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Effective guardianship for unaccompanied and separated migrant children

Committee Opinion¹

Committee on Social Affairs, Health and Sustainable Development

Rapporteur: Ms Sibel ARSLAN, Switzerland, Socialists, Democrats and Greens Group

A. Conclusions of the Committee

1. The Committee on Social Affairs, Health and Sustainable Development welcomes the excellent report prepared by Ms Rósa Björk Brynjólfssdóttir (Iceland, UEL) for the Committee on Migration, Refugees and Displaced persons. It fully agrees that member States must take stronger action towards fulfilling their obligations under international law, and protect unaccompanied and separated migrant children, including through providing effective guardianship for them.

2. As rightly pointed out in the report, these children are amongst the most vulnerable individuals. Effective guardianship should be an integral part of the national child protection system – a system which should equally protect all children on the territory, regardless of their nationality or migration status. An effective system of guardianship should also take into account the specific needs and circumstances of unaccompanied and separated children in migration, in order to protect and promote their rights and secure their best interests. The committee is especially worried about the current situation of unaccompanied and separated migrant children in overcrowded camps or centres, (which *inter alia* puts them at a higher risk of contracting the coronavirus). It thus stresses the urgent need for member States to collaborate on the urgent and safe relocation of these children.

3. With this in mind, the committee wishes to propose a few specific amendments to reinforce the text.

B. Proposed amendments

Amendment A (to the draft resolution)

In paragraph 3, after the words “protect the best interest of all children on their territory” add the following words:

“without discrimination”

Amendment B (to the draft resolution)

At the end of paragraph 5, add the following words:

“- thus providing unaccompanied and separated migrant children, regardless of their age or status, with the same protection as national children, in line with international obligations”

1. Reference to committee: [Doc. 14637](#), Reference 4410 of 23 November 2018. Reporting committee: Committee on Migration, Refugees and Displaced Persons. See [Doc. 15133](#). Opinion approved by the committee on 22 September 2020.



Amendment C (to the draft resolution)

At the end of paragraph 7.1, add the following words:

“for unaccompanied and separated children in migration, in line with the best interests of the child”

Amendment D (to the draft resolution)

In paragraph 7.4, replace the words “every unaccompanied migrant child is provided with guardian immediately on reception” with the following words:

“every unaccompanied or separated migrant child, regardless of their age or status, is provided with a guardian immediately after identification as such a child, in order to meet their needs relating to care, safety, education and health and to safeguard their legal entitlements to protection;”

Amendment E (to the draft resolution)

In paragraph 7.5, replace the words “the problems of children” with the following words:

“the needs of children”

Amendment F (to the draft resolution)

At the end of paragraph 7.5, add the following sentences:

“guardianship institutions must also collaborate with qualified professionals from specialist services, as required, to assess and determine the best interests of the child and his or her needs, taking into account the child’s family situation, health status, specific vulnerabilities, gender, and ethnic and religious background. For this purpose it would be an advantage for professionals, guardians and other carers to have a migrant background;”

Amendment G (to the draft resolution)

In paragraph 7.6, after the words “ensuring that a” “add the following words:

“child-friendly and”

Amendment H (to the draft resolution)

In paragraph 7.7, replace the words “maintaining guardianship up until they turn 21 years old, when possible” with the following words:

“maintaining guardianship or another type of continuing care up until they turn 21 years old, when possible, and reviewing their practice of delivering temporary residence permits to unaccompanied and separated migrant children to put in place a more rights-based and child-friendly legislation in order to fully ensure their well-being while they are still within the jurisdiction of member States, and providing them with the same benefit of having a guardian or another type of continuing care up until the age of 21, as reflected in the Committee of Ministers Recommendation CM/Rec(2019)4 on supporting young refugees into adulthood”

Amendment I (to the draft resolution)

At the end of paragraph 7.8, add the following words:

“and to complement children’s limited legal capacity by safeguarding their best interests and taking into account their right to be heard in processes and decisions affecting them”

Amendment J (to the draft resolution)

In paragraph 8, replace the word “minors” with “children”.

Amendment K (to the draft resolution)

In paragraph 9, after the word “unaccompanied” add the following words after:

“and separated”

Amendment L (to the draft recommendation)

In paragraph 2.1, replace the words “Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe” with the following words:

“new Council of Europe Action Plan in the field of migration and human rights (currently under preparation)”

Amendment M (to the draft recommendation)

In paragraph 2.3, after the word “unaccompanied” add the following words (twice):

“and separated”

Amendment N (to the draft recommendation)

After paragraph 2.3, add the following paragraph:

“invite the Network of Focal Points on Migration to explore the possibility of increasing dialogue on international and national multi-disciplinary co-operation in view of improving the protection of unaccompanied and separated children in the context of migration, including improving data collection and exchange on this group in Council of Europe member States;”

C. Explanatory memorandum by Ms Sibel Arslan, rapporteur for opinion

1. First of all, allow me to congratulate Ms Rósa Björk Brynjólfssdóttir (Iceland, UEL) on the excellent report she has prepared for the Committee on Migration, Refugees and Displaced Persons.
2. Unaccompanied and separated children are at a distinct disadvantage without their parents or other caregivers and are consequently in a situation of high vulnerability and risk. In accordance with the United Nations Convention on the Rights of the Child (CRC), an unaccompanied or separated child, no matter the child's circumstances or immigration status, is first and foremost a child and should be treated as such.² I share Ms Brynjólfssdóttir's concern that, although all Council of Europe member States have ratified this convention, these children are not given the necessary protection and assistance they are entitled to. This protection and assistance should be provided without discrimination (**Amendment A**).
3. The CRC General Comment No. 6 clarifies that States' obligations under the CRC apply within the borders of the State, including with respect to children who come under the State's jurisdiction while attempting to enter the country's territory.³ The best interests principle applies to all children, without discrimination, including to unaccompanied and separated children at risk outside their country of origin⁴ and must always be the primary consideration, also in relation to guardianship for unaccompanied and separated migrant children (**Amendment C**).
4. Children who are temporarily or permanently deprived of their supportive family environment are entitled to special protection and assistance in accordance with Article 20 of the CRC. Mechanisms established under national law in order to ensure alternative care for children deprived of their family environment shall also cover unaccompanied and separated children outside their country of origin.⁵ Given that children seeking asylum are in a particularly vulnerable situation, Article 22 of the CRC specifies their rights to appropriate protection and humanitarian assistance, including tracing of family members. Besides providing for an obligation of co-operation, Article 22(2) expressly accords to an asylum-seeking or refugee child whose parents or other family members cannot be found, the right to the same protection as any other child permanently or temporarily deprived of his or her family environment as set forth in Article 20.⁶
5. Identified unaccompanied and separated children need prompt appointment of a guardian and referral to child protection services in order to meet their needs relating to care, safety, education and health, and to have their legal entitlements safeguarded (**Amendment D**).

2. UNHCR and UNICEF: Best interest of unaccompanied and separated children in Europe, p. 53.

3. UNHCR and UNICEF, *ibid.*, p. 25.

4. UN Committee on the Rights of the Child, CRC General Comment No. 6 (2005), “Treatment of Unaccompanied and Separated Children Outside their Country of Origin”, 1 September 2005, CRC/GC/2005/6.

5. CRC/GC/2005/6, *ibid.*, paras 39-40.

6. Sharon Detrick, A Commentary on the United Nations Convention on the Rights of the Child, 1999, p. 371.

6. The best interest of the child must be assessed and determined individually for each child and according to his or her needs. In order for a guardian to assist, in particular, in the identification and implementation of measures regarding the assessment and determination of the child's vulnerabilities and best interests, such as in relation to mental and physical health, accommodation, care, educational and recreational needs, it is necessary to have an enabling environment for the guardian to develop a relationship of trust with the child. This entails regular contacts and visits, clear confidentiality rules applicable to communication and collection of information such as on the child's family situation, health status, specific vulnerabilities, gender and gender identity, and ethnic and religious background. The guardian should act as a link between the child and relevant officials, and co-operate and coordinate with qualified professionals on issues concerning the child, in particular with carers, the child's legal representative, education professionals, social workers and social services, health professionals, police, migration officials, etc. Guardians must be child-friendly, gender-sensitive, properly trained and supported, and have knowledge in particular of asylum and migration law, family reunification, as well as aspects of cultural and linguistic diversity. **(Amendments E, F and G).**

7. Guardianship is crucial not only from the perspective of protecting children from harm but also due to its central role in ensuring children – who lack full legal capacity – can access their rights and entitlements. The CRC General Comment No. 14 calls for comprehensive and co-ordinated action in relation to the child.⁷ Issues facing an unaccompanied or separated child may fall under the jurisdiction of several authorities and can often be time consuming. This calls for a holistic approach with all relevant stakeholders. A guardian is therefore key to ensure that the best interest of the child is protected during the different encounters and procedures. The guardian also complements the child's limited legal capacity and safeguards the child's best interests and ensures the child's right to be heard throughout the process. The role of a guardian in acting as the legal representative of these children should be distinguished from that of a lawyer or legal professional who should be appointed in addition to the guardian for the purpose of legal proceedings.⁸⁹ **(Amendment I).**

8. Despite clear international obligations to do so, many member States fail to ensure the same level of protection to all children. It is regrettable that in some member States, the specific migration and residence status of children determines the level and type of protection granted to them, and their guardianship or representation arrangements.¹⁰ In Norway, for example, migrant children who are above 15 years old, are under the supervision of the immigration authorities instead of the local child protection agency. In these cases, the care and protection that is given to migrant children differs from what is provided for national children. The Committee of Ministers CM/Rec(2019)11¹¹ recommends avoiding the appointment of guardians with financial or institutional connections with authorities or agencies responsible for care or immigration proceedings, which may have conflicts of interests with those of the child. Even though some member States might have more developed child protection and asylum and immigration systems in place, which are more favourable than what is called for by the Convention, if a person or group is treated, without justification, less favourably than another, this might be regarded as discrimination.¹² **(Amendment B).**

9. In many member States, national children who are temporarily or permanently deprived of their supportive family environment are provided with a guardian, or continued care and support through guardianship or other means, for a transitional period after reaching 18 years of age and up to the age of 21. Given that unaccompanied and separated migrant children are particularly vulnerable, such extension of guardianship or protection arrangements should also apply to them. Recommendation CM/Rec(2019)4 opts for promoting the continuity of social support services and of the relationship with the contact person after the age of 18.¹³ Such an extension needs to be adjusted to the maturity level of each individual and should not result in limiting the legal capacity of young migrants but rather represent a form of additional support. The committee is particularly concerned about the situation for unaccompanied and separated migrant children

7. UN Committee on the Rights of the Child, CRC General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, paragraph 1), 29 May 2013, CRC /C/GC/14.

8. Council of Europe Guidelines on child-friendly justice (Section III and IV, paragraphs. 1 and 17).

9. The case of *H.A. and others v. Greece*, no. 19951/16 (judgment of 28 February 2019, paragraphs 209-213) is indicative of the role the legal guardian has in obtaining legal assistance and representation to unaccompanied and separated children in the context of migration: the guardian's failure to act resulted in a violation of Article 5, paragraph 4 of the Convention.

10. European Union Agency for Fundamental Rights: Guardianship systems for children deprived of parental care in the European Union (2015).

11. Recommendation CM/Rec(2019)11 of the Committee of Ministers to member States on effective guardianship for unaccompanied and separated children in the context of migration, adopted on 11 December 2019.

12. European Court of Human Rights, *Biao v. Denmark*, paragraph 90.

13. Recommendation CM/Rec(2019)4 of the Committee of Ministers to member States on supporting young refugees in transition to adulthood, adopted on 24 April 2019, paragraph 8 of the appendix.

with temporary residence permits who will be returned to their country of origin when they turn 18 years old. These children are at higher risk of going missing from reception centres.¹⁴ The uncertainty of their future, together with the lack of proper care from a guardian, introduces new stressors in the lives of these children while also worsening pre-existing vulnerabilities. This practice is clearly not in the best interest of the child and it deprives the child of possibilities of successfully developing into adulthood. It is my opinion that this practice is harming the member States' obligations to ensure the fundamental rights of the child in line with the CRC **(Amendment H)**.

10. In the current situation in some member States that are receiving a high number of migrants, it is challenging to ensure effective and rights-based guardianship for unaccompanied and separated migrant children, especially in countries of transit. This was the case for the Moria camp in Greece that hosted more than 12 000 migrants, including more than 4 000 children, even though its capacity was less than 2 800 people.¹⁵ As part of the Action Plan for immediate measures to support Greece, the European Commission had proposed to relocate up to 1 600 children (before the camp burned down).¹⁶ However, some States had stalled their plans of relocation due to the Covid-19, but the displacement of so many migrants by the fire does seem to have installed some sense of urgency for relocation plans now.

11. The committee would like to stress that the situation remains precarious despite the pandemic, and urgent action must be taken together with member States to ensure that these children are given the protection they are entitled to in line with the CRC. In addition, the committee agrees that a more sustainable mechanism must be set up to allow for the quick and safe relocation of unaccompanied migrant children, taking into account the child's opinion. The recent fires in the Moria camp in Greece once again highlight the structural problems of European migration policy. As stated by the Commissioner for Human rights, the lack of solidarity and action from other member States is responsible for the situation that has led to overcrowded, inhumane and unsustainable living conditions for migrants.¹⁷ As many unaccompanied and separated migrant children find themselves in desperate and unsafe situations, this calls for urgent action from member States to collaborate on their relocation, in order to secure their future and well-being. **(Amendments M and N)**.

12. Finally, some amendments have been included to achieve terminological consistency throughout the text, and taking into account also other Council of Europe and international legal standards, such as the Recommendation CM/Rec(2019)11 of the Committee of Ministers to member States on effective guardianship for unaccompanied and separated children in the context of migration and Recommendation CM/Rec(2019)4 of the Committee of Ministers to member States on supporting young refugees in transition to adulthood, as well as referring to the new Action Plan in the field of migration and human rights, currently under preparation by the Special Representative of the Secretary General on Migration and Refugees of the Council of Europe (rather than the completed Action Plan on Protecting Refugee and Migrant Children in Europe). **(Amendments D, J, K, L and M)**.

14. In a letter to the Norwegian Ministry of Justice and Public Security of December 2016, the Directorate of Immigration (UDI) expressed concern about the surge in migrant children going missing from reception centres after more children were given temporary residence permits. The children reportedly went to live on the streets in bigger cities of Germany and France.

15. The camp burned down on 8 September 2020.

16. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1288.

17. Statement of 9 September 2020 by the Commissioner for Human Rights: "Commissioner calls on the Greek authorities to provide adequate support to all those affected by the fire in Moria".