

ICM Spotlight on the EU: Durable Solutions

WHAT'S AT THE HEART OF THE MATTER?

Finding a durable solution means identifying a country in which children have a right to reside and live their lives. A durable solution is one that, to the greatest extent possible, fulfils the best interests of the individual child in the long term and is sustainable and secure from that perspective. A secure and long-term residence status is vital to ensure that children in migration access all of their rights, including their rights to well-being and development. A durable solution may involve integration in the country of residence or resettlement or reunification with family members in the country of origin or in a third country, with support.

Governments should seek durable solutions for a child, whether they are within a family or as an unaccompanied or separated child. Because a decision on a durable solution will have fundamental long-term consequences for the child, it should be based on a formal procedure to examine their best interests and protection needs, and address their rights as children. This procedure should also ensure the child is well informed and duly take into account their views.

National laws and policies concerning status determination have frequently been set out in a fragmented way, with different grounds for decision-making spread between different laws, policies and procedures. This is beginning to change, in particular with a focus on developing best interests' determination procedures in relation to unaccompanied and separated children, following increased guidance from international law sources and agencies, such as CRC General Comment No 6 and Safe and Sound from UNHCR and UNICEF. Procedures concerning children within families often focus primarily on the status of the adult family members, with children's status dependent, and little or no consideration of their own rights and needs. This includes procedures concerning children's access to birth registration and acquisition of a nationality, which in some European countries are dependent on the parents being documented or having legal residence, even where the child would otherwise be stateless. However, there has been an increasing focus internationally on the best interests of the child in these proceedings as well, most recently in General Comments 22 and 23 of the Committee on the Rights of the Child.

Transnational cooperation between States can also be an important element in identifying and implementing durable solutions in the best interests of the child. This is an area which requires further focus and action at European level (see also Spotlight sections on Solidarity and cooperation between EU Member States and on Fulfilling migrant children's rights in EU external policy).

WHAT CHILD RIGHTS ARE AT STAKE?

The best interests of the child, and how all of their rights are fulfilled, are relevant to finding durable solutions. Ensuring that the child is able to develop in an environment which will meet his or her needs and fulfil his or her rights as defined by the [CRC](#) should be at the centre of durable solution process. *CRC rights are organised by the [UN Child Rights Clusters used for country reporting to the Committee on the Rights of the Child \(periodic review\)](#)*. These Clusters are used by national governments when reporting to the UN Committee on the Rights of the Child and are a useful point of reference. The following clusters are in particular focus in finding and

implementing durable solutions: *the general principles, violence against children, civil rights and freedoms, family environment and alternative care and special protection measures.*

Guidance of particular relevance to durable solutions can also be drawn from the [General Comments of the UN Committee on the Rights of the Child](#) and in particular:
[General Comment No. 6 \(2005\)](#): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin
[General Comment No 12 \(2009\)](#): The right of the child to be heard
[General Comment No 13 to Article 19 CRC](#): the rights of the child to freedom from all forms of violence
[General Comment No. 14 \(2013\)](#) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)
[Joint General Comment No. 3 of the CMW and No. 22 of the CRC](#) in the context of International Migration: General principles
[Joint General Comment No. 4 of the CMW and No. 23 of the CRC](#) in the context of International Migration: States parties' obligations in particular with respect to countries of transit and destination

WHAT EU POLICIES & INSTRUMENTS ARE RELEVANT?

There is no single EU *legal instrument* dealing with finding durable solutions for children in migration, whether they are unaccompanied or within families. Instead, different legal instruments apply depending on whether the child may be the child of regularly residing migrants and beneficiaries of international protection, seeking international protection, trafficked, or falling within the scope of the Return Directive. There are several cross-cutting EU *policies and funding instruments* relevant to the issue.

All

- [European Commission Communication on the protection of children in migration](#) (April 2017)-
“Durable solutions are crucial to establish normality and stability for all children in the long term. The identification of durable solutions should look at all options, such as integration in a Member State, return to the country of origin, resettlement or reunification with family members in a third country. It is essential that a thorough best interests determination be carried out in all cases.” (p.11)
- [Council Conclusions on the protection of children in migration](#) (June 2017)- *“UNDERLINE that the best interests of the child must be a primary consideration in all actions or decisions concerning children and in assessing the appropriateness of all durable solutions; resettlement, integration or return depending on their specific situation and needs”.*
- [Action Plan on the integration of third country nationals](#) (EC Communication 2016) – actions to promote integration of all children in migration except undocumented/irregularly resident children.
- Various EU funding instruments can be used by governments to advance the rights of children in migration. Ahead of the 2016 EU Forum on the rights of the child, which was dedicated to children in migration, the European Commission prepared a [background document](#) (revised on 5 of February 2018) with an overview of the different EU funds and

their scope, with examples of recent EU contributions. These funds are undergoing change, however the document provides a useful illustration of projects to date.

Children of regularly residing migrants including beneficiaries of international protection:

- [EU Directive on long-term residents](#) - covers status and rights of non-EU migrants who have resided regularly and continuously for 5 years, who meet certain criteria.
- [Family Reunification Directive](#) – covers conditions under which family reunification is granted to regularly residing non-EU migrants, establishes procedural guarantees and provides rights for the family members.
- [EU ‘Blue Card’ Directive](#) – covers status and rights of people admitted for the purpose of highly qualified employment and their family members. The Directive provides for Blue Card holders to migrate with their families and access long-term residence status.
- Note: other EU legislation on regular migrants does not provide provisions for durable solutions for children or refer to the best interests of the child. The [EU Single Permit Directive](#) sets down a single application procedure and common set of rights for many migrant workers, but does not include provisions related to the residence of dependent children. The [EU Directive on researchers, students, etc.](#) and the [EU Intra-Corporate Transferees Directive](#) address aspects of the situation on family members of researchers and intra-corporate transferees respectively, but do not consider residence rights. The [EU Seasonal Workers’ Directive](#) does not provide for family reunification for children of permit holders.

Children seeking or granted international protection:

- [EU International Protection Legislation](#). The Qualifications Directive covers the substantive basis for status determination for children seeking international protection and the rights which flow from international protection status, with procedural aspects covered by the Procedures Directive. *The existing international protection legislation is currently being renegotiated on the basis of proposals from the Commission made in 2016.*
- [EU resettlement scheme](#) provides the possibility for children outside of the EU in need of international protection to be granted it in the EU. *There is also a proposal under negotiation for a Regulation establishing a Union Framework for Resettlement.*
- [EASO Practical Guide on the best interests of the child in the asylum procedure](#) – published in 2019. Consult [EASO](#) website for other kinds of support and guidance that may be relevant to durable solutions, including “permanent support: supporting and stimulating the common quality of the asylum process through common training, common asylum training material, common quality and common Country of Origin Information (COI).”

Trafficked children:

- [EU Trafficking Directive](#) – see in particular Article 16 which requires member states to take the necessary measures to find a durable solution based on an individual assessment of the best interests of the child.

Children who may be subject to return proceedings:

- [EU Return Directive](#) (2008/115/EC) – procedures and rights of children identified by immigration authorities as irregularly residing - see in particular Article 5 requiring member states to take due account of the best interests of the child, family life and health

status, Article 6.4 on granting a right to stay for compassionate, humanitarian or other reasons and Article 6.5 refraining from issuing a decision to people with an ongoing application. Currently the recast of the Return Directive is the subject of a [Commission proposal](#).

- [European Commission Recommendation on making returns more effective](#), 7 March 2017 – paragraph 13 recommending clear rules on the residence status of unaccompanied children (issuing return decision or right to stay), based on an individual assessment of the best interests of the child, with safeguards.
- [European Commission Communication on the protection of children in migration](#) – “Clear rules should be established on the legal status of children who are not granted asylum but who will not be returned to their country of origin” (p.12)
“Where it is in their best interests, children should be returned to their country of origin or reunited with family members in another third country. Decisions to return children to their country of origin must respect the principles of non-refoulement and the best interests of the child, should be based on a case-by-case assessment, and following a fair and effective procedure guaranteeing their right to protection and non-discrimination.”
“It is important to ensure that children who will be returned are given prompt access to appropriate (re)integration measures, both before departure and after arrival in their country of origin or another third country.” (p. 13)
- [EU Return Handbook](#), revised 27 September 2017 (EC Communication) -
The Handbook is intended to guide implementation of the Return Directive. On durable solutions, the Handbook builds on the language in the EC Recommendation on making returns more effective of 7 March 2017 on identification of durable solutions for unaccompanied children. The Handbook states:
“Durable solutions are crucial to establish normality and stability for all minors in the long term. Return is one of the options to be examined when identifying a durable solution for unaccompanied minors and any Member State’s action must take into account as key consideration the best interests of the child. Before deciding to return an unaccompanied minor, and in accordance with Article 12(2) of the Convention on the Rights of the Child, the minor s concerned must be heard, either directly or through a representative or an appropriate body, and an assessment of the best interests of the child shall always be carried out on an individual basis, including on the particular needs, on the current situation in the family and on the situation and reception conditions in the country of return. Such assessment should systematically look at whether return to the country of origin, including reunification with the family, is in the minor’s best interests. The assessment should be carried out by the competent authorities on the basis of a multidisciplinary approach, involving the minor’s appointed guardian and/or the competent child protection authority....” (continues, including with further emphasis on the right to be heard, references to interpretative and operational guidance, and more of the residence status of unaccompanied children, see p.44-45).
However, all this content in the Handbook only references unaccompanied children, rather than all children in migration, in line with child rights standards and the EC Communication on children in migration.
- The [Global Compact on Migration](#), which the EU and member states negotiated with other countries at the UN (due to be adopted in December 2018), has child rights and best interests as a cross-cutting principle, mentions the need to find sustainable solutions in particular for unaccompanied and separated children, and includes the action:
“Ensure that return and readmission processes involving children are carried out only after

a determination of the best interests of the child..." (para 37g)

The [Global Compact on Refugees](#), which has been adopted at the UN General Assembly in December 2018 addresses the three traditional durable solutions of voluntary repatriation, resettlement and local integration, as well as other local solutions and complementary pathways for admission to third countries. Within this, it specifically highlights the use of emergency transit facilities or other arrangements for emergency processing for resettlement for women and children at risk (para 92).

Stateless Children/Children at risk of statelessness

- [Council Conclusion on Statelessness](#) - *Recalling that the right to acquire a nationality has been reiterated in a number of instruments of international human rights law such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child.*
- [Council Conclusion on the Promotion and Protection of the Rights of the Child](#) – Calls on member states to *..."continuously raise awareness of the importance of birth registration at the national, regional and local levels"*.

Other/non-EU relevant standards

- [European Convention on Nationality](#) – provides principles and rules applying to all aspects of nationality and is designed to ensure that acquiring a nationality is easier, nationality can not be arbitrarily withdrawn, procedures governing nationality applications are just and fair. See in particular Article 6 on the acquisition of nationality, which states that national law should enable nationality to be acquired by children who would otherwise be stateless at birth, and children who have remained statelessness on the territory.
- [1961 Convention on the Reduction of Statelessness](#) – the leading international instrument that sets out rules to prevent cases of statelessness from arising

Note: For an overview of legal provisions and guidance concerning unaccompanied children as of June 2014, see www.connectproject.eu.

Jurisprudence

Important international and European jurisprudence has been handed down on grounds that can establish a right of residence in a country based on human (and child) rights, and international protection. Often this is in relation to appeals against return decisions or removal orders.

Jurisprudence can be very helpful to support advocacy. Consult the websites of:

- the [Court of Justice of the European Union](#)
- the [European Court of Human Rights](#)
- the [UN Committee on the Rights of the Child](#) Optional Protocol No 3 Complaint Procedure
- <http://www.europeanmigrationlaw.eu/>
- [Asylum Information Database \(AIDA\)](#)
- [PICUM's Case Law Tool](#).

WATCH THIS SPACE: *Updated as of March 2019*

In a nutshell:

- **The ongoing revision of the international protection instruments are proving**

*Initiative
for children in migration*

protracted and contentious.

- **The implementation of the Trafficking Directive across Member States requires more work in relation to its durable solutions provisions.**
- **The European Commission has released a [proposal](#) to change some of the articles in the Return Directive, in line with the strong political focus on increasing returns. There are clear concerns about the impacts on children and child rights safeguards. The updated [Return Handbook of November 2017](#) has some strong language around procedures for unaccompanied children, while also reflecting problematic policy recommendations.**

RESOURCES FOR ADVOCACY

CEAS

Several organisations have been actively commenting on the **revision of the international protection legislation**, including the Qualifications Regulation and the Resettlement Regulation.

ECRE has produced detailed comments on the European Commission Proposal for a Qualification Regulation (available [here](#)), and the proposal for a recast Return Directive (available [here](#)). ECRE has also published two Policy Notes on the proposal for a Union Resettlement Framework: Untying the Union Resettlement Framework (available [here](#)) and EU Resettlement for Protection (available [here](#)). An ECRE/ELENA Legal Note on Ageing out and Family Reunification can be found [here](#).

Returns

Child rights agencies [raised concerns](#) that the **EC Recommendation on returns** contained several provisions that will likely harm children and violate their rights, through encouraging restrictions on procedural safeguards, increased detention and forced removal.

The Commission drew from its recommendations in its [proposal](#) for a “recast” of the Return Directive, (the recast process means changes to particular articles are proposed (rather than the whole text). Key changes include: a (broad) definition of the “risk of absconding” (Art. 6), an obligation to cooperate (Art. 7), immediate and automatic issuance of a return decision together with a rejection or termination of regular residence (Art. 8), restrictions on voluntary departure (Art. 9), entry bans during exit checks (Art. 13), return management systems (Art. 14), restrictions on appeals and their suspensive effect (Art. 14), a new ground for detention and minimum of 3 months for the maximum period initial detention (Art. 18) and new border procedures (Art. 22) with simplified procedures, extremely limited voluntary departure and appeal possibilities, and up to 4 months of detention (separate from other detention under the Directive). The proposal is subject to triilogue negotiations, so the European Parliament now has the opportunity to table amendments to the proposal, for negotiation with the European Council (who can also suggest amendments) and European Commission. No changes to the provisions specifically addressing unaccompanied children have been proposed by the Commission.

Several organisations involved in Initiative for Children in Migration are developing a guidance document on **procedures to identify durable solutions in the best interests of the child, for all children who may be subject to return proceedings**. It is intended as a technical document for development and implementation of procedures. An advocacy paper is also being developed. See related upcoming ICM Module: Advocating for Durable Solutions for Children in the Context of Return procedures: Key Messages & Policy Recommendations.

Regularisation

PICUM has published a [manual on regularisations for children, young people and families](#) which has been prepared by – and for – organisations working on advocating for mechanisms to regularise undocumented children, young people and families. The publication outlines mechanisms to regularise status or access citizenship in Belgium, France, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Spain and United Kingdom, and highlights key aspects of mechanisms and campaigns that have been found to be effective, as well as others that have been problematic or challenging. It aims to be a source of inspiration and reflection to support advocacy and technical level work on regularisations. The full manual is accompanied by two separate documents, one with the [Executive summary and policy recommendations](#), and one with [talking points](#) to argue for regularisations for children, young people and families' to support organisations who address the issue with decision makers and key stakeholders.

Unaccompanied and Separated Children

UNHCR's publication "[Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe](#)" (October 2014) includes an explanation on how to apply the best interests principle (Article 3.1 CRC) from arrival to a durable solution. As part of the pilot project from [The Way Forward](#) (July 2017), UNHCR Sweden has recently launched the new report "[I want to feel safe: Strengthening child protection in the initial reception of unaccompanied and separated children in Sweden](#)" (December 2018), including the possible durable solutions to consider.

As part of the [Child Protection Issue Briefs](#), UNHCR prepared a briefing note to guide field operations on [Family Tracing and Reunification](#) (January 2017).

Statelessness

The European Network on Statelessness has published a policy brief developed by Dr Tendayi Bloom from the Open University on [Statelessness and the Global Compact for Safe, Orderly and Regular Migration](#) for those who are working on statelessness and want to know more about the Compact and how to engage with it. The brief outlines why the Compact is relevant to statelessness and compares how statelessness is addressed in the final draft of the [Global Compact on Migration](#) in comparison with the zero draft, the New York Declaration and the final draft of the [Global Compact on Refugees](#). This includes analysis of how the Compact relates to children's rights enshrined in the UN Convention on the Rights of the Child, most notably Article 7 which states that children will be registered immediately after birth and have the right to acquire a nationality, particularly where the child would otherwise be stateless.

[#StatelessKids – None of Europe's Children should be Stateless](#) – the European Network on Statelessness has developed a number of resources highlighting the issue of childhood statelessness in Europe, and the fact that many European countries don't have the necessary safeguards in place to protect children from statelessness. [Ending Childhood Statelessness – A Comparative Study of Safeguards to Ensure the Right to a Nationality for Children Born in Europe](#). complements the European Network on Statelessness' 2015 report [No Child Should Be Stateless](#) and provides an in-depth analysis of the nationality laws of 45 Council of Europe states against international norms granting nationality to otherwise stateless children. There are also three useful infographics on childhood statelessness, which cover [what it means for a child to be stateless](#), [why children become stateless](#), and [birth registration](#).