

SAVE THE CHILDREN'S COMMENTS ON THE COMMISSION'S PROPOSAL FOR THE REVISION OF THE DUBLIN II REGULATION

Introduction

Save the Children Europe Group (hereafter Save the Children) welcomes the significant and necessary improvements in promoting the rights of children and ensuring their protection, contained in the Commission's proposal for the revision of the Dublin II Regulation.

Save the Children encourages the European Parliament and the Member States *both* fully to support these revisions *and* to achieve some further progress necessary in key areas. We refer to our detailed comments on the revision of the Dublin II Regulation published before the adoption of the proposal which can be found at http://www.savethechildren.net/alliance/europegroup/europegrp_pubs.html.

Here we focus on a number of core key issues, including:

- (a) the definition of family members;
- (b) Article 5 Personal interviews;
- (c) obligations in relation to guardianship and legal representation;
- (d) Article 7(3) and the hierarchy of criteria;
- (e) Article 8 unaccompanied minors: the provisions for reunification with a relative; the Member State in which the asylum seeker most recently made an application; the need for formal procedures to assess best interests;
- (f) age assessment and the provisions of the Procedure's Directive in this regard; and
- (g) obligation not to transfer of an unaccompanied minor (separated child) prior to an appeal.

1. Support for Improvements in the Commission's Proposal

To begin with the positive aspects, Save the Children very much welcomes the fact that the Commission Proposal significantly improves the child specific provisions of the Regulation, including:

- the UN Convention on the Rights of the Child (UN CRC) and the EU Charter of Fundamental Rights are referenced;
- the Reception Directive will apply to persons falling within the scope of Dublin II Regulation;
- specific "guarantees for minors" are established, including the obligation that the best interests of the child shall be a primary consideration for Member States with respect to all procedures under the directive, detailing factors to be taken into consideration as regards best interests, as well as a recognition of the right to be

- heard; the guarantees also include an obligation to establish family tracing procedures;
- a definition of a “minor” as a person below the age of 18 is included;
 - there are some improvements to the definition of “family members”;
 - there is some improvement in the definition of “unaccompanied minor” through the removal of its limitation to unmarried minors;
 - there is a clearer recognition of the principle of family unity;
 - the best interests of the child is a guiding concern in determining which Member State should examine their claim; essentially the Member State responsible for determining the claims of unaccompanied minors is identified by reference to the Member States in which family members or relatives are legally present, or absent family members or relatives, the Member State in which the unaccompanied minor has most recently made an asylum application, *provided that this is in the child's best interests in each case*;
 - Article 7(2) provides that the determination under Article 8 will be made on the basis of the situation obtaining at the time that the most recent application has been made;
 - there are improved information obligations, including an obligation to provide information in a manner appropriate to the age of the applicant;
 - there is a recognition that the situation of children should be indissociable from that of its parent or guardian but only provided that this is in the child's best interest;
 - detention of unaccompanied minors is prohibited and detention of other minors can take place only if it is in their best interests;
 - there is a provision for exchange of information between Member States to ensure that receiving authorities are in a position to provide an applicant with adequate assistance, having regard to their needs;
 - there is a possibility to suspend transfers pending appeal of Dublin II decision; and
 - there is a possibility for free legal assistance on appeal of Dublin II decision.

2. Priorities for Further Amendments

Key outstanding issues for the European Parliament and Council to address in relation to child rights are as follows:

(a) Definition of Family Members

Article 2: Definition of family members: the limitation of “family members” by the term “insofar as the family already existed in the country of origin” means that children born in countries of transit or in countries of destination are simply not identified as family members and therefore Member States are not obliged to treat them as family members. Equally, children born of couples formed outside the country of origin may not be recognised as family members of minor applicants.

It is not clear what legitimate justification exists for depriving a child of the right to have its relationship with its family recognised and respected. We recommend deletion of the limitation.

(b) Article 5 Personal Interviews

We recommend that Article 5 refer to the safeguards needed when interviewing minors and will refer to our comments in relation to the Procedures Directive in that regard and a reference to the revised Procedures Directive may be appropriate in due course. More generally Article 5(4) could include the addition that “*interviews of minors will take place only under child friendly conditions.*”

(c) Appointment of a Guardian and a Qualified Legal Representative

Article 6(2): Save the Children believes that every separated child who arrives in the EU should be appointed an independent guardian who has powers to represent the child’s best interests in order to ensure that their welfare and protection needs are properly safeguarded within the context of the asylum determination and immigration process and that their support and care needs are met by all responsible agencies.

We believe the Reception Directive should include a definition of the qualifications and role of a guardian based on General Comment No. 6 and the SCEP Statement of Good Practice in the following terms:

“A guardian should be appointed to advise and protect the separated child and to ensure that all decisions are taken in the child’s best interests. A guardian should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded and that the child’s legal, social, health, psychological, material and educational needs are appropriately covered. Agencies or individuals whose interests could potentially be in conflict with those of the child’s should not be eligible for guardianship.”

The revision of Dublin II recognises that the Reception Directive applies to persons falling under the Dublin II Regulation (preamble 9). We would welcome express recognition in Article 6(2) of the revised Dublin II Regulation that the *guardian* appointed by virtue of the revised Reception Directive should represent and assist the unaccompanied minor with respect to all procedures provided for in this Regulation.

As well as the appointment of a guardian, a legal representative should be appointed to advise the child on his or her rights and the procedures associated with those rights, including asylum procedures, any other protection procedures and return procedures under national law. Such representative should have the necessary knowledge of the special needs of minors. Such legal assistance should in general be provided free of charge.

Consequently, we recommend the inclusion of the following provision, in place of the current proposal for Article 6(2):

Member States shall ensure that the guardian of an unaccompanied minor as referred to in Article [] of Directive [] laying down the minimum standards for the reception of asylum seekers shall represent and and/or assist the unaccompanied minor with respect to all procedures provided for in this Regulation. In addition, a qualified legal representative should be appointed free of charge, to assist the child during the

procedure, such representative having the necessary knowledge of the special needs of minors.

(d) Hierarchy of Criteria

Although we welcome the improvement contained in Article 7(2) that “ the Member State responsible ... shall be determined on the basis of the situation obtaining when the asylum seeker lodged his/her most recent application for international protection” , we would seek an amendment to refer to “.. *the situation obtaining at the time of determining the Member State responsible under this Regulation.*” We would also seek deletion of the sentence “this paragraph shall apply on condition that the previous applications of the asylum seeker have not yet been the subject of a first decision regarding the substance” or in the alternative, the addition of the phrase “*save if such decision has been taken in his or her absence*”.

(e) Article 8 Unaccompanied Minors

Reunification with a Relative

Article 8(2): We recommend that reunification with a relative who can take care of [an unaccompanied minor] should take place when this is in the best interests of the minor “*and based on the consent of both the minor and the relative*”, and thus recommend inclusion of this latter condition.

Most Recent Application

Article 8(4): we recommend that any asylum application that a child makes post the initiation of a Dublin II determination should be taken into account (taking into consideration that a child may fall within the Dublin II procedure prior to making an asylum application in the determining Member State). We therefore recommend the following amendment:

“In the absence of a family member or of another relative, the Member State responsible for examining the application shall be that where the minor has lodged his or her most recent application for international protection, including any application made in the determining Member State during the procedures under this Regulation, provided that this is in the best interests of the minor.”

Formal Procedure for Best Interests Determination

We recommend the inclusion in Article 8 of a formal and documented procedure for determining the best interests of the child in the context of Dublin II decisions. Absent such an obligation, it is not evident that there will be a proper and careful consideration of the factors to be taken into consideration in the individual circumstances of each child. We recommend inclusion of the following provision:

An unaccompanied minor should benefit from a formal procedure determining in what Member States his or her claim for asylum should be heard, taking as a primary consideration the best interests of the child.

(f) Age Assessment

Article 8: We recommend inclusion of an obligation on the Member State carrying out the process of determining the Member State responsible under this Regulation to establish for itself whether a child is in fact a minor for the purposes of the procedures under the Regulation; however we urge that this also be done by reference to the age assessment procedures contained in the Procedures Directive in this regard.

In the context of the Dublin II revision, we recommend inclusion of the following provision:

“For the purposes of applying the principles and criteria set out in Articles 6 and 8, in cases of a well founded doubt about whether an individual is a minor, a Member State carrying out the process of determining the Member State responsible under this Regulation should itself establish the age of the individual through the procedures as provided for under Directive [] on minimum standards on procedures in Member States for granting and withdrawing refugee status. No transfer of the individual should take place pending such assessment or appeal thereon.”

For the purposes of the revision of the Procedures Directive and in relation to age assessment, we recommend the inclusion of a provision as set out below. In the event that a reference to the Procedures Directive in the revised Dublin II Regulation is not considered appropriate, we would advocate inclusion of the provision below in the revised Dublin II Regulation:

Member States must establish clear age assessment procedures to address cases where there is a serious doubt about the age of an individual in a timely manner.

Age assessment procedures should take into consideration physical and psychological development, taking into account ethnic and cultural factors. Such procedures should be implemented by independent and trained professionals, specialized in working with children.

The individual should always be informed, in a language that s/he understands and according to his/her degree of maturity, about the fact that his/her age may be assessed, on the method of the procedures, including any medical examinations, the possible consequences of the result of the assessment and the processes for appealing any assessment.

In cases where medical examinations are used as a matter of last resort, Member States should ensure that:

- (a) Individuals and/or their guardians consent to carry out an assessment and to particular examinations to determine the age of the individual concerned; a refusal to undergo a medical examination cannot be the basis for any decision on the merits of the case.*
- (b) Any medical examination should be performed in full respect of the individual's dignity, selecting the less invasive exams, based on available good practices at international level. The guardian shall represent the individual throughout the entire process.*

The results of age assessments should always fully reflect the margin of error associated with the tests, based on scientific and ethical standards. A copy of the certificate of the results shall be issued to the child in a language that s/he can understand.

Age assessment procedures are subject to an appeal.

Pending the age assessment results, and in case of any doubt arising out of the assessment, the person should be considered to be a minor and benefit from his or her rights as a minor under the EU asylum instruments [complete citation].

We emphasise that when it is necessary to determine whether an applicant is a minor, Member States are obliged to consider all relevant factors (including physical, psychological and cultural elements), with a full appreciation of the margin of error in medical examinations where these are used, and applying the benefit of doubt in favour of the individual. It should be recalled that there is little consensus on the conclusiveness of any particular medical examinations. As a consequence, we would not welcome a reference to “a reasonable and thorough assessment” via medical examinations, “as required by scientific and ethical standards”. We respectfully submit that this latter formulation suggests that more accurate medical examinations exist than is the case and detracts from a full consideration of other relevant factors.

(g) No Transfer Pending an Appeal

Article 26 (3) should oblige Member States not to transfer of an unaccompanied minor pending the outcome of an appeal.

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