

Comments on “Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals”

Further information from:

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## **Introduction**

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

The following comments are based upon international standards and good practice as outlined in Save the Children and SCEP's joint "Position Paper on Returns and Separated Children" as well as the "Common Principles on Removal of Irregular Migrants and Rejected Asylum Seekers."

The main aspects of the Return Directive proposal that Save the Children commends:

### **The possibility to receive an autonomous residence permit on compassionate, humanitarian or other reasons**

As has been the good practice of some, more Member States should be encouraged to consider issuing an autonomous residence permit on the grounds that it is in the best interests of the child.

In this regard, victims of trafficking should be protected as defined in the UN Palermo Protocol and the European Convention on Action against Trafficking in Human Beings.<sup>2</sup> Furthermore, victims of human rights violations such as labour exploitation or sexual abuse should be able to obtain guarantees for redress before any return decision or removal order is executed.

### **Recognition of the best interests of the child as a primary consideration**

We are pleased to note the references to the best interests of the child, but remain concerned that specific guidance should be developed by the Commission to assist Member States in interpreting this key principle, and mechanisms should be established for monitoring and evaluating implementation.

For example, the Ombudsman for Children in Sweden published a report<sup>3</sup> on how the best interests principle should be applied to asylum applications and listed the following criteria for assessing a child's best interests: the child's need to be with its parents; the child's need for health care including medical care and rehabilitation; the child's relationship to its parents including their

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<sup>1</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>2</sup> Convention on action against trafficking in Human Beings, CAHTEH committee, May 2005; UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (November 2000), Article 7

<sup>3</sup> Barnets bästa i asylarenden, *en studie av Migrationsverkets praxis i asylarenden med barnfamiljer*, 26 September 2000

ability to give emotional and material support; the child's need to develop; and the child's attachment to the country of asylum.

Furthermore, in our position paper on Returns and Separated Children, Save the Children and the Separated Children in Europe Programme argue that determination of best interests should assess and balance a variety of factors including: safety, family reunification, the child's view, voluntary return, age and maturity of the child, child's level of integration in the host country, socio-economic conditions in the country of origin and the views of the legal guardian and carer.

Clearly, in practice some governments take a very narrow view of the best interests of the child—for instance, assuming that reunification with the family in the country of origin is the best durable solution. Such a narrow interpretation of the best interests principle allows governments to disregard children's best interests in some cases and to quickly repatriate children without a real assessment of what impact return will have on their safety, welfare and development.

Additionally, Save the Children would like to emphasize the following points with regards to:

#### **Article 5 – family relationships and best interest of the child**

While the proposed Directive instructs Member States to take account of family relationships, it falls short of requiring Member States to respect family unity.

Save the Children recommends that it be clearly stated that children should never be separated from their families or primary caregivers unless this is in the child's best interests. Furthermore, families with children should not be forcibly removed if it is in the child's best interests to stay.

#### **Article 8 – postponement**

We welcome that unaccompanied minors are given special consideration and that their removal should be postponed pending an assessment in their country of origin and arrangements for hand over of their care.

However, it should be clear that the assessment should cover a variety of factors including both child welfare and security concerns. Furthermore, the child should be consulted regarding the decision.

The Committee on the Rights of the Child has recently provided guidance on this matter<sup>4</sup> outlining that such a determination shall *inter alia* take into account the:

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<sup>4</sup> CRC General Comment No. 6 (2005) on Treatment of Unaccompanied and Separated Children outside their Country of Origin.

- Safety, security and conditions, including socio-economic conditions awaiting the child upon return including through home study, where appropriate, conducted by social network organizations.
- Availability of care arrangements for that particular child.
- Views of the child expressed in exercise of his or her right to do so under article 12 and those of the caretakers.
- The child's level of integration in the host country and the duration of absence from the home country.
- The child's right "to preserve his or her identity, including nationality, name and family relations" (art. 8).
- The "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (art. 20).

Save the Children recommends that additional language be added to specify that the assessment in the country of origin should cover both child welfare and security concerns as outlined above.

Additionally, regarding handover to a family member, an equivalent representative, guardian or competent official, it should be made clear that 'handover' to an official is not sufficient to ensure the child's protection and development. As the Committee on the Rights of the Child further comments: in the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.

Save the Children recommends that this provision also include the stipulation that an unaccompanied minor should not be repatriated without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.

#### **Article 15 – conditions of temporary custody –**

The UN Convention on the Rights of the Child makes it clear that children may be detained only in the most exceptional of circumstances. Such measures would not be warranted by asylum and immigration concerns.

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