from Jyothi Kanics (Child Circle) and Jantine Walst and Veronika Pišorn (Defence for Children - ECPAT Netherlands). It is informed by the experience and work of the European Child Rights Helpdesk partners and draws from analysis and mapping undertaken by our partners.



Introduction

Across the countries covered by the European Child Rights Helpdesk, our partners are assisting children arriving in Europe, and the professionals working to support them, to secure their rights under the UN Convention on the Rights of the Child (CRC).

These children may be in Europe seeking international protection, reunification with their families, opportunities for education or work and some may arrive as victims of trafficking in human beings. Whether with their families or separated from them, the status of these children and their access to services are typically governed by a myriad of different laws and procedures, including those regulating asylum applications, protection for victims of trafficking and the granting of residence on humanitarian grounds, as well as removal and return. These children are referred to as “children on the move” throughout this paper. Under the CRC, the EU Charter of Fundamental Rights (EU CFR) and the European Convention on Human Rights (ECHR), EU States are obliged to fulfil all of the rights to which each of these children is entitled simply because they are children, regardless of their immigration status. These include their access to safety, adequate housing and medical care.

Supporting these children on the move and their families or guardians to access these rights, or assisting other organisations to do so, is at the heart of the work of the European Child Rights Helpdesk. The Helpdesk also aims to share its case experience with policymakers and stakeholders across Europe to contribute to changes in law, policy and practice.

Although there continue to be serious violations of the rights of children on the move and much progress still to make, we see that children’s rights are gaining a firmer foothold in recent years in international law and policy. These policies and guidance explicitly acknowledge that the best interests of the child should be considered as a primary consideration by decision makers, building momentum for progress. The recent EU

Migration and Asylum Pact states that “the reform of EU rules on asylum and return is an opportunity to strengthen safeguards and protection standards under EU law for migrant children”.

These commitments provide genuine momentum for improved child protection in Europe.

However, we share in the recognition of many stakeholders, including NGOs, IGOs and professionals supporting children, that there is often **a significant gap between overarching commitments on the one hand and the reality of the measures that are applied in practice.** Indeed, in circumstances when the numbers of arrivals fluctuate, policies or priorities change or public finances come under strain, these commitments can remain largely on paper, and deteriorate in practice. Furthermore, despite the welcome commitment to fulfilling children’s rights in the recently published EU Pact on Migration and Asylum, we also underline our serious concern that certain proposed EU measures, such as mandatory border procedures, may put children on the move at risk.

Our aim in this reflection paper is to contribute to and encourage the Europe-wide dialogue on achieving progress amongst policy makers, non-governmental organisations (NGOs) and international governmental organisations (IGOs), practitioners and academics.

The European Child Rights Helpdesk has identified four foundation stones necessary to ensure a robust and fair system which can ensure that the rights of children on the move are taken into account in administrative and judicial proceedings. Having compared challenges and practices in ensuring these foundation stones are in place, the partners have developed joint recommendations for a common agenda for change. Through our European legal framework, we believe **that policymakers and stakeholders can work together across Europe to achieve progress.** To this end, we share our recommendations on strategic lines of EU action, in the hope of fueling momentum for improvement.

Our key messages and pathway of the reflection paper

There is increasing recognition of children's rights in international law and policy concerning children on the move. This provides momentum for progress.

→ The international legal and policy context: a snapshot of key recent developments

The Helpdesk's casework with children and their families demonstrates the urgent need - and the possibilities - for bringing children's rights to the fore in decision making affecting them

→ Translating these commitments into practice: experience from the European Child Rights Helpdesk

Key foundation stones are necessary to create a robust and fair system of decision making for children on the move.

→ Children should have a pathway into justice; they should have proper legal assistance; they should be entitled to claim their rights as children; and the right procedures and decision making should lead to their rights as children being respected

Based on our Helpdesk experience we have identified key actions for an agenda for change

→ Across Belgium, Greece, Ireland, Italy, the Netherlands, Poland and Sweden, we share recommendations for key action as regards the foundation stones

By exploring new approaches and examining challenges, we seek to enhance the application of the CRC and its guiding principles in cases involving children on the move

→ Across the partnership countries, we share experience on how countries are taking a range of approaches to make significant changes in the law applying the CRC to children on the move

The EU can also play a significant role in helping us to make progress together

→ Our recommendations address three strategic lines of EU action which can promote progress across the EU

01

The opportunity for change presented by the international law and policy setting

For many years, decision making in cases involving children on the move has been approached through asylum and migration law and policy measures, which have focused primarily on the goals of immigration control, rather than the fulfilment of children's rights.

Indeed, frequently these measures were generally designed to address the situation of adult migrants. Where measures specifically addressed children, they largely focused on unaccompanied children. Such measures typically included the provision of immediate support and assistance and rules to determine which country should have responsibility for the child in the context of asylum and migration law. They did not take the allocation of parental responsibility and child welfare concerns as their starting point. Equally, few provisions expressly address the situation of children within families. The situation of children within families has often simply been subsumed into the situation of their parents, with the result that their particular needs and rights were not identified and considered properly.

The starkest exemplification of this discriminatory approach towards children on the move includes reservations and declarations initially entered by some countries to the application of the CRC to children on the move (for example, in the UK and Germany).

In recent years, however, there has been increasing recognition that State responsibilities to children on the move also flow from their obligations to protect, respect and promote child rights.

- Joint General Comments from CRC Committee and CMW Committee
- Explicit references to the CRC in EU law, with enhanced references to the best interests principle in proposals to amend migration and asylum measures from the Commission
- European Commission Communication on the protection of children in migration
- European Parliament's resolution on 30 years of children's rights, which "recalls that the best interests of the child should be a primary consideration in all decisions concerning children and migration"
- Jurisprudence of the European Court of Human Rights and of the Court of Justice of the European Union
- Council of Europe Guidelines on child-friendly justice

This authoritative guidance and related commitments clearly represent important momentum for progress in the field. As is reflected in the caseload of the European Child Rights Helpdesk partners, much work still is needed. Illustrative highlights of our experience are shared in section 4 below. We see that targeted actions to strengthen decision making systems are urgently needed to improve access to justice for children on the move. Moreover, as we will see in section 4, discussing a common agenda for change, there remains a manifest need to enhance the ways in which the CRC and its key guiding principles are explicitly recognized as relevant and applied in these cases.

02

Working to translate law and policy into practice

Many stakeholders, including IGOs, NGOs and practitioners, have been working towards ensuring that the CRC, as well as related laws and policies, are being translated into practice in Europe. European Child Rights Helpdesk partners receive calls from children on the move, their families, guardians and legal advisers as regards issues they encounter and challenges they are facing. They work to put children's rights at the centre of their submissions in relation to children.

In their every-day work, the Helpdesk partners function as "antennae" on what issues might need to be addressed in EU or national law, policy or practical measures of support. The European Child Rights Helpdesk gains experience and insights into specific issues which children on the move confront. These include questions concerning family reunification, detention, Dublin transfers, age assessment, access to reception, health and educational services, and many more.

Family reunification

The Swedish Refugee Advice Centre has acted in several cases concerning family reunification. One case concerned six children from Somalia, who were appealing the rejection of their application to be reunited with their mother residing in Sweden. It also helped two boys from Syria to appeal a rejection decision concerning a request to reunite with their mother in Sweden. The Centre has also acted in other cases where children have been granted residence permits, but one of the parents has been denied, for instance in a case concerning a woman from Afghanistan and a man from East Africa. In both cases an application was handed in arguing the negative impact for the children if they are separated from the parent in question and their right to family life with both parents. In the first case, the mother is now in Sweden; the latter case had a negative outcome.

Access to appropriate accommodation

Following the introduction of Covid 19-related measures in Ireland and their impact on families in

migration, the Irish Refugee Council represented many people in re-accessing accommodation, or in seeking transfers to suitable accommodation. For example, one mother and daughter were living temporarily in over-crowded accommodation while they awaited the birth of the woman's second baby. The Irish Refugee Council represented them in being re-accommodated in family accommodation together with their father.

Experience from cases also reveals information on more general procedural issues relating to access to justice. For example, children on the move can be effectively cut off from the justice system (e.g. children in age assessment disputes, hotspots, at disembarkation points or in protective custody).

Protective custody

A 16-year-old separated boy from Syria entered Greece as an unaccompanied minor, where he finally joined his brother's family in Katerini. ARSIS made a legal request so his brother could take over his guardianship (civil law) from a government-appointed guardian. Court proceedings took place in Katerini, where custody was finally assigned to his brother. This was essential in order to avoid the boy being detained under protective custody in a police station. Additionally, his brother can now make every legal action needed for his well-being. The assignment of custody to his brother should also benefit him under the Greek Asylum legislation.

Procedural Delays

ELIL provided assistance to asylum seekers including children, alleged children and vulnerable individuals, who arrived in the last 10 days of March 2020. The applicants were put in unofficial quarantine of 14 days upon arrival, which eventually lasted for more than 28 days. They were not even able to lodge their intention to request asylum, and were stranded without access to migration procedures. During this period ELIL sent ongoing reports questions to the police requesting information on their situation and rights. ELIL

requested that the applicants be able to continue with the procedure and to register at least their intention to request asylum. Without an answer from the authorities, ELIL finally submitted a report to the Ombudsperson and the Ombudsperson For Children's Rights in April. The persons of concern were, finally, taken to the reception centre in Moria and their registration process was started by the authorities in May.

Quality legal assistance is not always available to children on the move. Moreover, we have seen that children cannot always rely on their rights as children in procedures involving them.

Lack of information and assistance

A person called the helpdesk of Vluchtelingenwerk Vlaanderen because she had met a young Afghan boy of 14-15 years old who just arrived in Belgium and who wanted to ask for international protection. She called the Immigration Office on how to proceed. The response at the time was that there was currently no access to the arrival centre and that she should contact Vluchtelingenwerk Vlaanderen Flemish Refugee Action.

The helpdesk was surprised at the absence of basic information provided by the Immigration Office. It immediately advised her about an online form to ask for an appointment to request international protection. It also explained that (at that time) everyone who want to request asylum needs to ask an appointment first, but that the rules on unaccompanied children had changed to ensure that they could in fact go without appointment to the arrival centre. It also informed her that unaccompanied children must always be notified to the guardianship service. The helpdesk subsequently received confirmation that the boy had been able to go to the arrival centre and was directly provided reception.

He was then sheltered in an observation and orientation centre.

Furthermore, procedures frequently do not address the needs and rights of children.

A boy with a disability receives a residence permit on humanitarian grounds

In 2014 S., a 13 year-old boy fled his country of origin with his siblings and parents, because his older brother's life was in danger - he was at risk of being drafted to the militia or killed should he not obey. S has cerebral palsy and uses a wheelchair to move around. He is a bright and sociable boy, has only ever Polish schools and he identifies with Polish culture. After several failed asylum procedures, the Border Police initiated the deportation process for S. and his family. This is when S's family contacted SIP's helpdesk. The authorities failed to interview him because of his disability, nor did they examine how the deportation decision would impact his well-being or give due weight to his best interests in their decision making.

The helpdesk lawyer's task was to make the decision makers see the boy as an individual with his own rights and a child whose best interest has to be determined before any decision can be made in his case. After an appeal, and the case being returned back to the first instance body, the boy was finally interviewed, evaluated by a psychologist and granted a residence permit on humanitarian grounds.

Equally procedures may provide only limited outcomes (e.g. temporary residence status with limited entitlements), which are typically available under asylum and migration laws and policies. Such procedures may not be able to deliver comprehensive, secure and sustainable solutions for unaccompanied children or ensure family unity or security for children in families. Procedures should in fact ensure that the entire situation of the child and the family is always reviewed so as to find the right outcomes for them.

Child victim of trafficking allowed to remain despite Dublin claim

In 2014, a 4-year old girl and her parents fled their country of origin and arrived in the Netherlands. They became victims of human traffickers and were exploited while working on a farm. During this period, the girl was sexually abused by the human trafficker. After several months, the parents escaped together with the girl. After applying for asylum in the Netherlands, the authorities claimed that the family should be transferred to another EU Member State to hear their asylum claim, because they were in the possession of a visa for that country. However, the parents did not want to leave the Netherlands, because their daughter was treated by a gynaecologist and by a children's doctor in a hospital there. However, their lawyer indicated that nothing could be done to prevent their transfer.

The child rights helpdesk of Defence for Children-ECPAT Netherlands was the first organisation to pick up the signals that this family might be a victim of human trafficking. Before this family was referred to the helpdesk by another NGO, nobody had paid attention to the fact that the child was seeing a gynaecologist or investigated the reasons for this. The child rights helpdesk called the parents of the girl by phone, together with an interpreter, so that they could speak freely and tell their story. The helpdesk found another lawyer for the family who advised the family to report to the police that they had been victims of human trafficking. The parents indicated that they did not dare to go to the police station on their own. After mediation by Defence for Children-ECPAT Netherlands, a representative of the Dutch Refugee Council was willing to accompany the parents to the police station. Defence for Children-ECPAT Netherlands contacted the human trafficking unit of the police. The report of the parents was taken seriously by the police and they were granted a temporary residence permit. The transfer was cancelled.

Defence for Children-ECPAT Netherlands continued to support this family in relation to their procedure for a residence permit. The helpdesk wrote a

children's rights report which drew attention to the fact that the immigration authorities had not paid attention to the situation of the girl and did not take her interests into account. At the hearing, the Immigration and Naturalisation Service withdrew their decision to reject the application.

In exceptional circumstances, the child may become embroiled in criminal law proceedings without properly taking into consideration their circumstances and best interests.

Criminal law proceedings

In November 2019, a case was referred to Arsis by the former Ombudsman of Child. It involved a 12-year-old Afghan girl (child within family). She was accused by the public prosecutor of illegally trying to exit Greece in violation of penal and refugee law. More specifically, the girl tried to travel to her mother in Germany despite not having the necessary legal travel documents. The girl and her father's claim for family reunification with the mother in Germany had been previously rejected by the public prosecutor.

A criminal conviction would have negatively impacted the child's application for international protection. ARSIS represented the girl before the Court, submitting to the Court that this particular behavior of a child should not be judged a criminal offence under Greek Migration Law.

The Court accepted our arguments and considered the girl's behaviour to be an emergency situation, as defined under Greek law. As a result, the court of minors decided that the girl was not guilty of the offence of illegal exit.

03

Foundation stones for a robust and fair system of decision making for children on the move



Looking across this caseload, the European Child Rights Helpdesk believes that it is vital to work towards achieving a robust and fair system to ensure the rights of children on the move can be examined and fulfilled by administrative and judicial decision makers. We believe four key foundation stones are essential to building or strengthening this system:

1) A clear pathway for migrant children into administrative and judicial proceedings:

Children on the move should have information and support in order to be able to access justice proceedings to claim their rights to services and status determination. They should not be invisible to the system.

2) Access to proper legal assistance and representation:

Children on the move, whether unaccompanied or within families, should have access to quality legal representation. Lawyers should have the right qualifications and support.

3) The ability to claim their rights as children under the CRC:

All children on the move should be able to claim the full range of their rights under the CRC, including access to accommodation, education and health services

4) Child-centred procedure and decision making must be in place:

Child-centred and child-sensitive procedures and decision making should ensure that procedures are appropriate for children in terms of both the way in which they operate and their ability to deliver outcomes in line with the rights of the child under the CRC.

The European Child Rights Helpdesk developed a framework of questions around the foundation stones which allows us to:

- Share experience between partners and spot trends across our countries
- Create a common agenda for change and identify priority actions

In the future, the European Child Rights Helpdesk aims to continue to use the foundation stones to:

- Identify challenges and progress in how the rights of children on the move are fulfilled in decision making
- Encourage improved practice for professionals working to enhance children's access to justice



04



Whether the foundation stones for a robust and fair system of decision making for children on the move are firmly in place depends on both the regulatory environment (policy and law) and practice (including the knowledge, attitudes and skills of relevant stakeholders and decision makers).

Looking across our partner's experiences in Belgium, Greece, Ireland, Italy, the Netherlands, Poland and Sweden, we found both significant challenges as well as good practices. We share some illustrative highlights below, before turning towards our common agenda for change.

1. Pathway to justice

A clear pathway to justice begins with child-friendly information, robust vulnerability screening, proper identification and referral to appropriate supports and procedures. In practice, this means that children on the move are identified as children and that it is determined whether they are separated or with family and whether they have any special needs. Furthermore, all children, whether separated or not, should be provided with information on their rights and relevant procedures. In assessing whether there is a well-defined and accessible pathway to justice in their national contexts, Helpdesk partners exchanged experiences regarding the first encounter that children on the move typically have with the authorities. They considered

Towards a common agenda for change: highlights from the experience shared by the partners of the European Child Rights Helpdesk

whether these measures, special assistance and support) vary significantly for separated children versus children in families. In this regard, Helpdesk partners also examined respect for freedom from detention and whether children and families in more restrictive settings faced greater barriers in accessing information and procedures.

A wide range of challenges were identified that prevent children on the move from accessing justice and appropriate procedures. In some cases, this included the need to improve vulnerability assessment, identification and referral to assistance and support. In particular, the use of detention, for example, for age-disputed individuals at the border, raised serious concerns and often prevented access to information and legal assistance. Many gaps were identified in national age assessment practices such as: lack of support from a guardian, lack of legal aid and assistance, lack of an effective remedy or appeal mechanism and the need for a multidisciplinary approach. In cases where children were recognised as separated and appointed guardians, there was often varying quality reported and calls for further training and quality standards to be put in place for guardians. Lack of child-friendly information on rights and procedures in different languages was also highlighted as a significant gap, as well as the limited scope and inadequate quality of information provided. For example, some children indicated that they did not know what was expected from them during the asylum interview. Additionally, children in families often remain unheard as they are treated as merely an

appendage to their parents and denied the right to make their own independent application for international protection.

On the other hand, noteworthy good practices were also reported, such as the systematic appointment of a guardian in the Netherlands from first encounter and the involvement of the guardianship service in Belgium. In Sweden, information is provided to children within families and individual assessments are carried out to identify what kind of supports should be in place. Cultural mediators can also play a key role in countries such as Italy in providing information and guidance to children and families, although they are not always available in practice.

Towards an Agenda for Change

Robust vulnerability screening: Helpdesk partners recommend developing and implementing a specific screening tool to identify vulnerabilities of children on the move. Such a vulnerability assessment tool should consider children's special reception and procedural needs.

Provision of child-friendly information: Children should be provided with information about relevant procedures (e.g. asylum, residency, foster care and age assessment) and services available in a child-friendly, age-appropriate format and in a language that they understand. Information

leaflets should also be provided to children within families. When possible, practitioners could also use explanatory videos and apps to convey useful information.

Respect for freedom from detention: In the short-term, where detention exists, children and families, as well as age-disputed individuals, should be provided with free legal assistance. Governments should be encouraged to implement alternatives to detention.

Support from qualified professionals: Unaccompanied and separated children should be appointed qualified and trained guardians as soon as possible. Persons working with children and families should participate in regular trainings and have access to specialised courses, appropriate support and practical guidance.

Safeguards when age assessment is deemed necessary: Age assessment should only be carried out in cases of serious doubt. The procedure should be holistic and not limited to medical examinations. The benefit of the doubt should be applied and any margin of error applied to the benefit of the individual concerned. The individual should have the support of a guardian as well as legal assistance and be able to seek an effective remedy from a statutorily-based independent appeal mechanism.

Access to asylum for children in families: Accompanied children should have a clear right to apply for international protection independently of their parents' claims.

2. Access to quality legal assistance

The right to legal aid and access to quality legal assistance, including child-friendly procedural information, are important safeguards for children on the move. Depending on the national system, legal assistance may be provided by different actors such as a legal aid lawyer, a law clinic, NGO legal advisor, pro bono lawyer or by the

child's guardian when they are a qualified lawyer. Helpdesk partners noticed significant gaps in access to quality legal assistance. Worryingly, in some countries, there is a lack of legal aid for important procedures, such as family reunification. In other cases, social workers or guardians do not actively refer children or family to legal aid and assistance. In some cases, children are sometimes informed of the acceptance of their applications for free legal aid and the appointment of a lawyer for appealing decisions a few days before the court hearing. This fact significantly and substantially diminishes the value of the legal assistance. As noted above, placement of migrants and asylum seekers in restrictive settings such as hotspots, "protective custody" or detention also greatly limits the ability of legal aid providers to offer advice and counsel. More generally across countries, there is also a real need for more specialised training for legal advisers.

However, there were also several good practices exchanged by Helpdesk partners. For example, in Belgium, there is a clear entitlement for legal aid and a specialised service within the Brussels bar for providing legal assistance and representation for unaccompanied children. In Sweden, the Migration Agency is due to issue new instructions on the qualifications needed in order for the Agency to appoint a person as legal counsel.

Towards an Agenda for Change

Clear entitlement to legal aid in the law

Provision of legal assistance by an independent qualified lawyer

Legal aid available for all relevant procedures, e.g. age assessment and family reunification

Training: Legal representatives need to be trained on the CRC and how to use its provisions in their work. States should ensure that all professionals having direct contact with children receive specialised training on how to communicate with them at all ages and stages of development,

and with children in situations of particular vulnerability.

Additional supports: Guarantee in all judicial and administrative proceedings on the presence of an interpreter as necessary and greater availability of cultural mediators.

3. Claiming their rights as children

Children on the move should have a clear entitlement to claim the full range of their rights under the CRC. Pending decisions on their status, children should not suffer from lack of access to accommodation, education and health services. These are crucial to their wellbeing and their development, wherever their future lies.

However, it remains the case that many children on the move only have an explicit entitlement to the sometimes limited provision of key services under migration control measures. Indeed, access to services for children on the move may vary depending on the particular instruments that apply to them. Challenges arise from the fact that there may be a lack of an explicit, effective legal obligation to respect the CRC in all procedures concerning children on the move. And even where legal entitlements exist, children on the move may suffer from being placed in disadvantaged areas, which leads to discrimination in terms of the resources and services available to them.

Furthermore, children may lack sufficient avenues to exercise their CRC rights to effective remedies on a local, national and international level. For example, there may not be any national complaints mechanism for children in place. The Ombudsperson for Children may not be provided with the mandate and resources to receive individual complaints.

The Helpdesk partners also shared some good practices including access to the same education services for children on the move as national children and access to healthcare for all children on the move in Belgium, Ireland and Sweden.

We also saw the active implication of Ombudspersons for Children in promoting the rights of children on the move. For example, the Ombudsman for Children in Ireland has investigated complaints relating to children seeking international protection and identified that children who were living so-called "Direct Provision" accommodation for asylum-seekers. Direct provision involves providing asylum seeker residents with accommodation free of charge and a small allowance, meaning that children and families are living in institutional settings, typically with limited choices over their basic living conditions, including the food that they eat. The investigation found that these children "needed positive change in the realization of their rights". The Ombudsman heard directly from children on their experiences of inclusion and exclusion within their accommodation, school, local community and wider Irish society, documenting those experiences in "Direct Provision", and advocating for improvements.

Towards an Agenda for Change

- **Same entitlements in general law for children on the move as national children**
- **Explicit entitlement to all services for all children on the move in asylum and immigration measures**
- The best interests principle should be recognized as a substantive basis for children's claims
- **Measures to strengthen access to rights (non-discrimination)**
- The rights of children on the move and participate in society to be heard should be bolstered
- **Child-specific mechanisms to claim rights as children (e.g. national children's ombudsperson)**

4. Child-centred procedures and decision making

Child-centred and child-sensitive procedures should be in place to ensure that procedures are appropriate for children in terms of the way in which they operate. Decision makers should also be in a position to deliver outcomes in line with the rights of children under the CRC, including comprehensive, secure and sustainable solutions. Outcomes should not be limited only to those traditionally available under asylum and migration (e.g. temporary residence status with limited entitlements), but should afford children the possibility to exercise all of their rights.

The Helpdesk partners see a number of challenges in this regard. It includes the end of support and assistance to unaccompanied children when they turn 18. If children age out during procedures, their rights as children may be extinguished, even when procedures have been protracted and drawn out over years for reasons outside their control. They sometimes need to choose between international protection and durable solutions procedures, which means that, if their international asylum claim is rejected, alternative legal pathways to remain in a country may not be examined properly.

We also see that consideration of child-specific persecution and to the best interests of the child is in practice more automatic in procedures relating to unaccompanied children and less when it concerns accompanied children. Moreover, child-specific persecution or experiences of persecution are not always properly recognised. In decisions concerning the potential return of unaccompanied children there is sometimes a failure to examine the individual circumstances of the child properly and, rather, their best interests are systematically equated with family reunification in the country of origin.

The Helpdesk partners were able to identify some good practices. For example, Swedish authorities are obligated to perform child impact assessments before a decision is taken.

Nonetheless, it is not always clear how the best interests has been taken into account, as decisions are not sufficiently individualized, nor sufficiently reasoned. The Swedish Migration Agency recently published a legal position on the examination of the best interests of children. It aims to provide general process-wide legal guidance to the Migration Board's operational activities regarding the rights of the child with the rights of foreigners and on how to conduct a legally certain examination of the child's best interests (Legal Position Examining of children's best interests 009/220). Other good practices include the fact that there is more attention to child-specific forms of persecution in the Netherlands. Durable solutions procedures are in place in Belgium, even if they need improvement. In Italy, when an unaccompanied child turns 18 needs a prolonged support aimed at the success of their integration path undertaken to gain autonomy, the juvenile court can order a continued support from services from 18 to 21 (at the request of social services).

Towards an Agenda for Change

- **Best interests procedure to be applied in all decisions for all children**
 - **Multidisciplinary approaches should be applied**
 - **Increased specialisation of case workers (e.g. training of country of origin/child-specific issues)**
 - **Adapted procedures in cases involving children (improving interview process with children and due consideration of their views)**
 - **Support and entitlements for individuals who have aged out**
 - **Training for judges**
 - **Oversight and quality assurances over decision making**
-

5. New approaches and continuing obstacles: applying the UN CRC to children in migration

The exchange within the European Child Rights Helpdesk brought into focus a number of significant developments across the EU concerning the implementation of the guiding principles of the CRC, in particular of the best interests of the child as a primary consideration in all actions concerning children on the move.

We have seen a number of different approaches across Europe, which can help ensure that the rights of children on the move are properly anchored in the national legal systems.

General Comment No 14 of the Committee on the Rights of the Child underlines that the best interests of the child is a threefold concept: a substantive right, a fundamental interpretative legal principle and a rule of procedure. However, the principle, which is contained in both the CRC and the EU Charter of Fundamental Rights, in practice runs into a number of constraints, whilst also finding diverse channels for its application. In some countries, it has not yet been recognised as being directly applicable, or has been criticised as a vague principle, which cannot be applied rigorously to the individual circumstances of a child's case. However, in other countries or settings, it is emerging as a key tool through which to assess an individual child's circumstances and the specific rights at stake.

In recent developments in partner countries, we have seen that the best interests principle as far as it applies to children on the move has been reflected in the enactment of new laws concerning children on the move (e.g. Belgium, Greece and Italy), transversal measures on children's rights which also affect children on the move (e.g. CRC incorporation in Sweden and constitutional amendments in Ireland), and important judgments

on the best interests principle (e.g. in the Netherlands and in Ireland).

New laws which have been enacted, in particular as regards unaccompanied children in Italy, contain strong safeguards. They are in the process of being implemented and still require significant resources. So, although they establish important provisions, their impact remains to be seen. Already, DCI Italy identified particular needs for improvement, including in procedures in age disputed cases and in relation to family tracing (with few children being informed of the possibility). In Greece, while recent laws relating to age assessment and guardianship appear positive, they have yet to be implemented. Moreover, recent amendments to the Greek asylum law risk negatively impacting children's rights. For example, amongst other things, under the new asylum law, it is permissible for the authorities to put unaccompanied children in a closed camp, and the humanitarian status residence permit for the asylum seekers has been abolished (which has a strong impact on the children's asylum cases).

In Belgium, there is a specific procedure for unaccompanied children who are not seeking asylum, which requires the migration office and the guardian to review which durable solution is in the best interests of the child. Family reunification is given preponderant weight however, with room to develop better procedures for review. In cases of asylum, both accompanied and unaccompanied children can be heard, and authorities may take separate decisions for children within families.

In the Netherlands, in the past, the bar on fulfilling the principle was set very low, with Dutch policy reflecting the notion that the best interests' principle does not "contain a norm which is directly applicable without elaboration in national law or policy". This position will likely give way under the pressure of recent developments and, in particular, in light of European jurisprudence in the field, which have begun to reshape Dutch law. This has led to a new legislative proposal by two parliamentary parties to introduce a new ground to grant a residence permit because the best interests of the child warrants it. The draft law emphasises the need to safeguard the child's

development, and avoids return where the child's development would be at risk.

In Ireland, a referendum in 2012 brought a new constitutional provision on the rights of the child with the application of the best interests principle explicitly recognised in limited procedures only, such as child protection applications and parental custody cases. Court proceedings delayed its implementation and these changes were signed into law on April 2015. Although a new International Protection Act 2015 came into effect in December 2016 and brought with it improvements for family reunification, the best interests principle was not explicitly indicated to be an overarching requirement.

A recent decision considered the extent to which the Irish constitutional amendment altered the balance of rights in the situation of a proposed deportation. However, the court of appeal stated that Article 3 CRC is not part of Irish law and that there is no requirement to take the best interests as a primary consideration under Irish law, but rather to take due account of the child's welfare and best interests. This is a fairly circumscribed view of the application of the best interests principle, with the court specifically ruling that that deportation decisions under Irish law were not ones to which the EU Charter of Fundamental Rights applies. (The EU Return Directive, the application of which does require respect for the EU Charter of Fundamental Rights, does not apply in Ireland.)

Sweden has seen an important recent development with the capacity for significant change. Following a decision from the Swedish parliament 2018, the CRC is incorporated into national law since January 1, 2020, which is a welcome development. It nonetheless remains to be seen how it will affect change in the field of migration, in particular, the extent to which it will provide impetus for a more holistic view of the rights of the child and their situation, as well as their right to be heard.

In cases in Sweden involving children, both a child-focused conversation with the parent or other guardian should be held and a conversation with the child him- or herself (with the consent

of the guardian). This applies both to cases of normal review and to cases dealt with by the Dublin Unit.

Consequently, the child's right to be heard is given significant weight and an assessment that it is inappropriate for the child to be heard can only be considered if the child does not wish to participate in the examination. The purpose of the conversation is to obtain information from the parent/guardian about the child. The conversation addresses the child's health and briefly the child's own and/or child-specific reasons for asylum (if it is a normal case) or reasons against being transferred to another Member State (if it is a Dublin case). Child-focused conversations should always be conducted, whether the Swedish Migration Agency talk to the child or not. If there are several children in a family, a conversation should be held individually for each child.

As already referenced, there also exists an obligation in Sweden to consider the rights of the child in claims for international protection. However, there is a negative and constrained view by the authorities of how thorough a best interests assessment should be. Moreover, decisions are frequently criticised by NGOs and lawyers on the ground that they are insufficiently reasoned. It will be important to see whether the recent incorporation of the CRC into Swedish law will lead to a fuller, more holistic approach towards fulfilling children's rights. It is worth noting that an ongoing review is considering the extent to which Swedish laws comply with the CRC.

The Helpdesk partners will continue actively to share these developments, which reflect different ways to provide a strong mechanism for the application of the CRC to cases involving children on the move.

05

Shifting the paradigm: looking to the future



We recommend three important lines of action to fuel momentum to work together on our agenda for change. We believe strategic actions at the EU level have an important role in this regard.

1. The rights of children on the move should be explicitly included in broader measures on children generally.

In particular, they should be supported the mainstream national policies (e.g. providing for equitable treatment and care or families with equitable social welfare benefits). Children on the move should not be relegated to a parallel, often under-resourced and discriminatory, system for migrant children. The European Child Rights Helpdesk believes that achieving this should greatly reduce the need for children and families to litigate to access their entitlements.

Role of the EU: *In its upcoming EU Strategy on the rights of the child, the EU has the opportunity to promote the recognition of children on the move in national child rights policies. An emphasis on the inclusion of children on the move, also in national child guarantee schemes, will be vital. And the EU Child Rights Strategy should also focus on ensuring children on the move have access to channels of participation at EU level, particularly on issues in which the EU has a unique role, such as cross-border family reunification or relocation within the EU.*

2. Comprehensive measures are needed in law to achieve a robust and fair system for decision-making in all cases concerning children in migration. Without this, children on the move's entitlement to their rights cannot be claimed and fulfilled in practice.

A robust and fair system requires specific improvements to ensure each of the foundation stones are present. Without each of these elements firmly in place, there can be no guarantee that the best interests of the child are duly considered and that States are fulfilling the children's basic rights, such as access to reception, health and education, and even less guarantee that they are taking proper decisions, which will profoundly affect the lives of these children, from family reunification to durable solutions.

Role of the EU: *The ongoing reform of EU migration and asylum instruments provides a significant opportunity to ensure that all children on the move, of all ages, including children travelling alone and with families, can access decision making which can fulfil their rights.*

EU law- and policy-makers must ensure a comprehensive, child rights-based approach, rather than limited, piecemeal improvements (such as strengthening guardianship or legal assistance for some children e.g. for those seeking asylum but not others, e.g. those who have been trafficked or who are facing return decisions). They must provide for consistent procedural safeguards for all children in decision making affecting them, across the different EU measures which apply (including in any screening, border, asylum, anti-trafficking and return instruments).

Furthermore, the EU must not pay lip service to the rights of children on the move, while permitting or facilitating hostile and punitive general procedures that risk violating their rights, including detention at the border.

3. Forging better practice in child-centred decision-making processes must be an EU priority.

There is an important need - and opportunity - to strengthen the sharing of experience on practices and case law across Europe in relation to child-centred decision making. We must work harder to connect the "dots" that already exist in this regard, through concerted efforts to enhance the development of specialised knowledge and resources and make them available across Europe. Multidisciplinary approaches to assisting the child and examining their best interests should be shared and promoted across countries. Jurisprudence from the national and European Courts, as well as decisions from the Committee on the Rights of the Child in response to complaints, should be an engine for progress and the authorities should better translate them into systemic changes.

Role of the EU: *We urge the EU to take specific action under its new EU Strategy on the rights of the child to strengthen the competence of*

professionals in the field and a child-centred approach to decision-making involving children generally.

A focus in the Strategy on further promoting the Commission's principles on integrated child protection will be important to encouraging multidisciplinary approaches to examining the best interests of children on the move.

More broadly, the EU Child Rights Strategy can do much to change understanding and decision making that affects them and the importance of specialised support and child-sensitive procedures.

We also urge the Commission in its review of the implementation of the Communication on the protection of children in migration to prioritise action to improve decision-making through further dissemination of regional materials of support for policy makers and practitioners. These include guidance and handbooks from EASO and the Fundamental Rights Agency on best interests, age assessment and guardianship. EU resources should also be earmarked specifically to achieve better practice through the development of new tools and training, and creating platforms for exchange

As important change is discussed and implemented across Europe in the coming years, the European Child Rights Helpdesk will continue to share experience from the partnership, consider how the EU can take actions to achieve the recommendations in our agenda for change and monitor progress.



World Children's Day, November 20, 2020