

PRIORITIES: CHILDREN FIRST AND FOREMOST

Meeting EU Minimum Standards for Separated Children Seeking Asylum- Incorporating the Best Interest of the Child into the Immigration, Residence and Protection Bill 2010

BACKGROUND

Separated children are children under the age of 18, who are outside of their country of nationality or, if stateless, outside his or her country of habitual residence and who is separated from both parents, or from his or her previous legal or customary primary caregiver. Separated children may be seeking asylum or may be in need of temporary protection or permission to remain in the State owing to their separation from their home and/or guardians. Above all, separated children are children first and foremost.

Council conclusions on unaccompanied minors
3 June 2010

a) Considering that an increasing number of third-country nationals or stateless persons below the age of eighteen arrive annually on EU territory, unaccompanied by a parent or legal guardian, or are left unaccompanied after they have entered EU territory;
b) Taking into account that the reasons behind the arrival of this particularly vulnerable category of minors are manifold and include, inter alia: to escape from wars and conflicts, discrimination or persecution; being sent by their family in the expectation of work, for a future family reunification, a better life or in order to access education and welfare; to join family members; being victims of trafficking;
c) Recalling that the EU Charter for Fundamental Rights and the United Nations Convention on the Rights of the Child, establish that children should be treated as such regardless of their migratory status, nationality or background

RIGHTS OF THE CHILD

Separated children are provided protection under various human rights instruments:

- The Convention on the Rights of the Child
- Council Directive 2005/85/EC, or *Asylum Procedures Directive*
- Council Directive 2004/83/EC, or *Qualification Directive*
- Council Directive 2003/86/EC, or *Family Reunification Directive*

Their rights are also promoted through various forms of soft law and recent European Union conclusions:

- UN Committee on the Rights of the Child, *Concluding Observations to Ireland September 2006 & January 2008*
- UN Committee on the Rights of the Child, *General Comment No 6 on the Treatment of Unaccompanied and Separated Children outside their Country of Origin*
- Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*
- EU Fundamental Rights Agency, *Report on Separated, Asylum-Seeking Children in European Union Member States 2010*
- European Commission Action Plan on Unaccompanied Minors 2010-2014
- UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees

PURPOSE

There is a need for greater visibility regarding the specific needs of separated children within the Immigration, Residence and Protection Bill 2010. The following analysis is broken down into four priorities: the inclusion of a definition of separated children; the best interest of the child; the provision of care and their protection status, tracing the over-all exclusion of basic international and European Union principles related to the rights of the separated child and recommends areas for amendment. These four areas were chosen as a starting point for debate and are by no means exhaustive. This submission tracks where changes from the 2008 Bill have been observed, where commitments were made during the Committee stage of the 2008 Bill and where they have been upheld in the 2010 Bill. Very few suggested amendments have been incorporated into the 2010 Bill that bolster the rights of children seeking protection or residence.

DEFINITION OF 'SEPARATION CHILD'

CURRENT PROVISION

Not included

RECOMMENDATION

Bring in line with SCEP/UNHCR definition as clarified by the UN CRC:

Insert on Page 14 "separated child" means a child under the age of 18, who is outside his or her country of nationality or, if stateless, outside his or her country of habitual residence and who is separated from both parents, or from his or her previous legal or customary primary caregiver"

Recommended in: Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008.

OBLIGATION

CRC Article 20(1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

At a minimum, the Bill should transpose Article 2(h) of the Asylum Procedures Directive, or Council Directive 2005/85/EC: *'unaccompanied minor' means a person below the age of 18 who arrives in the territory of the Member States unaccompanied by an adult responsible for him/her whether by law or by custom, and for as long as he/she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he/she has entered the territory of the Member States*

BEST INTEREST PRINCIPLE

CURRENT PROVISION

The best interest of the child has been removed from: Section 73(10); 74(8); and 85(9) of the 2008 Bill.

Section 81(7) (b) For the purposes of paragraph (a), the officer may make such inquiries of or about the foreign national concerned, and the adult, as the officer considers necessary in order to satisfy himself or herself that the adult is taking the responsibility referred to in paragraph (a) and is authorised to do so.

(amendment number 394- section 88(7))

(c) Where the officer (whether or not having made appropriate enquiries under *paragraph (b)*) is not satisfied either that the adult is taking responsibility for the foreign national or that the adult is authorised to do so, he or she shall so inform the Health Service Executive, and-

Section 81(9) A protection application shall not be made by a person appointed under *subsection (8)* unless the Health Service Executive is satisfied, on the basis of the information available to it, that such an application should be made.

RECOMMENDATION

Include the best interest of the child in:

Section 81(7)(b) For the purposes of paragraph (a), the officer SHALL make such inquiries of or about the foreign national concerned, and the adult, as the officer considers necessary in order to satisfy himself or herself that the adult is taking the responsibility referred to in paragraph (a), is authorised to do so AND IS IN THE BEST INTEREST OF THE CHILD.

(c) Where the officer (whether or not having made appropriate enquiries under *paragraph (b)*) is not satisfied either that the adult is taking responsibility for the foreign national or that the adult is authorised to do AND IS IN THE BEST INTEREST OF THE CHILD, he or she shall so inform the Health Service Executive, and-

An application for protection should not be unless it is in the child's best interest:

Section 81(9) A protection application shall not be made by a person appointed under *subsection (8)* unless the Health Service Executive is satisfied, on the basis of the information available to it, that such an application should be made AND IT IS IN THE BEST INTEREST OF THE CHILD TO DO SO. THE CHILD MAY MAKE AN APPLICATION FOR PROTECTION INDEPENDENT OF PERSON APPOINTED UNDER *SUBSECTION*

Section 83(8)(a) Where a protection applicant is under the age of 18 years and is accompanied by an adult other than his or her parent, the interviewer, where he or she considers it appropriate to do so, shall require the adult to satisfy him or her that the adult is taking responsibility for the care and protection of the protection applicant concerned.

Section 93(7) An oral hearing under this section may be dispensed with where the Tribunal is of the opinion that-

- (a) Where the protection applicant is under 18 years of age (in this section referred to as a “minor”), he or she is of such an age and degree of maturity that an oral hearing would not usefully advance the appeal, or

Section 93(9)(b) For the purposes of *paragraph (a)*, the Tribunal may make such inquiries of or about the protection applicant concerned, and the adult, as the Tribunal considers necessary in order to satisfy itself that the adult is taking the responsibility referred to in *paragraph (a)* and is authorised to do so, it shall so inform the Health Service Executive, and-

- (b) Where the Tribunal (whether or not having made appropriate enquiries under *paragraph (b)*) is not satisfied either that the adult is taking responsibility for the protection applicant or that the adult is authorised to do so, it shall inform the Health Service Executive, and-

Best Interest and Detention

64.—(1) Subject to *subsections (2) and (5)*, *section 60* does not apply to a foreign national who is under 18 years of age.

(2) If, and for so long as, an immigration officer or member of

(8).

Section 83(8)(a) ...shall require the adult to satisfy him or her that the adult is taking responsibility for the care and protection of the protection applicant concerned AND IS IN THE APPLICANT’S BEST INTEREST.

- (a) Where the protection applicant is under 18 years of age (in this section referred to as a “minor”), he or she is of such an age and degree of maturity that an oral hearing would not usefully advance the appeal OR IT IS NOT IN THE MINOR’S BEST INTEREST, or

Section 93(9)(b) ...and is authorised to do so AND IS IN THE BEST INTEREST OF THE CHILD it shall so inform the Health Service Executive, and-

- (c) ...and is authorised to do so AND IS IN THE BEST INTEREST OF THE CHILD it shall so inform the Health Service Executive, and-

Exclude separated children from the provisions in Chapter 6, including Section 119(2)(j) which allows for the temporary detention of a person who, having arrived in the State directly from a safe third country, makes a protection application. 2008.

Best Interest and Detention

Separated children should not be detained for immigration related reasons and if a child’s parent/guardian is detained upon arrival in or prior to removal from the State, decisions relating to that child should be made in the best interests of the child.

the Garda Síochána who has the custody of a foreign national believes and has reasonable grounds for believing that the foreign national is 18 years of age or over, *section 60* shall apply to the foreign national.

(3) Where an unmarried person under the age of 18 years is in the custody of another person (whether his or her parent or a person acting in *loco parentis* or any other person) and that other person is detained under *section 60*, the immigration officer or the member of the Garda Síochána concerned shall, without delay, notify the Health Service Executive of the detention and of the circumstances thereof.

(4) An immigration officer or member of the Garda Síochána may, by direction in writing given to a foreign national under the age of 18 years, require that foreign national to comply with any of the conditions specified in *section 61(1)(a) to (c)* or *62(1)(a) to (d)*.

(5) Where a foreign national fails to comply with a condition imposed upon him or her under *subsection (4)*, an immigration officer or member of the Garda Síochána may arrest and detain that foreign national under *section 60(1)*.

OBLIGATION

According to the UNHCR, best interest of the child needs to be examined on an individual basis. A best interest assessment should take place from the moment the child presents which will lead to a best interest determination that will identify durable solutions for the child- which includes deciding on temporary care arrangements and family/legal guardian reunification or separation.

The Convention on the Rights of the Child:

- The best interests of the child shall be a primary consideration in all actions affecting children (Article 3)
- There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status (Article 6)
- Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6)
- Children should be assured the right to express their views freely and their views should be given “due weight” in accordance with the child’s age and level of maturity (Article 12)

UN Committee on the Rights of the Child, *Concluding Observations to Ireland*, September 2006: 23- The Committee recommends that the State party:

- (a) Ensure that the general principle of the best interest of the child is a primary consideration without distinction and is fully integration into all legislation relevant to children; and
- (b) (b) Ensure that this principle is also applied in all political, judicial and administrative decisions, as well as projects, programmes and services that have an impact on children.

31: (c) Ensure that the principle of the best interest of the child is always a primary consideration when making decisions involving children under any legal or administrative procedures.

Council Directive 2004/83/EC, or the Qualification Directive:

Article 20.5 The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

Preamble: Recital (12) The «best interests of the child» should be a primary consideration of Member States when implementing this Directive.

Article 30

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.

Council Directive 2005/85/EC, or the Asylum Procedures Directive:

Article 2: Definitions

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

Article 17.6 The best interests of the child shall be a primary consideration for Member States when implementing this Article.

Preamble: Recital (14) In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their vulnerability. In this context, the best interests of the child should be a primary consideration of Member States.

Best Interest and Detention

UN CRC Article 37(b) [...] 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 of time [...].

Asylum Procedures Directive *Article 18*

Detention

1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.
2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.

Return Directive

Article 17

Detention of minors and families

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
5. The best interests of the child shall be a primary consideration in the context of the detention of minors pending removal.

NOTE:

Recast of: Reception Directive and Dublin II to include provisions prohibiting detention of minors: “unaccompanied minors shall never be detained”

CARE REFERRAL AND INDEPENDENT REPRESENTATION

CURRENT PROVISION

Current provision: The current Bill makes reference to the Child Care Acts, but does not address the fact that the Child Care Acts were adopted before the situation of separated children arose in Ireland. Therefore, it has been noted that the Child Care Acts do not outline specific measures to be taken to address the distinct care issues, rights and needs of separated children. This is reflected in the different levels of support applied to separated children in

RECOMMENDATION

Recommendation: Ensure, at a minimum, that separated children are taken into care with an Interim Care Order and, where necessary, a long term Care Order in line with the Child Care Act 1991.

Irish Human Rights Commission, *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008: the 2008 Bill presents an

the different HSE areas.

28.—(1) Where (whether or not in the performance of his or her functions under *section 27*) it appears to an immigration officer that a foreign national under the age of 18 years who has arrived at a frontier of the State is not accompanied, or is not to be accompanied, by an adult who is taking responsibility for the care and protection of the foreign national, the officer shall, as soon as practicable, notify the Health Service Executive of that fact.

(2) (a) Where (whether or not in the performance of his or her functions under *section 27*) it appears to an immigration officer that a foreign national under the age of 18 years who has arrived at a frontier of the State is accompanied or to be accompanied by an adult, the officer shall require that adult to satisfy him or her that the adult is taking responsibility for the care and protection of the foreign national.

(b) For the purposes of *paragraph (a)*, an immigration officer may make such inquiries of or about the foreign national, and the adult, as the immigration officer considers necessary in order to satisfy himself or herself that the adult is taking the responsibility referred to in *paragraph (a)* and is authorised to do so.

(c) Where the officer (whether or not having made appropriate enquiries under *paragraph (b)*) is not satisfied either that the adult is taking responsibility for the foreign national or that the adult is authorised to do so, he or she shall so inform the Health Service Executive.

(3) *Subsections (1) and (2)* apply also in relation to a foreign national under the age of 18 years who is found in the State but in respect of whom the Health Service Executive was not notified under those subsections.

(4) It shall be presumed that a foreign national in respect of whom the Health Service Executive has been notified under this section is a child in need of care and protection, and the Child Care Acts 1991 to 2007 and other

important opportunity to amend the Child Care Acts 1991 (as amended), in order to outline specifically what the legal obligations of the HSE are towards separated children who come into their care.

European Union Agency for Fundamental Rights, Separated, asylum-seeking children in European Union Member States April 2010, recommendations:

Member States should ensure that separated, asylum seeking children are placed in suitable care based on a thorough assessment of their needs, which must be regularly reviewed. Children should be placed according to their best interest...

Member States should provide separated children with equitable treatment and care comparable to that provided to children having citizenship of the State, including an appropriate ratio of qualified social workers to children to allow for individualised care and attention.

Accommodation for separated children should be inspected by the Social Service Inspectorate.

enactments relating to the care and welfare of persons under the age of 18 years shall apply accordingly.

(5) *Subsection (4)* is without prejudice to the application to any particular foreign national under the age of 18 years of any enactment other than those mentioned in that subsection.

Guardianship

Not included

Guardianship

UNCRC Comment No. 6

(b) Appointment of a guardian or adviser and legal representative (arts. 18 (2) and 20 (1))

33. States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations.

FRA Recommendation:

A legal guardian should be provided to every separated, asylum seeking child as soon as possible. Appropriate legal representation, advice, counselling and free legal aid should be provided to separated children and their guardians or other representatives as soon as possible.

OBLIGATION

UNCRC Article 3(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform

with the standards established by competent authorities, particularly in areas of safety, health, in the number and sustainability of their staff, as well as competent supervision.

Guardianship

Council Directive 2004/83/EC (Qualification Directive) Article 30

- (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.

Article 17

Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall:
 - (a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application. This representative can also be the representative referred to in Article 19 of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (1);
 - (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself/herself for the personal interview. Member States shall allow the representative to be present at that interview and to ask questions or make comments, within the framework set by the person who conducts the interview. Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.

CRC Article 18(2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

Statutory provision for aftercare: CRC Article 20(3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

IMMIGRATION AND PROTECTION

CURRENT PROVISION

Section 28 (6) (a) Where it appears to an immigration officer that a foreign national to whom this section applies is seeking protection in the State, the officer shall, as soon as practicable, notify the Health Service Executive of that fact.

(b) Where it appears to the Health Service Executive, on the basis of information available to it, that a protection application should be made on behalf of a foreign national in respect of whom it has been notified under this section, *subsections (8), (9) and (10) of section 81* shall apply.

(7) If and for so long as it appears to an immigration officer that a foreign national is 18 years of age or over, the provisions of this Part shall apply to the foreign national as if he or she were 18 years of age or over.

RECOMMENDATION

Separated children may present in Ireland on the basis of:

- fear of persecution;
- armed conflict;
- Family circumstances (i.e. domestic violence or servitude or death);
- trafficked for sexual exploitation or servitude;
- poverty or deprivation; and/or
- education.

Not all of these reasons invoke international, European or Irish protection law. However, they are still a vulnerable group who require a legal status whilst they are under the age of 18 if the separated child cannot reasonably be expected to return home.

UNHCR Guidelines on formal Determination of the Best Interest of the Child

This section should include the provision of a temporary residence permit to ensure the child has a legal entitlement to be present in the State while the best interest of the separated child is being determined.

There should be provision for the appointment of an independent guardian to determine the best interest of the separated child in consultation with the Refugee Legal Service.

Section 28 should include an alternative to protection for a separated child who is vulnerable yet whose purpose for being in the State or reason for arrival may not invoke international protection law 2008.

EUROPEAN UNION ACTION

Council of Europe Parliamentary Assembly **Protection and assistance for separated children seeking asylum Doc. 10477** 22 March 2005:

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

European Commission Action Plan on Unaccompanied Minors 2010-2014

III.-REGARDING THE RECEPTION AND THE PROCEDURAL GUARANTEES IN THE EU THE COUNCIL HAS AGREED:

11. To invite the Commission to assess whether the EU legislation on UAM offers them sufficient protection in order to ensure adequate standards on reception and procedural guarantees for all UAMs, regardless of whether they are asylum seekers, victims of trafficking or illegal migrants, to guarantee that minors are treated as such until proven otherwise.

12. To encourage Member States to adopt a decision on the future of each UAM within the shortest possible period of time taking into account the importance of finding durable solutions based on an individual assessment of the best interest of the child. These solutions could consist of return and reintegration in the country of origin or return, granting international protection status or granting other status according to national law of the Member States.

PRIORITY RECOMMENDATIONS

Provide clear definition of a 'separated child'

Provide for the determination and consideration of the best interest of the child in all matters related to the separated child

Opportunity to amend the Child Care Acts to reflect the particular needs of separated children

Provide adequate residency options and support for the particular immigration needs of each separated child in line with their best interest- from temporary residency upon arrival for suspected separated children through to the recognition of the need for protection as a refugee, or someone otherwise in need of international protection.