

Opinion of the European Economic and Social Committee on the ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State’

COM(2014) 382 final — 2014/0202 (COD)

(2015/C 012/11)

Rapporteur: **Grace ATTARD**

On 3 July 2014 the European Parliament decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State

COM(COM(2014) 382 final — 2014/0202 (COD).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 30 September 2014.

At its 502nd plenary session, held on 15 and 16 October 2014 (meeting of 15 October), the European Economic and Social Committee adopted the following opinion by 143 votes to 1.

1. Recommendations and considerations

1.1 The EESC supports the proposal for amending Regulation (EU) No 604/2013. However, barriers such as the complexity of the administrative, judicial and other systems in Member States, the lack of information, and the fear of being reported, among other things, have to be addressed to ensure that no child is left in a situation of legal uncertainty or statelessness.

1.2 The EESC strongly recommends that the principle of **‘the best interests of the child’** should take precedence over all other national and international law.

1.3 The EESC notes that the current proposal does not provide criteria on ‘how’ and ‘by whom’ the ‘best interests of the child’ are to be established. This definition should follow the rules and standards of international human rights conventions.

1.4 The Committee recommends that personnel dealing with unaccompanied minors should be properly trained to respect children's rights.

1.5 To avoid conflicts of interest and secure qualified staff, the body determining the best interests of the child should be an independent body not connected to the immigration authorities. It should preferably be the national body responsible for child protection issues ⁽¹⁾.

1.6 The EESC stresses that ending the **detention of children** should be addressed as an urgent priority, whether they are accompanied or not, and regardless of which procedure they are subject to.

⁽¹⁾ Such as the *Oficina de Protección de Menores* in Spain or the Youth Welfare Office in Germany.

1.7 Unaccompanied and separated children should never be refused entry into a country, in accordance with the **non-refoulement** obligations deriving from international human rights, humanitarian and refugee law.

1.8 The EESC recommends that the Commission should establish uniform procedures and appropriate and flexible time limits for cases regarding 4b, 4c and 4d in securing agreements between Member States based on the best interests of the child.

1.9 The terms 'inform' and 'effective opportunity' need to be clearly defined to ensure that the minor is assisted by properly trained social workers, independent interpreters and a qualified representative acting as legal guardian to understand the implications of the whole process of lodging an application for international protection in any EU Member State.

1.10 The EESC considers that a **legal guardian** should be a 'qualified representative' who must have experience in dealing with minors and a knowledge of national alien law and child protection legislation.

1.11 The EESC strongly urges Member States to ensure that any age assessment procedures are based on the minor's best interests with the primary aim being to ensure that the minor is granted the rights and protection he/she is entitled to. The assessment should be carried out in the presence of a legal guardian.

1.12 The EESC strongly recommends that in situations where the minor becomes an adult during the process of determining the Member State responsible for examining the application for international protection, the person's age should be considered to be that on the date of the initial application.

1.13 A range of **EU policy agendas** for the protection of undocumented minors in a migrant situation need to be reviewed⁽²⁾. These include regularisation as a migration policy tool, informing and supporting undocumented families, building a database of evidence, birth registration and data protection as well as the right to education and vocational training, health services and accommodation.

1.14 The EESC considers that there is a need for a **more comprehensive definition** of 'unaccompanied children in an irregular migrant situation' to cover the various situations that have arisen in practice and which are not covered by the proposed regulation.

1.15 The EESC stresses the importance of consultation with civil society experts, legal professionals and practitioners with experience in the field of migrant children, and looks forward to collaborating with the Commission in this process.

2. Summary of the Commission proposal

2.1 In its proposal the Commission aims to amend Article 8, paragraph 4 of Regulation (EU) No 604/2013 of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (the Dublin III Regulation).

2.2 The proposal has been made in the light of a recent judgment⁽³⁾ of the Court of Justice of the EU, which clarifies which Member State is responsible for examining applications made by unaccompanied minors. It will improve the situation of those minor applicants for international protection who have no family, siblings or relatives on EU territory.

2.2.1 Paragraph 4a is a codification of the Court ruling in case C-648/11 and states that 'where the unaccompanied minor has no family member, sibling or relative legally present in a Member State as referred to in paragraphs 1 and 2, the Member State responsible shall be the one where the unaccompanied minor has lodged an application for international protection and is present, *provided that this is in the best interests of the minor.*'

⁽²⁾ Dr Sarah Spencer, COMPAS, University of Oxford.

⁽³⁾ Case C-648/11 MA and others vs. Secretary of State for the Home Department, UK.

2.2.2 Paragraph 4b addresses a situation in which a minor who is an applicant as referred to in paragraph 4a is present in the territory of a Member State without having lodged an application there. That Member State shall inform the unaccompanied minor of the right to make an application and give him/her an effective opportunity to lodge an application in that Member State, *unless this is not in the best interests of the minor*.

2.2.3 The minor has therefore two options: either to apply for international protection or not to apply.

2.2.4 Under paragraph 4c, in the latter case, i.e. in the case of a minor who decides not to lodge a new application in the Member State where he/she is present which is not addressed by case C-648/11, the minor is to be transferred to *the Member State which the consideration of the minor's best interests indicates as the most suitable*. This rule is meant to ensure that there is certainty in establishing the Member State responsible by introducing a rule that is certain and predictable and that the procedure does not drag on unnecessarily. The guarantees for minors provided in Article 6 of Regulation 604/2013 apply to all minors that are subject to the procedures of this regulation, but the proposal also introduces, in paragraph 4c, an obligation for the requested and requesting Member States to cooperate in assessing the minor's best interest.

3. Background

3.1 The challenges that unaccompanied minors face are diverse and complex, requiring multilateral, comprehensive and holistic approaches.

3.2 The EESC recommends that every child should be provided with information on his/her rights suitable to his/her age, based on the relevant UN Convention, thus ensuring that minors, especially 'invisible' minors who are under no proper care, can be empowered to seek protection.

3.3 In 2013, about 120 000 asylum applicants in the EU were minors, representing more than one quarter of the total number of asylum applicants. 12 685 asylum applicants were unaccompanied minors⁽⁴⁾. The proportion of unaccompanied minors claiming asylum in Europe has remained stable over the past 10 years at around 5 % of the total number of asylum claims made in Europe.

3.4 The status of 'children on the move' may differ at various stages on their journey and they may encounter many different situations of vulnerability⁽⁵⁾, all of which need to be addressed.

3.5 They may be travelling with their family, or independently, or with non-family members, or have been left unaccompanied after entering the territory of the Member State. The parents or caregivers of these children may also be undocumented, for example those who have entered irregularly or overstayed residence permits or visas as a family. The parents or their caregivers may also have a regular migration status, for example when children come to Europe to be reunited with their family but do not fall under reunification schemes. Children who are born in Europe may also be undocumented, because their parents are undocumented. Furthermore, children may be left behind in the case of a deportation.

3.6 Member States are legally obliged to ensure that the rulings of the European Court of Justice, particularly in the case of C-648/11 relevant to Regulation No 604/2013, and UN convention protections and standards are enacted in national legislation and must heed two overarching principles of the CRC: (i) the principle of non-discrimination (Article 2) and (ii) the best interests of the child (Article 3). Any policy or practice that is contrary to international and/or European laws should be challenged as unlawful, and infringement procedures should be launched whenever children's rights are violated.

⁽⁴⁾ Eurostat (2014), Asylum Statistics, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_statistics

⁽⁵⁾ Background paper of the European Forum on the Rights of the Child (2012) — http://ec.europa.eu/justice/fundamental-rights/files/background_cps_children_on_the_move_en.pdf

4. General comments

4.1 The proposed regulation will ensure that Member States comply with General Comment No. 6 of the United Nations Convention on the Rights of the Child (CRC), which deals with the treatment of unaccompanied and separated children outside their country of origin.

4.2 The THC 1996 ⁽⁶⁾ states that, regardless of national legislation, the age limit of 'children' or 'minors' is ALWAYS 18 years.

4.3 Fundamental principles with regard to children's rights need to be **mainstreamed** into the development, implementation and monitoring of laws, policies, procedures and practices affecting unaccompanied migrant children.

4.4 Minors whose application has been previously rejected in any Member State should be covered by this proposed legislation.

4.5 Personnel dealing with unaccompanied minors (law enforcement authorities, judicial authorities, interviewers, interpreters, social and youth workers, health professionals, guardians, legal representatives, police officers and border guards, amongst others) should be **properly trained** to respect children's rights.

4.6 The UN Convention obliges states to treat undocumented children in the same way as 'all' children, without distinction. However in practice there is a tension between national legal frameworks governing immigration control and those on child protection. The EESC urges Member States to ensure that children in an irregular situation are considered and protected as children, first and foremost, under national systems for child protection.

5. Specific comments

5.1 The EESC has strongly voiced its views on policies and practices regarding the fundamental rights of migrants in a regular or irregular situation in a wide range of EESC opinions ⁽⁷⁾ and through its participation in the European Integration Forum.

5.2 **Child-friendly reception conditions**, according to the UN Convention on the Rights of the Child and other International Conventions, like the Convention on The Rights of Persons with Disabilities, should be ensured for all migrant children or children in an irregular migration situation, whether undocumented or documented, even in the case of intra-European migration.

5.3 Immediately upon the arrival of any unaccompanied/separated child, free legal aid, and a qualified, independent **legal guardian** should be appointed to support, advise and protect him/her until he/she is reunited with his/her family or receives an appropriate care placement.

5.4 Although EU law recognises the importance of legal guardianship, it does not define the duties of a legal guardian. The legal guardian should be a 'qualified representative' who has experience in dealing with minors and a knowledge of national alien law and child protection legislation, with the authority to represent the child in all decision-making processes, provided the child gives his/her consent ⁽⁸⁾. The guardian shall have the financial resources to involve further expertise if necessary in the child's best interest.

5.5 Throughout the process of determining the Member State responsible, unaccompanied minors should have access to accommodation, education and vocational training, and health services **on the same basis as other children** within the jurisdiction of the receiving Member State, with particular consideration given to the child's psychological state.

⁽⁶⁾ The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (THC 1996), http://www.hcch.net/index_en.php?act=conventions.text&cid=70

⁽⁷⁾ (OJ C 128/29, 18.5.2010), (OJ C C48/6, 15.2.2011), (OJ C 67, 6.3.2014.), (OJ C 317/110, 23.12.2009).

⁽⁸⁾ THC 1996.

5.6 **Children's views** and accounts of their experiences need to be incorporated into policy formulation responses and action plans for children. Research on the need for child-centred evidence, including a child's right to express their views freely in all matters affecting them, has provided valuable first-hand evidence for the European Action Plan on unaccompanied minors (2010-2014) ⁽⁹⁾.

5.7 The terms 'inform' and 'effective opportunity' need to be clearly defined to ensure (i) that the minor is assisted by properly trained social workers, independent interpreters and a legal guardian in understanding the implications of the whole process of lodging an application for international protection in any EU Member State in a language that he/she can understand, and (ii) that the minor must give or withhold his/her consent, in writing if necessary.

5.8 At no phase in the process of applying for international protection should a minor be kept in **detention**. Moreover, detention will not allow them to exercise their right to move to another Member State in order to apply there ⁽¹⁰⁾.

5.9 Any decision taken under the Dublin II and III Regulations and concerning unaccompanied minors seeking asylum should comply with the recent jurisprudence of the European Court of Justice ⁽¹¹⁾.

5.10 Agreements and protocols with different Member States called for in the proposed regulation should comply with the Treaty on the Functioning of the European Union.

5.11 The EESC fully agrees that following the adoption of this amended regulation, the Commission should carry out a review of Delegated Acts, as set out in the Dublin III Regulation and on the basis of Article 290 of the Treaty of the Functioning of the European Union.

5.12 The term '**adult sibling**' needs to be clarified when dealing with the right of the minor to family re-unification so as to ensure that the adult can carry out his/her duties towards the minor in a responsible manner according to the law.

5.13 The EESC recommends that Member States provide the necessary support and specialised care for **vulnerable children**, including children with psychological problems, mental or physical disabilities and/or health problems, as well as children in emergency situations, including children coming from regions of conflict where they or their family have been through traumatic experiences, as well as pregnant teenagers or parents under the age of 18.

5.14 The EESC strongly urges Member States to ensure that any **age assessment** procedures (i) are based on the minor's best interests ⁽¹²⁾, (ii) require the presence of a legal guardian, and (iii) are processed by a variety of independent professionals, including child psychologists, social workers and legal experts, as part of the team of male and female experts. The process of the assessment and the decision should be accurately documented.

5.15 Until the assessment is completed, each person claiming to be a minor should be considered and treated as a minor.

5.16 Age assessment should primarily take place on the basis of documentary evidence. A recent ruling by the Spanish Court has established that documentation should not be questioned.

5.17 The minor should be fully informed about the process of age assessment and its consequences and his/her views be given due weight in accordance with his/her age and maturity.

⁽⁹⁾ FRA (2009) Developing indicators for the protection, respect and promotion of the Rights of the Child in the European Union.

⁽¹⁰⁾ UN Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied minors and separated children outside their country of origin CRC/GC/2005/6.

⁽¹¹⁾ European Court of Justice, 6 June 2013, case C-648/11.

⁽¹²⁾ ENOC European Network of Ombudspersons for Children — www.ombudsnet.org

5.18 In the absence of documentation or in cases of serious doubt about the age of the minor, medical/physical investigations may be conducted as a measure of last resort, respecting the child's culture, dignity, physical and moral integrity, as some physical assessments may be particularly stressful, invasive and traumatic. Informed consent should be requested and obtained when medical/physical investigations are considered necessary. The medical/physical investigation shall be accompanied by a socio-pedagogical assessment made by experts. Both proceeding should be cumulative.

5.19 The findings of any proceedings should be **subject to appeal**.

5.20 The legal position of unaccompanied **minors who become adults** is complex, and differs between Member States. Although the procedural rules are set out in the Asylum Directive on this issue, there is a need to establish rules on the rights of a person who turns eighteen during the procedure.

5.21 The EESC strongly recommends that in such situations, age is to be determined in the initial stages of application, to reduce the risk of the minor drifting into an irregular status and disappearing.

5.22 The response of states to the issue of **child trafficking** must not be determined by the immigration status of the child and their asylum application, but in the best interests of the child.

5.23 Children in an irregular migration situation should never be subject to **criminal proceedings** for reasons solely related to their immigration status or where their involvement in criminal activity is the result of exploitation.

5.24 Member States have until the end of July 2015 to enact the Asylum Protection Directive which includes, among other things, the obligations of Member States to identify cases of vulnerable, unaccompanied children at an early stage.

Brussels, 15 October 2014.

The President
of the European Economic and Social Committee
Henri MALOSSE
