



Separated Children in Europe Programme



**Save the Children**

## **The Implementation of the Dublin II Regulation and the Best Interests of Separated Children**

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## Introduction

Save the Children is an international children's rights NGO working in over one hundred countries worldwide. Together with UNHCR and partner NGOs covering 29 countries we have established the Separated Children in Europe Programme<sup>1</sup> – a programme to realise the rights of separated children<sup>2</sup> within Europe.

Save the Children welcomes the European Commission's review of the Dublin II Regulation<sup>3</sup> and hopes that this analysis and subsequent changes will improve protection of the rights of asylum seeking children and responses to their specific needs.

## Dublin II and the best interests of the child

*The principle of the best interests of the child should be the primary consideration when applying the Dublin II Regulation in cases involving children.* In particular, Member States should ensure that all decisions regarding transfer, take back and taking charge of the asylum application of a separated child should be made in the best interests of the child.

The text of the Dublin II Regulation does potentially allow for a child rights approach through a variety of measures including:

Article 15: Separated children shall be reunited with family members in another Member State on humanitarian grounds if it is in their best interests.

### **Member States should positively and proactively facilitate family reunion**

In a judgment of 23 February 2005 the Administrative Court of Giessen ruled that Germany was obliged to take the responsibility for an asylum application of two unaccompanied minor applicants as the adult brother of the applicants was legally appointed as the guardian by the German authorities. Through this procedure the family unity was facilitated as after the appointment the older brother was a family member in the scope of definition of Article 2i) iii) of the Dublin II Regulation.

Article 6: Where the applicant is a separated child, the Member State responsible for examining the application shall be that where a member of his/her family is legally present, provided that is in the child's best interests. In the absence of a family member, the Member State responsible shall be that where the child has lodged his application for asylum.

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<sup>1</sup> Case studies cited in this paper have been provided by partners active in the SCEP.

<sup>2</sup> Separated children are children under 18 year of age who are outside their country of origin and separated from both parents or their previous legal/customary primary caregiver.

<sup>3</sup> Council Regulation (EC) No 343/2003 Art. 28 states that the Commission shall report to the European Parliament and the Council on the application of the Regulation in 2006.

**Member States should accept responsibility for separated children**

The Norwegian approach recognises the particular vulnerability and rights of separated children by applying an exclusion clause at the national level so that they are not removed from the country under the provisions of the Dublin II Regulation. This is the case even if it can be proven that they have lodged an asylum application in another Member State.

Article 3(2): the 'opt out' clause – each Member State may examine an application for asylum lodged with it by a third country-national, even if such examination is not its responsibility under the Regulation's criteria.

Unfortunately, the practice of most Member States in the implementation of the Dublin II Regulation does not employ these measures to respect children's rights and may arguably increase the vulnerability of children subjected to this procedure.

**Further recommendations in response to Member State practice**

Save the Children and the Separated Children in Europe Programme would like to propose some specific recommendations that Member States should fulfil in order to respect children rights when implementing the Dublin II Regulation or similar measures in the future.

**Harmonization efforts should strengthen child-friendly procedures and quality of refugee status determination and protection**

Despite the EU's efforts to harmonize asylum systems across Europe, there is still a great disparity among the procedures, protections and resources available in different EU Member States. This has impacted on the implementation of the Dublin II Regulation. For example, there are cases documented where EU Member States have refused to return children to Greece because of concerns raised regarding access of returned applicants to a fair asylum procedure as well as inadequate care provisions for separated children.

As a necessary underpinning to a functioning asylum system, the European Commission should call on all Member States to develop and implement child-friendly asylum determination procedures that are appropriate and responsive to the needs of separated children. The EC should provide Member States with further guidance on child-specific forms of persecution and determining the best interests of the child.

Furthermore, an independent and skilled guardian should be appointed as soon as a separated child is identified. Additionally, such children should also be provided with quality legal representation. Decisions regarding separated children must not be implemented prior to the full involvement of the guardian and legal representative.

In order to ensure that decisions are made in the best interests of the child Member States should ensure that separated children are consulted during the process and that their views are given due weight in accordance with their age and maturity (as enshrined in art. 12 of the Convention on the Rights of the Child).

**Lack of proper consultation increases secondary movements as well as vulnerability and lessens chances for a durable solution**

Practice shows that children are not always informed that their asylum application is being considered by a host country and that they most likely will be sent back to that country if they migrate onwards.

Furthermore, in several countries, children's views are not taken into consideration and they are simply informed that they will be returned under the Dublin II Regulation procedures. In some cases, children have then disappeared before removal.

In other cases, children have been removed and later returned to the country. There is a case documented in Austria where the child was removed, returned and subsequently accepted to the asylum procedure in Austria.

Specifically, children should have an opportunity to state their preferred outcome and they should be allowed to comment on the procedures followed under the Dublin II Regulation. Children should be provided with interpreters who speak their preferred language whenever they are interviewed or require access to services of legal procedures.

Immigration and asylum staff working with separated children within the Dublin II procedures should receive appropriate training in the skills necessary to work sensitively with children. In order to adequately assess the best interests of a particular child, immigration and asylum authorities will need to liaise with child welfare agencies and be prepared to defer to the latter's findings as appropriate.

**Decisions should be made in a timely manner and children should never be detained**

In cases where separated children are arrested at the border in Belgium, they stay in a closed centre until a decision is made under the Dublin procedure and this can take up to two months. Children have been detained during the processing of Dublin II requests in other EU Member States as well such as the United Kingdom and Finland.

Member States must ensure that separated children who are being considered for transfer under the Regulation are treated as a priority in a timely manner. Detention of separated children for reasons related to their immigration status should be prohibited. Appeals brought in relation to inadmissibility or transfer under the application of the Regulation should suspend removal directions

**Member States should respect family unity  
and a broader definition of 'family member'**

Although his uncle was a recognized refugee in Austria, a child in the Czech Republic awaiting a decision on reunification was refused because Austria claimed that the uncle is not a close enough relative.

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In an exceptional case in 2004, an Eritrean child was returned from Germany to Italy under Art. 6 Section 2 Dublin II, as he had applied in Italy before he entered Germany. However, the German authorities had failed to examine the child's family links to his father who - as a naturalized former refugee - legally stayed in Germany. After some weeks the minor was allowed to return to Germany for family reasons.

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There have been similar cases in the Netherlands where state authorities have neglected to provide information on family in the Netherlands. For example, there was a case where the Dutch authorities did not inform that the child's mother was legally in the Netherlands and Spain therefore accepted to take the child back from the Netherlands. Eventually a Dutch court decided that the child should stay in the Netherlands.

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Some cases involve an unnecessary and undue delay such as the UK case where the child has been living with his aunt and uncle, waiting more than a year, facing possible return to Italy.

The European Commission should consider that for the purpose of the Dublin II Regulation the definition of 'family member' should be broadened to include extended family members and any other significant adult who has cared for the child. Member State action should not separate a child from its family. Mechanisms will need to be developed to ensure that the prospective carer is suitable and that placement with them is in the best interests of the child.

Member States should develop procedures to ensure that child welfare agencies in the receiving country are notified of the impending transfer of a separated child. The timescale must be suitable for appropriate reception and short term plans to be made for the child. This will require appropriate assessment of need and information sharing, within the boundaries of confidentiality, between the various agencies.

Finally, research has shown a lack of adequate data collection regarding the processing of Dublin II cases. Member States should record appropriate statistics and biographical information relating to separated children considered under the Regulation.

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