

No. 4

LEGAL NOTE:

EU PROTECTIONS FOR CHILD REFUGEES

Read time: 25 mins

Published on: 14 September 2017



ACCOUNTABILITY
UNIT



© Getty

LEGAL NOTE:

EU PROTECTIONS FOR CHILD REFUGEES

EXECUTIVE SUMMARY

- EU Member States and EU agencies are required to act in “the best interests of the child” in all decision-making processes.
- EU law recognises the vulnerability of child refugees to human rights abuses especially gender-based harm.
- Special protections for child refugees are provided in EU law including in relation to their: accommodation upon arrival; reunification with families; and forced return to a country of origin where required.
- Implementation of the EU’s protective legislation is varied and inconsistent. The reality is that many children are kept in inappropriate conditions and are vulnerable to sexual exploitation, trafficking as well as other abuses.

BACKGROUND

What specific issues do children migrating into Europe face?

1. Between January 2015 and September 2016, more than 664,500 children claimed asylum in the European Union (EU).¹ This represents one in three asylum seekers registered in the EU over the same period. Child asylum claims continue to increase in Europe: there has been a six-fold increase in the number of child asylum applicants in Europe in the last six years.²
2. The number of unaccompanied minors who applied for asylum in Europe reached 96,465 in 2015 — nearly a quarter of the applicants under 18 years of age arrived in Europe unaccompanied.³
3. Child refugees are particularly vulnerable to the risk of gender-based violence or harm, such as trafficking, sexual violence and sexual exploitation, as they suffer from a lack of protection whilst travelling along migration routes. Many children go missing or are separated from their families during the migration journey. Italian social workers have reported that many female children arriving from African countries were forced into prostitution in Europe and Libya.⁴ Doctors in Save the Children’s migrant program in Italy reported that 50% of children they encounter are suffering from a sexually transmitted infection; evidence believed to demonstrate sexual exploitation along the migrant routes.⁵ When entering the EU irregularly, many child refugees are placed in significant danger. In 2016, 38% of migrants who arrived in Greece by sea were children;⁶ in the first 11 months of

2015, one in every three people who lost their lives in the Eastern Mediterranean was a child.⁷ In addition, child refugees face a risk of detention upon arrival. Whilst detention of children is required to be a measure of “last resort”, for the “shortest period of time” and in facilities suitable to minors,⁸ the reality of increased migration has left many children in migration holding centres (known as “hotspots”) for prolonged periods (see paragraphs 47 to 52 below). These centres have been described as “squalid”, “deplorable” and, by children themselves, as “scary”.⁹ More generally, child refugees suffer separation from their families, disruption to their education, and a broader lack of legal advice and support during what is already an inherently traumatic process.

Which groups of child migrants are protected under EU law?

4. All EU Member States are party to the UN Convention on the Rights of the Child (UNCRC), which defines a “child” as “every human being below the age of 18 years unless under the law applicable to the child, majority is attained later”.¹⁰ EU laws, discussed below, also contain specific protections for “unaccompanied minors”, meaning persons under 18 who arrive in the EU unaccompanied or who are left unaccompanied after their arrival. This note also excludes from its scope regional instruments such as the European Convention on Human Rights, protections under EU law, or the domestic law of individual States.
5. The key EU legal instruments contain protections for “persons in need of international protection”, which

includes “refugees” and “persons eligible for subsidiary protection”.¹¹

6. “Refugees” are persons unable to remain in their home country due to a well-founded fear of persecution for reasons of “race, religion, nationality, political opinion or membership of a particular social group”.¹² This is the same definition given in the UN Convention Relating to the Status of Refugees (the Refugee Convention).¹³
7. “Persons eligible for subsidiary protection” are persons who do not qualify as “refugees”, but in respect of whom “substantial grounds” are shown that, if returned to their country of origin or habitual residence, they “would face a real risk of suffering serious harm” and are therefore unable or unwilling to “avail [themselves] of the protection of that country”.¹⁴
8. EU law also provides protections for asylum seekers, i.e. persons seeking international protection whose requests for sanctuary are yet to be determined.

Which key EU instruments provide protections and rights to child refugees?

9. This note provides a snapshot of the EU law instruments providing protection to child refugees and asylum seekers. It does not address the laws and regulations of individual Member States, the implementation of key EU instruments by individual Member States, or the protections available under international law. Some of the legal protections afforded to refugee and asylum-seeking children under EU law are set out in Directives. As Directives need to be implemented into national law and Member States enjoy a wide discretion in this

regard, implementation is not consistent across Member States. In addition, certain Member States have opted out of key legislative measures.¹⁵

10. Child refugees enjoy multi-layered protection in the EU. The relevant binding legal framework consists of the Treaty on the European Union (TEU), the EU Charter of Fundamental Rights (CFR), and the Refugee Convention. In addition, EU Member States must also comply with the case law of the European Court of Human Rights (ECtHR), which has rendered a number of judgments dealing with detention, the status of reception facilities and the interpretation of legislated rights. These decisions are dealt with in a separate legal note.
11. At the core of the EU's asylum seeker and refugee protection system is the right to asylum and the prohibition of refoulement (i.e. the protection against return to a country where a person has reason to fear persecution),¹⁶ as guaranteed by the CFR and the Refugee Convention.
12. More generally, the overarching principle that a child's best interests are paramount is central under EU law. The CFR provides that in all actions relating to children, whether taken by public authorities or private institutions, "the child's best interests be a primary consideration" and that Member States must ensure that children have "the right to such protection and care as is necessary for their well-being".¹⁷ The "best interests" principle is reaffirmed in the Directives and other EU instruments discussed below.

13. The TEU also provides for protection of children's rights within the EU's borders and the promotion of children's rights externally.

KEY POLICIES AND PRINCIPLES FROM LEGAL INSTRUMENTS

Processing Incoming Child Refugees and Asylum Seekers

Standards for Reception Facilities

14. The Recast Reception Conditions Directive¹⁸ sets out the standards for reception of applicants for international protection while their applications are being considered (i.e. while they are asylum seekers).
15. Member States must consider the specific situation of those designated as having special reception needs, including minors.¹⁹ Member States are specifically required to ensure a standard of living "adequate for the minor's physical, mental, spiritual, moral and social development" by reference to, inter alia, the child's own views.²⁰
16. Child asylum seekers must be housed with their parents or the adult responsible for them, and minor siblings, provided this is in their best interests.²¹ In accommodation centres they must have access to "leisure activities, including play and recreational activities appropriate to their age".²² Member States must provide rehabilitation, mental health and counselling services to minors who have suffered from abuse, neglect, exploitation, torture, cruel, inhumane or degrading treatment, or armed conflict.²³

17. Unaccompanied child asylum seekers must be placed with any adult relatives, in accommodation centres with special provisions for children or in other suitable accommodation.²⁴ A representative must be appointed who will empower and enable them to benefit from the rights granted.²⁵ Representatives must be assessed regularly for suitability by the appropriate authorities.²⁶ As far as possible, unaccompanied siblings should be kept together, and changes of residence should be kept to a minimum.²⁷

Processing Applications for International Protection

18. The Recast Asylum Procedures Directive²⁸ sets out common standards for granting and withdrawing applications for international protection. It contains specific provisions relating to child migrants. Minors must have the right to apply for international protection either on their own behalf, or if they are unaccompanied or lack legal capacity, through their parent or other responsible adult.²⁹
19. It is left to individual Member States to determine whether minors shall be entitled to a personal interview in respect of their application. Any such interview must be conducted in a child-friendly manner.³⁰
20. The Directive also contains guarantees for unaccompanied minors, including that someone is appointed to represent and assist them. The representative must “inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself”.³¹ The representative can be the same

representative as referred to in the Reception Conditions Directive — continuity in representation is important in order to build mutual trust between the representative and the unaccompanied minor. The Directive does not specifically provide for any qualifications or specific duties of the representative; rather, this is left to national law.

21. Unaccompanied minors have the right to have their representative and/or legal advisor present at any personal interview.³² Any person who conducts the interview must be sufficiently informed of the minor’s special needs. A decision on the minor’s application for international protection must likewise be made by an official with knowledge of the minor’s special needs.³³
22. Medical examinations to determine a minor’s age are permitted subject to certain important restrictions. Member States can only carry out a medical assessment of the applicant’s age with the consent of the applicant and/or their representative, and only when considered essential to determine the applicant’s age. Failure to consent cannot be the sole grounds to refuse an application.³⁴ If doubt remains after the assessment, Member States must assume that the applicant is a minor. Examinations must be carried out “by qualified medical professionals” in “the least invasive examination”. Examinations must be conducted in a gender-sensitive manner, with “full respect for the individual’s dignity”.³⁵ Notwithstanding these protections, however, in practice medical examinations continue to be described as “flawed” and “extremely

humiliating”.³⁶ Furthermore, there is no consistent practice across Member States as to how the testing is carried out.³⁷

23. The Directive specifically requires Member States to ensure that personal interviews and examinations are gender-sensitive.³⁸ Recognising that girls may find it difficult to tell their story to a man, girls should be given the option of a female interviewer, and, if necessary, a female interpreter.³⁹
24. The Directive allows Member States to use expedited or border procedures for determining an unaccompanied minor’s application for international protection only in the very limited circumstances set out in Article 25(6).⁴⁰ Article 25(6) has attracted criticism amongst non-governmental organisations: the European Council of Refugees and Exiles states that it is “particularly concerned” by Article 25(6) on the basis that it “is overly complex and extremely problematic from a children’s rights perspective as it may seriously jeopardise in practice unaccompanied children’s effective access to the safeguards laid down” elsewhere in the Directive.⁴¹

Reunification of Families

25. The journey to Europe by those seeking asylum can often be chaotic, with children frequently being separated from their families along migration routes and amid processing.⁴² Unaccompanied children are at greater risk of exploitation, including sexual abuse, trafficking, and child labour.⁴³ Often, unaccompanied children cannot be reunited with family members at all. It is therefore crucial that EU legislation provides common methods for

maintaining family unity and reuniting separated families across Member States where possible. Two legal instruments govern the reunification of families of refugees within the EU: the Family Reunification Directive and the Dublin Regulation.

26. The Family Reunification Directive⁴⁴ sets out the conditions for third-country (i.e. non-EU) nationals lawfully residing in the EU to bring family members to live with them in the EU. It applies only to those who have already been recognised as entitled to international protection.
27. Where an unaccompanied minor is a refugee, Member States shall allow entry to their “first-degree relatives in the direct ascending line” (i.e. parents and siblings) entry for the purpose of family reunification, and may allow entry to another legal guardian or family member where no such first-degree relatives can be traced.⁴⁵ Where a refugee is unable to provide documentary evidence of family relationships, Member States may consider other evidence.⁴⁶ Applications must not be rejected solely for lack of documentary evidence.⁴⁷
28. Unfortunately, implementation has not been consistent across Member States. It has tended to be restrictive, with countries such as the Netherlands imposing additional conditions, such as integration tests, for reunification.⁴⁸
29. The Dublin Regulation⁴⁹ sets out the criteria for determining the Member State responsible for examining an application for international protection.

“Respect for family life” must be a primary consideration when applying the Regulation.⁵⁰

30. The Dublin Regulation contains a set of guarantees for minors. For example, family reunification possibilities and providing minors with tracing services to locate family members must be considered as a means of promoting a child’s best interest.⁵¹ If an unaccompanied minor has a relative in a different Member State (and it is in the child’s best interests), that Member State shall assume responsibility for reuniting the family members.⁵²

Trafficking and Exploitation

31. Trafficking in human beings is the buying, selling and exploitation of adults and children. Between 2014 and 2016, at least 10,000 unaccompanied refugee children are estimated to have gone missing after their arrival in Europe,⁵³ with a distinct possibility of these children being trafficked or otherwise exploited.⁵⁴ Child asylum seekers are frequently trafficked during their journey to Europe, upon arrival in Europe, and along European migration routes, for purposes of sexual and/or labour exploitation.⁵⁵ Unaccompanied minors are at particular risk.

The EU Directive on Trafficking Human Beings

32. The EU Directive on Trafficking Human Beings⁵⁶ establishes the minimum rules concerning the definition of human trafficking and introduces common provisions to prevent trafficking and protect its victims. The Directive contains provisions specific to children. Where the age of a victim of trafficking is uncertain, if there is reason to believe that the victim is under the age of 18,

they will be presumed to be so and will receive the protections accorded to children.

33. Member States must take appropriate measures, such as education, training and awareness campaigns to discourage and reduce the demand for trafficking and to reduce the risk of people, especially children, becoming trafficking victims.⁵⁷
34. Officials likely to come into contact with actual or potential trafficking victims — such as Frontex officers, referred to in paragraph 43 below — must be regularly trained to ensure they are able to identify and assist them in a gender-sensitive manner.⁵⁸ This training is critical in order to prevent the trafficking of child asylum seekers upon their arrival in Europe.
35. Member States must take necessary short and long term measures to assist and support child victims of trafficking, including their physical and psychosocial recovery, following an individual assessment of the child’s special circumstances, taking into account the child’s views and needs, with a view to finding durable solutions. They must also provide access to education in accordance with national laws, and provide assistance and support to the child’s family situated on their territory.⁵⁹
36. Additional protections are granted to unaccompanied child victims, requiring that guardians be appointed and that specific actions are taken to assist and support these minors, with a view to finding durable solutions in the child’s best interests.⁶⁰

Returns or Expulsions

37. Expulsion policies for “irregular” (i.e. not legally entitled) immigrants are necessarily controversial and remain highly politicised within each individual Member State. Forced returns can infringe human rights — with particular risks including splitting families and people being forced to travel when unfit to do so.

Returns Directive

38. The Returns Directive⁶¹ governs repatriation of third-country nationals who are staying in a Member State illegally.⁶² This includes those who have had a negative decision on an application for international protection and have no further legal right to remain, as well as legal entrants who no longer fulfil entry conditions (e.g. visa over-stayers). The European Commission’s Returns Handbook⁶³ contains specific guidance on returns of unaccompanied minors.

39. The Directive permits Member States to grant to third-country nationals who are present in their territory residence permits or authorisations to stay, according to their national law, including for compassionate or humanitarian reasons.⁶⁴

40. Where a Member State chooses to allow an unaccompanied minor to stay, they must grant either a temporary permit or the right to stay until the unaccompanied minor reaches 18, or process a postponed removal.⁶⁵ While the decision is being considered, appropriate bodies (governmental or non-governmental)⁶⁶ must provide assistance. This is not limited to legal assistance,⁶⁷ and the mere provision of

guardianship is not sufficient.⁶⁸ “Appropriate bodies”⁶⁹ must have the right to lodge an application for international protection on behalf of an unaccompanied minor subject to an enforced return if they are of the opinion that such protection is needed.⁷⁰

41. Before returning an unaccompanied minor,⁷¹ the Member State must be satisfied that he or she will be returned to a family member, guardian or “adequate reception facilities in the State of return”.⁷² The Returns Handbook confirms that “the return to adequate reception facilities should not be seen as a durable solution and should preferably be accompanied by flanking reintegration and education measures.”⁷³ An assessment of reception facilities must be carried out on a case-by-case basis in line with the standards set out in Article 20 of the UNCRC.⁷⁴

42. Finally, while a return is pending, Member States must ensure that “family unity with family members present in their territory is maintained.”⁷⁵

Frontex

43. The European Border and Coast Guard Agency, commonly referred to as “Frontex”, carries out many refugee return operations as well as border management. The Frontex Code of Conduct for Joint Return Operations requires Frontex to consider the rights of children⁷⁶ and monitor the forced return of refugees.⁷⁷

44. Frontex is obliged to ensure that forced returns are performed humanely.⁷⁸ Returns must only be completed if the individual is fit to travel.⁷⁹ Where individuals are known to have medical conditions, a medical certificate

confirming fitness to travel is required where the joint return operation will be by air travel.⁸⁰

45. In 2011 and 2012, improvements were made including the adoption of a fundamental rights strategy and appointment of fundamental rights officers in order to establish a fundamental rights framework for Frontex operations. However, Amnesty International notes that these have had a limited impact in practice.⁸¹

Detention

46. The Recast Reception Conditions Directive sets out the limited circumstances in which Member States may detain asylum seekers.⁸² It contains special protections for minors.
47. Detention of minors can be utilised only as a “last resort”, after it has been established that other less coercive measures cannot be applied effectively.⁸³ Such detention must be for the shortest period of time and all efforts must be made to release the detained minors and place them in accommodation suitable for minors.⁸⁴ The preamble to the Directive also states that, in detaining children, Member States must uphold Article 37 of the UNCRC.⁸⁵
48. Unaccompanied minors may only be detained in “exceptional circumstances”. All efforts must be made to release them as soon as possible. Unaccompanied minors must be housed separately from adults and must never be detained in “prison accommodation”.⁸⁶ Similar protections are set out in the Returns Directive.⁸⁷
49. Detention facilities must also be gender-sensitive.⁸⁸ In a practical sense, this means that males and females must

be housed separately (with the exception of families that wish to stay together), girls must have their privacy respected including by having private bathing and sanitation facilities and having the ability to lock their rooms, and girls must receive proper health-care including counselling about their reproductive health rights.⁸⁹

50. Minimum requirements relating to a child’s quality of life whilst in detention are provided. Minors who are detained must be given access to leisure and recreational activities appropriate to their age.⁹⁰
51. The European Commission launched the “hotspot” approach in 2015, under which children are held in migration holding centres (or “hotspots”) set up along frequent migrant routes, aimed at swiftly identifying, registering, and fingerprinting incoming migrants to facilitate the relocation process and to ensure a fair distribution of refugees between EU Member States.
52. In practice, and despite the existence of the protections set out in the Directive, children are routinely held in hotspots for prolonged periods in inappropriate accommodations which, while not technically “detention” or “prison accommodation”, fall far below what must be expected. As noted in paragraph 3, these centres have been described as “squalid”, “deplorable” and, by children themselves, as “scary”.⁹¹
53. The Dutch Council for Refugees’ December 2016 study on the implementation of hotspots found that many newly arrived asylum seekers “have been trapped in prolonged detention without access to asylum, have not

received the right information in order to do so, or have been swiftly returned as a result of the hotspots approach.”⁹² In its April 2017 Special Report into hotspots, the EU Court of Auditors agreed that “many unaccompanied minors have been held for long periods at the hotspots in inappropriate conditions despite the law requiring they be prioritised.”⁹³ The EU Court of Auditors suggested that every hotspot site be overseen by a child protection officer; however, there was no recommendation that unaccompanied children be housed elsewhere. On balance, the EU Court of Auditors took the view that the hotspot approach is generally positive, noting that hotspots in Greece and Italy have contributed to faster management of incoming migrants.⁹⁴ Human rights concerns nonetheless remain: the Dutch Council for Refugees’ study noted that: the hotspot approach has resulted in fundamental rights being disrespected; Italy’s use of hotspots was unregulated and arbitrary; detainees in Italian hotspots had no access to effective remedy; and Greece’s practice of mandatory detention, applied indiscriminately even to families and small children, was contrary to EU law.⁹⁵

REFORM

54. Whilst the EU has enacted many protective measures, implementation is inconsistent. Children are still suffering in large numbers — a Harvard University Report describes witness accounts of child marriage, sexual exploitation of minors, rape and other violence against migrant children in Greece.⁹⁶ One of the reports author’s describes “a growing epidemic of sexual exploitation

and abuse of migrant children in Greece”.⁹⁷ Recently introduced measures such as the hotspot approach were intended to provide faster processing of asylum seekers and quicker access to refugee protections; in practice, those measures have led to yet further abuses.

55. Clearly, the rights of asylum seeking and refugee children are not being systematically upheld and protected in Europe. Furthermore, practical help is not reaching all affected children. Whether this is due to the sheer volume of migrants or institutional failings at the State level is unclear. There is a substantial need to strengthen the provision of information to newly arrived migrants in Europe, including as to their legal rights, and to quickly appoint appropriate representatives, legal representatives and/or guardians for unaccompanied minors. It must be ensured that any detention of children in hotspots is for a lawful purpose, necessary and proportionate and is decided on the basis of an individual, age-sensitive and gender-sensitive assessment in compliance with Member States’ obligations under EU law. The legal tools available at the EU level are useful, but greater progress and better implementation are required in utilising them to assist those they were enacted to protect.

REFERENCES

1. European Commission, Questions & Answers: protecting children in migration, 12 April 2017, available at http://europa.eu/rapid/press-release_MEMO-17-907_en.htm, (last accessed 14 August 2017).
2. *Ibid.*
3. UNICEF, *Refugee and Migrant Crisis in Europe*, September 2015, p. 1; European Asylum Support Office, Annual Report on Asylum in the European Union 2015, Doc. 2314-9701, 2016, p. 109.
4. *Ibid.*, pp. 41 and 43; UNICEF, *Uprooted: The Growing Crisis for Refugee and Migrant Children*, September 2016, p. 93.
5. European Union Committee, *Children in Crisis: Unaccompanied Migrant Children in the EU*, House of Lords Paper 34, 26 July 2016, p. 11.
6. UNICEF, *Refugee and Migrant Crisis in Europe*, Humanitarian Situation Report 12, 13 June 2016, p. 1.
7. UNHCR, Some 80,000 refugees arrive in Europe in first six weeks of 2016, available at: <http://www.unhcr.org/56bdf0f26.html>, (last accessed 14 August 2017).
8. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 (the "Reception Conditions Directive"), art. 11(2).
9. UNICEF, *supra* note 4, p. 93.
10. UN Convention on the Rights of the Child, 1981, 1577 UNTS 3 (entered into force 2 September 1990) ("UNCRC"), art. 1.
11. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (the "Qualification Directive").
12. *Ibid.*, art. 2(d).
13. UN Convention Relating to the Status of Refugees, 1951, as supplemented by the 1967 Protocol Relating to the Status of Refugees, art. 1.
14. Qualification Directive, *supra* note 11, art. 2(f).
15. The United Kingdom, Ireland and Denmark have opted out of the Recast Reception Conditions Directive, the Recast Procedures Directive and the Family Reunification Directive. Denmark has opted out of the Dublin Regulation and the EU Directive on Trafficking Human Beings. The United Kingdom and Ireland have opted out of the Returns Directive.
16. UNHCR, Note on Non-Refoulement, available at: <http://www.unhcr.org/afr/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html> (last accessed 14 August 2017).
17. Similar protections exist under arts. 3(1) and 3(5) of the United Nations Convention on the Rights of the Child (*supra* note 10), which has been ratified by all EU Member States.
18. Directive 2013/33/EU of the European Parliament and of the Council of 5 April 2013 (the "Recast Reception Conditions Directive").
19. *Ibid.*, art. 22.
20. *Ibid.*, arts. 23(1) and (2).
21. *Ibid.*, art. 23(5).
22. *Ibid.*, art. 23(3).
23. *Ibid.*, art. 23(4).
24. *Ibid.*, art. 24(2).
25. *Ibid.*, art. 24(1).
26. There is no specific guidance on suitability criteria for representatives. Appointment of guardians is grounded in guardianship law in each individual Member State. The EU's Fundamental Rights Agency has published a handbook, *Guardianship for Children Deprived of Parental Care*, which can be found at <http://fra.europa.eu/en/publication/2014/guardianship-children-deprived-parental-care-handbook-reinforce-guardianship> (last accessed 14 August 2017).
27. Recast Reception Conditions Directive, *supra* note 18, art. 24(2).
28. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 (the "Recast Asylum Procedures Directive").
29. *Ibid.*, art. 7(2).
30. *Ibid.*, art. 15(3)(e).
31. *Ibid.*, art. 25(1)(b).
32. *Ibid.*, art. 25(1)(b).
33. *Ibid.*, art. 25(3).
34. *Ibid.*, art. 25(5).
35. *Ibid.*, art. 25(5).
36. European Union Committee, *supra* note 5, pp. 15 – 16.
37. *Ibid.*, pp. 15 – 16.
38. Recast Asylum Procedures Directive, *supra* note 28, art. 15(3)(a) and recital 32.
39. European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, *Reception of female refugees and asylum seekers in the EU*, 2016, Doc. PE 556.946, p. 13.
40. *Ibid.*, art. 25(6)(b). This includes: if the minor comes from a safe country; if the minor has made a subsequent application; on grounds of national security or where the applicant has been expelled on public security or public order grounds; where there are reasonable grounds to consider that a non-EU country is a safe third country; where the minor has misled authorities by presenting false documents; or in bad faith, has destroyed a travel or identity document that would have assisted in determining their identity.
41. European Council of Refugees and Exiles (ECRE), *Information Note on Directive 2013/32/EU on of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international*

- protection (recast), December 2014, available at: <https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Asylum-Procedures-Directive-recast-December-2014.pdf> (last accessed 14 August 2017).
42. L. Dearden, Refugee crisis: Lost children being split from parents left "vulnerable to trafficking and abuse", *The Independent*, 10 September 2015.
 43. European Parliament, *Vulnerability of unaccompanied and separated child migrants*, Briefing Doc. PE 595.853, December 2016, p. 3.
 44. Council Directive 2003/86/EC of 22 September 2003 (the "Family Reunification Directive").
 45. *Ibid.*, art. 10(2).
 46. *Ibid.*, art. 11(2).
 47. *Ibid.*, art. 11.
 48. Similarly, in Sweden and Austria further legislative changes have allegedly led to a restriction on family reunification. See further House of Lords, Revised Transcript of evidence taken before the EU Sub-Committee on Home Affairs Inquiry on Unaccompanied Minors in the EU Evidence Session No 7, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-home-affairs-subcommittee/unaccompanied-minors-in-the-eu/oral/33093.html> (last accessed 14 August 2017).
 49. Regulation (EU) No 04/2013 of the European Parliament and of the Council of 26 June 2013 (the "Dublin Regulation").
 50. *Ibid.*, recitals 13 and 14.
 51. *Ibid.*, art. 6.
 52. *Ibid.*, art. 8. In CJEU, *The Queen on the application of MA, BT, DA v. Secretary of State for the Home Department*, Fourth Chamber of the CJEU, Case No. C-648/11, 6 June 2013, the CJEU considered the situation where an unaccompanied minor made an application for asylum in two Member States. The CJEU concluded that, given the particular vulnerability of unaccompanied minors and the need to process their claims expeditiously and avoid unnecessary transfers, the Member State in which the unaccompanied minor is currently present, should deal with their claim. However, the CJEU also found that if a negative decision is made in one Member State the unaccompanied minor cannot force another Member State to consider his or her case.
 53. Europol Official: 10,000 Migrant Children Missing in Europe, January 2016, available at <https://www.voanews.com/a/europol-officials-10000-migrant-children-missing-in-europe/3170459.html> (last accessed 14 August 2017).
 54. Europol, Situation Report: *Trafficking in human beings in the EU*, 765175, February 2016, p. 21.
 55. H. Sherwood, Unaccompanied young refugees in Europe 'at risk from criminal gangs', *The Guardian*, 1 November 2015, available at: <https://www.theguardian.com/world/2015/nov/01/unaccompanied-young-refugees-europe-traffickers> (last accessed 14 August 2017).
 56. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 (the "Directive on Trafficking Human Beings").
 57. *Ibid.*, arts. 18(1) and (2).
 58. *Ibid.*, art. 18(3).
 59. *Ibid.*, arts. 14(1) and (3).
 60. *Ibid.*, art. 16.
 61. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 (the "Returns Directive").
 62. The Returns Directive defines "third country national" as any person who is not a citizen of the EU within the meaning of art. 17(1) of the TEU and who is not a person enjoying the Community right of free movement, as defined in art. 2(5) of the Schengen Borders Code (see art. 3(1)) and "illegal stay" as the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in art. 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State (see art. 3(2)).
 63. European Commission, Return Handbook, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf (last accessed 14 August 2017).
 64. Returns Directive, *supra* note 61, art. 6(4).
 65. Return Handbook, *supra* note 63, § 10.
 66. *Ibid.*, § 10.1.
 67. Returns Directive, *supra* note 61, art. 10(1).
 68. Return Handbook, *supra* note 63, § 10.1.
 69. The "appropriate body" should be separate from the enforcing authority and could either be a governmental body (possibly a separate service within the same ministry) or a non-governmental institution or a combination of both systems, providing for multidisciplinary cooperation between government supported and non-governmental guardian.
 70. Recast Asylum Procedures Directive, *supra* note 28, art. 7(4).
 71. The Return Handbook, *supra* note 63, provides in § 10 that the definition of unaccompanied minor used in recent asylum directives (e.g. art. 2(e) of the Recast Reception Directive, *supra* note 18, which reflects the definition set out in the Qualification Directive, *supra* note 11) should be used in interpreting the Returns Directive, *supra* note 61.
 72. Returns Directive, *supra* note 61, art. 10(2).
 73. Return Handbook, *supra* note 63, § 10.2.
 74. *Ibid.*
 75. Returns Directive, *supra* note 61, art. 14(a).

76. Frontex, Code of Conduct for Joint Return Operations Coordinated by Frontex, art. 4(1).
77. *Ibid.*, art. 13.
78. *Ibid.*, art. 4(1).
79. *Ibid.*, art. 7(1).
80. Frontex, Code of Conduct for Joint Return Operations by Air Coordinated by Frontex, art. 6.1.17.
81. Amnesty International, *The Human Cost of Fortress Europe - Human Rights Violations against Migrants and Refugees at Europe's Borders*, Doc. 05/001/2014, 2014, p. 16.
82. The Court of Justice of the European Union has given a narrow interpretation of the circumstances in which asylum seekers can lawfully be detained under EU law (see CJEU, *J.N. v Staatsecretariat van Veiligheid en Justitie*, Case C-601/15 PPU, Grand Chamber, 15 February 2016).
83. Recast Asylum Procedures Directive, *supra* note 28, art. 11(2).
84. *Ibid.*
85. This requires that: (i) no child shall be subject to cruel or degrading treatment; (ii) no child shall be detained unlawfully or arbitrarily; (iii) detained children shall be treated with dignity; and (iv) children shall be given "prompt access" to legal and other assistance. Article 37 of the UNCRC requires that detained children be given the right to challenge the legality of their detention.
86. Recast Asylum Procedures Directive, *supra* note 28, art. 11(3) .
87. See Returns Directive, *supra* note 61, art. 17. As stated above, the Returns Directive is applicable to those illegally present in the territory of a Member State.
88. Recast Receptions Conditions Directive, *supra* note 18, art. 18(3).
89. European Parliament, *supra* note 39, p. 14.
90. *Ibid.*, art. 11(2).
91. UNICEF, *supra* note 4, p. 93.
92. Dutch Council for Refugees, *The implementation of the hotspots in Italy and Greece: a study*, December 2016, p. 52.
93. European Court of Auditors, *Special Report no 06/2017: EU response to the refugee crisis: the 'hotspot approach'*, 25 April 2017, p. 28.
94. *Ibid.*
95. Dutch Council for Refugees, *supra* note 92, p. 51.
96. Harvard University FXB Centre for Health and Human Rights, *Emergency within an Emergency: The Growing Epidemic of Sexual Exploitation and Abuse of Migrant Children in Greece*, 17 April 2017.
97. D. Taylow, *Child Refugees in Europe forced to sell bodies to pay smugglers*, *The Guardian*, 18 April 2017.

CONTACT INFORMATION

This briefing note is published to provide general information and not as legal advice. Please contact a member of the Accountability Unit Legal Team or Research Team if you would like to discuss the contents of this note.

We would like to acknowledge the kind efforts of our colleagues at Gibson Dunn & Crutcher LLP, Sophy Helgesen, Nooree Moola, Kathryn Vickers and Rebecca Sambrook who volunteered their time to research and author this note whilst managing their busy legal practices.

Gibson Dunn is an international law firm with over 1,200 lawyers located in major cities throughout the United States, Europe, Asia, the Middle East and Latin America. The firm has a long-standing and greatly valued tradition of commitment to pro bono, providing advice for a wide range of charitable and non-profit organisations, and has been privileged to work on many matters profoundly affecting our society and the civil rights of its citizens.

Accountability Unit
Registered UK Charity: 1166018
www.accountabilityunit.org



AU_Feed



@accountabilityunit

Aarif Abraham
Legal Officer

Sebnem Erener
Associate Legal Officer

Kai Hannah Brodersen
Research Editor

Safi Van 't Land
Research Editor