

Is Europe failing separated children?

by Diana Sutton and Terry Smith

The European Union's Hague Programme¹ aims at "strengthening freedom, security and justice" within the EU in the next five years. What is likely to be the impact of this and other European policy developments on separated children?

Separated children are children under 18 years of age who are outside their country of origin and separated from both parents or from their previous legal or customary primary caregiver. Some children are totally alone while others may be living with extended family mem-

bers. All such children are separated children and entitled to international protection under a broad range of international and regional instruments. The Separated Children in Europe Programme (SCEP) is a joint initiative of some members of the International Save the Children Alliance and

UNHCR. In 2003 SCEP published a report analysing policies and practices within 14 EU member states.² SCEP welcomed the EU's reaffirmation at the summit in Tampere in 1999 of the right of individuals to claim asylum but expressed concern that regulations and guidelines emerging from the EU have mainly focused on deterrents and the tightening of controls rather than advancing an individual's rights.

There is little evidence of a strong rights-based approach to children at EU level as immigration control appears rather to take precedence

over the 'best interest' of the child principle in the Convention on the Rights of the Child (CRC).³ Although the EU adopted a resolution on 'unaccompanied minors who are nationals of third countries' in 1997 it is relatively weak and does not provide a framework for improved protection or care. The Hague Programme will also follow a security-led agenda including the introduction of more measures to restrict access to the EU and greater emphasis on finding solutions outside the EU. Those of us advocating full implementation of the CRC are critical of measures which are purportedly designed to assist separated children but which in reality might put them at greater risk.

Current EU asylum policy and children

In the move towards a common EU asylum policy [see article pp17-19] a number of Directives and Regulations have emerged. Some may improve provision for children but many of these initiatives have been watered down and opportunities to meet the needs of refugee and migrant children have been missed. A number of themes emerge from the Directives:

Guardianship

The SCEP advocates that adult representation should be provided at all stages of the asylum process for all separated children under the age of 18. Separated children may not fully understand the asylum determination procedure, or may feel frightened and intimidated by it. While a number of Directives consider guardianship provision for separated children, the application of the phrase 'or any other appropriate representation' invariably follows each mention of guardianship. This considerably weakens these references and is inconsistent with SCEP's Statement of Good Practice. The Directive on Minimum Standards in Asylum Procedures allows for unaccompanied children to be interviewed as part of the asylum process without requiring the presence of a representative present. It further weakens the guardianship provision by outlining circumstances where no representative should be appointed to act on behalf of a separated child

(these include where a separated child is likely to turn 18 before a decision on their asylum claim is made, when they can receive free legal advice or if they are married).

Placements for children

The Temporary Protection Directive includes reference to the need to find 'appropriate placements' for unaccompanied children. The Directive notes that where possible this should preferably be with adults within their family or with whom they travelled to Europe – but it also deems accommodation in reception centres to be appropriate. This is worrying as it is difficult to see how children's needs can be adequately met in such a setting.

Decision-making processes

Within the recent Directives there are some references to seeking views from separated children but only one reference to child-specific forms of persecution. The reference to child-specific persecution is a useful development but limited if the burden of proof still rests with the child who may have difficulties in understanding, or explaining, why they have claimed asylum. It would have strengthened the Directive if it had included the need to apply the 'benefit of the doubt' when children are attempting to prove their circumstances. Similarly, there is no reference to the age and maturity of the child and how these will impact on a child's ability to accurately comprehend the circumstances of their departure from their country of origin and how to convey this to the investigating authorities.

Family reunification

The Directive on Family Reunification narrowly defines the family unit, restricting it to parents and siblings. This fails to appreciate the cultural importance within some communities of the extended family and the harsh realities of life for many unaccompanied children, some of whose parents may be dead, missing or imprisoned. There are restricted rights for children aged over 15 years who may have to demonstrate that they are dependent upon their parents and unable to live alone or support themselves. There is also a

provision to submit children over 12 years old to an integration test and to deny those who fail it the right to reunification. This is inconsistent with the provisions of the European Convention on Human Rights (Right to Family Life) and CRC Article 1. In all cases the child's 'sponsor' will need to have held a residence permit for a minimum of one year.

Within the text of the Regulation Allocating Responsibility For Examining Asylum Applications in the EU, there is improved scope for family reunification, including provision for the children of an applicant to join their family in Europe. The regulation also allows – if humanitarian grounds dictate and it is practically possible – for separated children to be reunited with family members in another member state. As the definition of family again excludes 'extended' family members, many separated children may be denied reunification with their principle carer. Furthermore, where a separated child has travelled through more than one EU state, the state where the child claims asylum will be responsible for processing the claim. This Directive should thus provide safeguards to separated children both regarding adherence to 'best interests' and stability. Regrettably, however, member states appear to be ignoring many of the provisions of the Directive.

Within the Minimum Standards for Reception Directive there is a call for prompt family tracing and a recommendation that those working with separated children should receive training. This is welcomed. SCEP emphasises, however, that family tracing should be done in a confidential manner that does not expose the family to danger and in a manner that reflects SCEP's Statement of Good Practice.

Return

The Directive on the Definition of a refugee and other forms of protection states that asylum seekers may be able to return to their country of origin if they can return to an area of the country (perhaps not where they have previously lived) that is deemed to be safe. Similarly they may be returned if the view is that non-state bodies active in the country can offer protection. This does not seem an

appropriate response for children who should only be returned to the care of a named individual who is both willing and able to care for them and where they will have opportunities for their further development.

Looking ahead

The Hague Programme is setting the framework for the EU's response to asylum and migration in a number of areas. The second phase of harmonisation – due for completion by 2010 – aims to establish a common asylum procedure and uniform status for those granted asylum and subsidiary. A study will look at the feasibility of joint processing of asylum applications both within and outside the EU. The proposals to process applications outside the territory of the EU are concerning for children. Given that children are potentially extremely vulnerable, holding them in external processing

involuntarily. The Council will begin discussions early in 2005 on minimum standards for return procedures, which will take into account special concerns regarding public order and security. Specifically, the proposals will include the launch of a European Return Fund and a special representative for a common readmission policy. In addition there will also be regional- and country-specific return programmes. SCEP has prepared a position paper on the return of separated children which sets out the case for voluntary return and placing decisions within the context of the best interests of the child.⁴ Return should only go ahead where it is demonstrably in the child's best interests following careful assessment, planning and preparation. Liaison must take place with appropriate authorities in the country of origin and children should only be returned to their families or other named carers.

Where a carer cannot be identified, it is difficult to see how institutional placements can adequately support an unaccompanied child through the difficult process of transition and reintegration following return. In such circumstances return should not be pursued as a durable solution.

Powers to exchange information across borders between law enforcement agencies will be strengthened. This may have important positive implications for children, for example, facilitating information exchange about people with a record of abusing children in order to prevent them from working directly with children. Currently this is not done and there have been recent cases of paedophiles crossing borders undetected and taking up employment with children. However, there are negative implications as well: to what other uses will the information be put and how will it be protected? Children who testify against their traffickers, for example, do so at great personal risk. Such information needs to be kept confidential to avoid potential reprisals to the child and their family.

In the immediate future we can expect to see a strong security-driven agenda on asylum and migration policy and a strong returns programme. In order to achieve positive

protection measures for children it is essential that:

- EU member states pursue policy harmonisation at the highest level of current practice and apply the standards outlined in the CRC and SCEP's Statement of Good Practice
- decision makers ensure that the child's best interests are included in all future legislation: separated children are children first and foremost
- the 1997 Council Resolution on Unaccompanied Minors who are Nationals of Third Countries be updated, made stronger and given binding legal force
- children should not be held in external processing centres alongside adults and without adequate systems for their protection
- trafficked children be perceived as victims rather than criminals and interventions be informed by child protection procedures rather than the maintenance of immigration control: the recommendations set out in the excellent EU expert group on trafficking's report must be adopted.⁵

Children need the highest protection standards. A common system must not simply entrench member states' lowest common denominator policies and laws but must look at best practice and the most effective way of protecting children.

Diana Sutton is European Officer, Save the Children Brussels. Email: diana-savechildbru@skynet.be. Terry Smith is an Adviser to the Separated Children in Europe Programme (www.separated-children-europe-programme.org). Email: g.wostear@btoopenworld.com.

1. www.statewatch.org/news/2004/nov/hague-annotated-final.pdf

2. www.separated-children-europe-programme.org/separated_children/publications/reports

3. The CRC is the world's most widely ratified convention. Unanimously adopted by the UN General Assembly in 1989, its 54 articles encompass children's civil, political, social and economic rights. See: www.unicef.org/crc

4. www.separated-children-europe-programme.org/separated_children/publications/reports/return_paper_final.pdf

5. http://europa.eu.int/comm/justice_home/fsj/crime/trafficking/fsj_crime_human_trafficking_en.htm

Disturbingly, the Hague Programme makes no mention of conflict prevention

centres alongside adults and without adequate systems for their protection could be dangerous and damaging to their long-term development.

The Programme contains a new emphasis on the external dimension of asylum and migration. The aim is to improve the capacity of non-EU states with regard to migration management and refugee protection, to promote better access to durable solutions and to address the practical problems associated with the return of migrants and failed asylum seekers. There will be a continued emphasis on linking migration and development debates which may not necessarily be positive. We may see more 'conditionality clauses' – only narrowly defeated previously – linking development aid directly to managed migration. Disturbingly, the Hague Programme makes no mention of conflict prevention, a significant omission given that research commissioned by SCEP and by others has established that most children move and travel in order to flee conflict.

The Programme states that if migrants do not choose to return voluntarily they should be returned