



European Ombudsman

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European Ombudsman

Mr Jean-Claude Juncker
President
European Commission

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Subject of case: The Protection of Children in Migration and in Returns

Dear Mr President,

I welcome the Commission's Communication of 12 April 2017 entitled 'The protection of children in migration'¹. I particularly welcome the inclusion of a 'key action' on the needs of children, who are to be returned to their country of origin², which encourages Member States:

- *"to ensure that appropriate family tracing and reintegration measures are put in place to meet the needs of children who will be returned to their country of origin"*. It is reassuring also to note that the Communication includes a statement to the effect that decisions to return children to their country of origin must respect the principle of the best interests of the child.

However, I am concerned that certain aspects of the Commission's Recommendation of 7 March 2017, providing guidance to the Member States on the implementation of the 'Returns Directive'³, may undermine the need to ensure that the 'best interests of the child' are given priority in returns cases. As explained below, I am concerned in particular about the recommendations made in points 12 ((a), (b) and (d)), and 17 of the Recommendation.

¹ Communication from the Commission to the European Parliament and the Council - The protection of children in migration, of 12 April 2017, COM(2017) 211 final.

² In Section 6 'Ensuring durable solutions'.

³ Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, OJ 2017 L 66, p. 15.



I am aware that these difficult but very important issues are currently being discussed in a number of forums - at EU, national and local levels, and by governmental and non- governmental organisations - across the EU at present. However, I am anxious to share my own concerns with the European Commission at this point.

Point 12 concerns

The recommendation in point 12(a) to use video-conferencing for return hearings may make it more difficult for unaccompanied minors, who are often traumatised and in need of special assistance, to speak freely. This could therefore jeopardise their right to be heard. There is arguably a need for procedural and age-appropriate accommodations. I appreciate that Point 13 (on "Family and Children") refers specifically to unaccompanied minors but it does not qualify the proposal to use video-conferencing in the case of such children.

The recommendations on short appeal deadlines (12 (b)), and for only one assessment of the risk of breach of the principle of *non-refoulement* (12 (d)), should not be applied to those who are in need of special procedural guarantees, such as unaccompanied minors.

These individuals have specific needs which make it hard to guarantee, in a comprehensive and timely manner, their right to a personal interview, their right to legal assistance, and their right to information.

The Commission's 'Return Handbook'⁴ clearly states that, before returning an unaccompanied minor, an assessment should be carried out on an individual basis. This should take into account the best interests of the child, the current situation in the family and the situation and reception conditions in the country of return.

The Handbook also makes clear that this assessment should be carried out by a multi-disciplinary and experienced team and it should involve the child's appointed guardian. It is hard to see how the recommendations for short appeal deadlines and limited scope for re-assessment comply with the guidance provided in the Handbook.

There is always the possibility that a deterioration in the situation in the third country could put the returned individual at serious risk (that is, risks to life, of torture or degrading treatment). It would seem appropriate that the deciding authority should check the situation in the third country, specifically in relation to the individual concerned, just before a deportation decision is adopted, unless the decision is taken, and the last assessment of the risk of

⁴ Set out in the Annex to the Commission Recommendation of 1 October 2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks (C(2015) 6250 final).



breach of the principle of *non-refoulement* has taken place, immediately beforehand.

Point 17 concerns

The recommendation on 'voluntary departure' does not make clear that unaccompanied children should be given special consideration among third country nationals who request voluntary departure. Voluntary returns are possible only if individuals actively request them. Nor does the recommendation mention that child-specific measures are needed if unaccompanied minors want to make such a request. These measures should include providing advice on how to apply for voluntary return and providing information in child-friendly language.

Migrant children from 'safe countries' who do not realise that they have no hope of being granted asylum (and sometimes endure violence, exploitation and abuse because of their false hopes), need to be informed that voluntary departure is better than the life they are currently leading. How the information about voluntary departure is communicated to children is crucial.

I note the inclusion of a 'key action' on alternatives to administrative detention in Section 4 of the Commission Communication of 12 April 2017, entitled 'Providing adequate **reception** in the European Union' (emphasis added). The Communication encourages Member States "*to ensure and monitor the availability and accessibility of a viable range of alternatives to the administrative detention of children in migration*". I assume that, consistent with Article 17 of the Returns Directive, the same encouragement is intended to apply in the case of unaccompanied minors awaiting return and it would be helpful if this was made more explicit.

Bearing in mind that the Returns Directive allows Member States to adopt provisions that are more favourable to returnees than the provisions of the Directive, I expect that the Commission would encourage Member States to make more favourable provisions in relation to migrant children in particular. However, the Recommendation could be understood by some as encouraging Member States to adopt laws allowing for the detention of minors if no alternative exists, rather than urging them to seek alternatives to the detention of children⁵. Point 14 of the Recommendation states: "*In respect of the fundamental rights and of the conditions set up by Directive 2008/115/EC, Member States **should not preclude in their national legislation** the possibility to place minors in detention, where this is strictly necessary to ensure the execution of a final return decision **in so far as Member States are not able to ensure less coercive***

⁵ It is worth noting that in his 23 March 2017 report identifying the main challenges faced by children in migration in the EU, the Council of Europe Special Representative of the Secretary General on Migration and Refugees pointed out that "*immigration detention is never in the best interests of the child*". Attention should also be drawn to the concerns raised by civil society organisations in a joint report entitled 'The reality of the EU-Turkey Statement', (in particular on page 7), available at: <https://www.nrc.no/resources/briefing-notes/how-eu-policies-are-eroding-protection-for-refugees-in-greece/>



measures than detention that can be applied effectively in view of ensuring effective return”⁶.

I appreciate that there is a balance to be struck between ensuring the human dignity and rights of unaccompanied minors and the need to ensure that the returns arrangements operate effectively and efficiently. What is important, I feel, is that the language of the Recommendation should not encourage the use of detention without the necessity to have first considered fully every other viable alternative to detention.

I understand that the Commission intends to update the ‘Return Handbook’ to take account of its Recommendation of 7 March 2017. Given that some aspects of the Recommendation could be understood by some as actually undermining the ‘best interests of the child’ principle, I would ask the Commission to consider how it can ensure that this understanding does not prevail. I would be grateful to hear from the Commission on how it intends to ensure that the guidance provided in the updated Return Handbook reflects fully the need to act on the basis of the ‘best interests of the child’ principle.

I would be grateful to receive the Commission’s reply within three months of the date of this letter.

Yours sincerely,

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European Ombudsman

⁶ Emphasis added.