

Comparative study on best practices in the field of return of minors

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European Commission - DG Home

EXECUTIVE SUMMARY

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Disclaimer: This research has been conducted within the terms of reference of the European Commission, DG Home tender “Comparative study on best practices in the field of return of minors” (HOME/2009/RFXX/PR/1002).

The outcomes of the research do not represent the positions of the respective organisations involved in the research on what good practice concerning the return of children must entail.

The views expressed in the study do not necessarily represent the views of the European Commission.

INTRODUCTION

A study on “best practices in the field of the return of minors” was carried out by ECRE, in strategic partnership with Save the Children, on behalf of the European Commission. The study looked at legislation and practice regarding the return of children, either unaccompanied or within families, who return voluntarily or are forced to return because of their status as illegally staying third country nationals. The study covered the 27 EU Member States and the 4 Schengen Associated States (Iceland, Norway, Liechtenstein and Switzerland). Further research was also conducted in seven selected countries of return: Afghanistan, Angola, Kosovo, Morocco, Nigeria, Sri Lanka and Ukraine. Information was gathered through research and interviews with relevant stakeholders involved in the return of children in all the countries covered as well as at the regional and supranational level.

The aim of the study is to help Member States develop an effective system for how to consider the return of children to countries outside of the EU. The final report is composed of:

- An introduction to the study (section 2),
- Statistics (section 3),
- An overview of the current legislation and administrative practices in the Member States (section 4)
- An overview of administrative practices in the selected countries of return (section 5)
- Criteria identified to define best practices (section 6)
- An inventory of noteworthy practices (section 7)
- A checklist (section 8)
- Conclusions (section 9)

The study does not aim to cover all dimensions of the return of children but focuses on key requirements as provided in the Return Directive¹. As indicated in the EU Action Plan for Unaccompanied Minors and the newly adopted EU Trafficking Directive, it places return as one option to be considered when Member States undertake to find durable solutions for unaccompanied children, based on an assessment of their individual circumstances and taking their best interests as a primary consideration.

It should also be emphasised that, although the Return Directive was the key reference when carrying out the research, the study is not an evaluation of its implementation. Indeed, it should be acknowledged that the study was carried out at a time when most Member States were still in the process of transposing or implementing the Return Directive and therefore legislation and practices will change or are likely to change in the near future. Expected changes in legislation are mentioned but the study can only capture national legislation and practices at the time of the research (first semester 2011).

¹ Directive 2008/115/ EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

Given the broad scope of the study, and the limited time and resources involved, the study covers central elements of the return process as stated in the national legislation or as perceived practice by involved actors. Whilst the findings are not comprehensive, they allow for some comparisons and conclusions to be drawn on a regional level and they provide a basis for further analysis of each country's situation or focussed assessment of particular features of those practices.

The study aimed to generate a checklist, which would assist Member States in developing their processes for considering the return of children informed by national good practices. Practices identified in this regard are those which stakeholders considered to be good or noteworthy but this study did not aim to evaluate their objectives, processes and effects. Moreover many recent or developing practices have not yet had any demonstrable effects. The inventory of noteworthy practices stands as a reference point which might inspire or be further improved by other stakeholders. Equally, the checklist is designed as a quality-planning tool and provides a common framework for the myriad actors to work together to achieve better practices and outcomes when considering returns. To this end, in addition to references to international legal obligations and authoritative guidance, it provides in an appendix, a number of indicators to be considered. In future, the Commission might consider the revision of the checklist and inventory of noteworthy practices on a periodic basis to reflect evolving practice.

KEY FINDINGS

Applicable Legislation

- Most of the Member States have transposed the Return Directive, though nine States are still undertaking this process. Transposition is however relatively recent in all Member States and practice is still evolving.
- Generally, national child protection laws are also applicable to migrant children as are relevant international law instruments, including the UN Convention on the Rights of the Child.

Different levels of experience across Member States

- Experience in relation to return varies greatly between Member States, with a noticeable difference between States perceived primarily as countries of transit and those seen as destination countries. The former reported less experience of returns in general whether regarding unaccompanied children or children within family groups. Stakeholders from the former were also guarded about defining particular practices as good or otherwise, referring to their limited experience as the reason for this.

Available Data

- It is difficult to measure the numbers of children returned because most States do not have complete data on this, nor do they generally record a breakdown of returns by age of

returnees (voluntary or forced). What emerges broadly from the data provided is that most Member States do not forcefully return unaccompanied children but do return children as part of a family unit. However, many Member States do offer assisted voluntary return programmes to unaccompanied children and families before forced return is undertaken.

- It would appear that very few Member States return unaccompanied children to countries other than to their country of origin, the common exception being reunification with their family residing in a third country.

Preference for Voluntary Returns

- Most Member States have schemes to allow families with children, and in some cases unaccompanied children, to engage in voluntary return, typically by providing some assistance for travel and information and/or assistance on reintegration possibilities. The definition of voluntary return is not always clear; sometimes it relates only to return before any return decision is taken; but sometimes voluntary return schemes also offer assistance to persons with a return decision.

General Approach to Children within Families

- When looking at children in families, a number of Member States first look at the legal situation of the family and if the decision is made to return the adults it is generally assumed that the children's best interest is to remain with their parents and be returned, without further assessment of the child's individual circumstances. However there is emerging jurisprudence, which may lead to more specific steps being undertaken to assess the child's best interest when within a family.
- Opportunities for children to participate in the return decision or to input into how the return would happen in practice are relatively rare. Children within families are largely seen as passive participants in the process.

General Approach to Unaccompanied Children

- Some countries have elements of a best interests' determination to inform outcomes on durable solutions. However the Study also shows that countries largely struggle with practical ways to gather information on the situation of the child, in particular in relation to tracing family, restoring family links and assessing family situation for the purposes of reunification. Unaccompanied children are sometimes afforded opportunities to state their views, sometimes with support from a guardian.

- Some Member States do not return unaccompanied children unless it is part of a voluntary return scheme. In other Member States, unaccompanied children are not returned until after they reach 18.
- A small number of Member States ascribe legal capacity to unaccompanied children aged 16 and over. On the one hand this enables them to seek out their own representation rather than be represented by a guardian, social worker or other actor. However, on the other hand, it may mean that where a young person is not equipped with the skills and knowledge to act independently throughout the immigration procedure, their representation is not satisfactory.
- The Directive also requires independent assistance to be provided to unaccompanied children. Almost all Member States have procedures to provide assistance, whether this is a guardian or other representative. In practice guardianship can be undertaken by a variety of actors (lawyers or social workers; paid professionals or volunteers; individual or institutions; from governments or NGOs), who undertake differing roles particularly regarding engagement in decisions to return and return procedures. There is no single model of guardianship across the Member States and standards as to mandate, qualifications and skills vary considerably. Unaccompanied children also generally have the right to legal assistance, but not necessarily automatically or free of charge. Family tracing practices and purposes vary considerably, although many States rely on the ICRC system, ISS or IOM.

Voluntary Departure Period

- The Return Directive provides for a voluntary departure period. All Member States that have transposed the Directive have included provisions in their legislation to allow for such a period. Though it is still too early to draw conclusions from the practice around the extension of this period, most States provide the possibility for an extension based on individual circumstances, such as the length of stay, school attendance or health issues. There are rarely any detailed criteria against which extensions will be considered and decisions are typically made on a case-by-case basis.

Post Return Phase

- After a return decision has been taken, and when the children are not placed in detention, in most Member States, they still have access to school, health care or social activities. However when costs have to be borne by the third country national, particularly for unaccompanied children, it may serve as a barrier to participation. In addition, in the case of voluntary return, or compliance with a return decision, most Member States allow unaccompanied children and families to remain in their previous place of accommodation.
- When it comes to detention, a number of Member States do not detain unaccompanied children, or only those above a certain age. However difficulties with assessing age remains a

significant issue concerning responses to unaccompanied children in Member States and in consequence a significant number of individuals who claim to be children are subject to detention. On the contrary, many Member States have provisions to detain children with their parents. In many countries, one of the parents may be detained while the rest of the family is not. The majority of Member States provide for alternatives to detention, such as restriction of residence or reporting duties, though they are not systematically applied in practice. Generally conditions in detention facilities are not suitable for children, particularly when detention is for a considerable period.

Reintegration Planning and Counselling Prior to Return

- There is some emerging practice of reintegration planning and counselling for both families and unaccompanied children prior to return.

Limited contacts between relevant actors in sending and receiving countries

- Perhaps one of the most striking findings of the Study is that, unless specific programmes are in place, there appears to be very few contacts between sending and receiving countries in relation to the circumstances of returning children or families.

Transfer Procedures

- During the return journey, unaccompanied children are almost always escorted in the framework of assisted voluntary return, but not in other types of returns. In some cases, there are specific processes for handling the transfer of families but these are limited. There are not always formal procedures for the transfer of care and custodial arrangements of unaccompanied children in place.

Return of Unaccompanied Children

- Consistent with the Return Directive Member States preferred option is to return unaccompanied children to a family member. Where this is not possible a nominated guardian is considered and then the option of return to residential facilities. However, no case of return to a nominated guardian has been identified through the study. Some Member States are seeking to support facilities in countries of origin specifically for the purpose of creating possibilities for return, including via the ERPUM project (the Netherlands, Norway Sweden and United Kingdom). However, there is only limited experience to date in terms of the use of such facilities, with one child from the Netherlands being returned to a centre in Angola.

Reintegration Assistance

- Within the remits of assist voluntary return and reintegration programmes, some reintegration assistance may be provided, though it is in most cases more targeted to adults than children. Many of these projects are run by the International Organisation for Migration (IOM), which typically seeks to establish processes that may address the specific situation of

unaccompanied children. However IOM acknowledges a number of challenges in terms of operating in countries with sometimes only nascent child protection systems.

Post Return Monitoring

- After return, monitoring is usually only carried out in the framework of assisted voluntary return programmes and for a limited duration (typically for 6 months).

Re-entry Bans

- There is mixed practice between Member States regarding the issuing of re-entry bans in respect of children. Roughly half the Member States do not issue them at all whilst those that do issue bans do so for varying lengths of time ranging from 18 months to 10 years. A number of variable factors also influence the length of the ban, including, for example, the age of the child, whether a criminal offence has been committed or whether the child failed to comply with a return decision etc. Practice regarding the issuing of re-entry bans is broadly consistent regardless of whether the child is unaccompanied or is part of a family unit.

Situation in Countries of Return

- As regards the countries of return researched, it is difficult to draw common conclusions though it appears that in the majority of cases there is no clear or solid infrastructure for assessing the situation of families or for providing effective reintegration support for families with children or unaccompanied children. This is particularly the case outside of voluntary return and reintegration schemes receiving funding from returning countries. However, in the case of the latter it is clear that reintegration support may be limited, and there tends to be little proper monitoring of outcomes. There are clear differences in the degree to which national child protection systems exist and function to address the situation of returning children. Obstacles in carrying out the research, including the limited knowledge or experience from stakeholders, make it difficult to get a full view of the practices and most findings reflect legislation or policy framework. A few Member States are supporting or considering supporting dedicated reception facilities for returning unaccompanied children in countries of origin, though to date there is little evidence concerning the suitability of such centres for their purpose, whether they fulfil essential child protection standards, or whether they achieve sustainable returns. Other projects otherwise dedicate resources and presence in countries of origin with a view to facilitating voluntary return by providing training and job opportunities in countries of origin for returning children. Some projects in countries of origin are concerned with providing opportunities for children to mitigate the need for unsafe migration.