

# Protecting the best interests of the child in Dublin Procedures

UNHCR's comments on the European Commission's 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

## Introduction

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At the time of the adoption of the Dublin III Regulation (604/13) in June 2013<sup>1</sup>, the co-legislators agreed to consider a revision of Article 8(4) of the Dublin III Regulation once the Court of Justice of the European Union (CJEU) ruled on case C-648/11 MA and Others vs. Secretary of State for the Home Department.<sup>2</sup> The aim was to find a solution for the ambiguity in Article 8(4) of the Dublin II Regulation (343/2003). As such, the legislators left Article 8(4) essentially unchanged in the Dublin III Regulation.

UNHCR welcomes the Commission's proposal<sup>3</sup> which aims both at revising Article 8 (4) and finalizing the Dublin III Regulation. The proposal seeks to ensure adequate protection for unaccompanied children seeking asylum in the EU on the basis of their best interests, by clarifying which Member State is responsible for examining their application.

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<sup>1</sup> European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 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 (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013

<sup>2</sup> Judgment of the Court of Justice of the European Union (fourth Chamber) of 6 June 2013, Regulation (EC) No. 343/2003 in Case C-648/11, MA, BT, DA v Secretary of the Home Department, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de26e1e178dc544e418a73ea935c222f5f.e34Kaxilc3eQc40LaxqMbN4Ob3mRe0?text=&docid=138088&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=215640>

<sup>3</sup> European Union, European Commission's 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 [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com\(2014\)0382\\_/com\\_com\(2014\)0382\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0382_/com_com(2014)0382_en.pdf)

## UNHCR Mandate

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.<sup>4</sup> According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [.]”<sup>5</sup>

UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention Relating to the Status of Refugees (hereafter ‘1951 Convention’). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (‘UNHCR Handbook’) and subsequent Guidelines on International Protection.<sup>6</sup> This supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees.<sup>7</sup>

UNHCR’s supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (‘TFEU’)<sup>8</sup>, as well as in Article 18 of the Charter of Fundamental Rights of the European Union (‘EU Charter’).<sup>9</sup> Declaration 17 to the Treaty of Amsterdam moreover, provides that “*consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy*”.<sup>10</sup>

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<sup>4</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

<sup>5</sup> *Ibid.*, paragraph 8(a).

<sup>6</sup> UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, <http://www.refworld.org/docid/4f33c8d92.html>.

<sup>7</sup> According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

<sup>8</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

<sup>9</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>

<sup>10</sup> European Union, *Treaty on European Union (Consolidated Version), Treaty of Amsterdam*, 2 October 1997, <http://www.refworld.org/docid/3dec906d4.html>

## The Commission Proposal

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The Commission proposal addresses the issue of responsibility for examining the asylum application of an unaccompanied child with no family, siblings or relatives on EU territory. The proposed provision covers the two possible cases of unaccompanied children found in such a situation:

Paragraph 4a covers the situation of an unaccompanied child with no family, sibling or relatives on EU territory and who lodged multiple asylum applications, including in the Member State where he or she is currently present. In this case, responsibility belongs to the Member State where the child lodged an application and is currently present.

Paragraph 4b addresses the situation where a child was an applicant for international protection in one Member State, is present in the territory of another Member State without having lodged an application there. The proposal is that the Member State should provide the child with the opportunity to lodge an application there, after having informed him or her of such a right and its implications. The child has two options: either to apply for international protection in that Member State or not to apply. Where an application is lodged with the authorities of that Member State, the circumstances of paragraph 4a apply.

The case of a child who decides not to lodge a new application in the Member State where he/she is present is not addressed by *MA and others*. However, this situation needs to be covered in order to avoid loopholes in the responsibility criteria. The solution proposed by the Commission proposal is that the Member State responsible should be the one where the child has lodged his or her most recent application, provided this is in the best interests of the child. The reference to the child's best interests is added in order to ensure, as in paragraph 4a, that transfers contrary to his or her best interests are avoided.

Paragraph 4c aims at ensuring that the assessment of the child's best interests is made in cooperation between the requested and the requesting Member States in order to jointly establish the Member State responsible for the child and avoid conflicts of interest.

The guarantees for children provided in Article 6 of Regulation 604/2013 apply to all children who are subject to the procedures of this Regulation.

Paragraph 4d does not contain a criterion for establishing responsibility, but provides a rule allowing Member States to inform each other of a newly assumed

responsibility. This allows the Member State previously responsible for carrying out a 'Dublin procedure' to close the case in its internal administration.

**UNHCR notes** that the Commission proposal is in line with the CJEU judgment, but is broader so that other scenarios outside the situation the Court had to deal with in *MA and others* are also clarified

**UNHCR supports** this pragmatic approach, given in reality such scenarios may arise and clarity is needed in order to ensure prompt access to the asylum procedure for unaccompanied children while ensuring their best interests are taken as a primary consideration, in line with Article 3(1) CRC and Article 24(2) of the Charter of Fundamental Rights of the EU (EU Charter).

**UNHCR particularly welcomes** the primary role the proposal accords to the best interests of the child as reflected by the inclusion of the principle in the proposed Articles 8(4)(a), 8(4)(b), and 8(4)(c).

## Responsibility of the Member State where an application for international protection has been lodged and the child is present - Article 8(4)(a)

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UNHCR welcomes the Commission's proposal that the Member State where the child has lodged an application for international protection and is present is responsible for examining the application in cases where s/he has no family member or relative anywhere in the European Union unless this is not in the child's best interests.

In UNHCR's view the proposal introduces clarity and predictability not only for the unaccompanied child but also for the concerned Member State(s) on which Member State is responsible for examining the application for international protection.

### Problems with past practice

Past practice has shown that transfers of unaccompanied children between Member States have been far from smooth. UNHCR has received reports of children who were not accommodated following transfer, resulting in these children becoming homeless and destitute. A lack of mutual recognition of age assessment outcomes has resulted in age disputed children being accommodated in facilities for adults or in detention. Moreover, delays in the appointment of a guardian in the receiving Member State have resulted in delays in accessing the asylum procedure. UNHCR believes that the Commission Proposal will result in less transfers and thus a lower likelihood of such malpractices occurring as it will allow for transfers only when it is in the best interests of the child.

### Stage of the procedure not the

**UNHCR furthermore welcomes** the fact that the Commission proposal does not distinguish between stages of the procedure in the Member State where the child

**determining factor**

first lodged an application. In accordance with Article 6(1) of the Dublin III Regulation the best interests of the child shall be a primary consideration with respect to all stages of the procedure determining the Member State responsible for examining an application for international protection. Distinguishing between stages of the procedure may be at variance with the best interests of the child. UNHCR is thus of the opinion that the stage where the procedure was left at in the Member State where the child first lodged an application should not form the paramount criterion for deciding the Member State responsible once a child moves to another Member State and lodges an application there.

**Age assessment**

While there may be a risk that some applicants initially claim that they are under 18 in order to prevent being transferred back to another Member State, prompt multidisciplinary age assessments, where there is doubt about the stated age, should be able to mitigate such risks.<sup>11</sup>

## Protection of children who have not lodged an application in the Member State where they are present (Article 8(4)(b))

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**Obligation to provide information in the best interests of the child**

UNHCR welcomes the proposal making explicit provision for giving information about the right to apply for international protection to an unaccompanied child who has not yet lodged an application in the Member State where he or she is present.

UNHCR emphasises that unaccompanied children are extremely vulnerable, deprived of care and protection by their parents or previous caregiver. Children may struggle to understand the nature and purpose of processes in which they are involved, how to apply and what potential and actual outcomes of procedures mean for them. In order to ensure that children can effectively exercise their right to be heard and access the asylum procedure promptly, Member States should ensure that they receive information about options available in a way that is appropriate to their age, allowing them to express their views on those same options in line with their age and maturity.<sup>12</sup> This is even more important for children who have not yet lodged an application.

UNHCR also welcomes the fact that the proposal addresses situations where the child, after having received all relevant information, does not lodge an application in the Member State where he or she is present. In such a situation, s/he shall be returned to the Member State where s/he lodged his/her most recent application,

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<sup>11</sup> UN High Commissioner for Refugees (UNHCR), *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, Box 8, p. 34, <http://www.refworld.org/docid/5423da264.html>.

<sup>12</sup> See UNHCR, *Safe and Sound*: Box 6, p. 31.

unless this is not in the child's best interests, thus ensuring that the child is not left without protection or in a legal limbo.

## Cooperation between Member States in assessing the best interests of the child and relevant criteria (Article 8(4)(c))

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UNHCR welcomes the Commission proposal in Article 8 (4) (c) for cooperation between the requesting and the requested Member States in order to establish which Member State is responsible. Implementing acts, as prescribed by Article 8(6) of the Dublin III Regulation, could bring more clarity to this process by establishing uniform conditions for the consultation and the timely exchange of information between Member States.

### **Best Interests Assessment**

In UNHCR's view, in case of multiple applications, a best interests assessment (BIA) should always precede the decision on which Member State is responsible for examining the asylum application. Such BIAs should, at a minimum, consider the factors outlined in Article 6(3) of the Dublin III Regulation, in particular, the child's well-being and social development; safety and security considerations, especially where there is a risk of the child being a victim of human trafficking; and the views of the child, in accordance with his or her age and maturity.<sup>13</sup>

Additional elements may need to be considered including that the BIA should be carried out preferably by persons with expertise in child protection/welfare and, where relevant, in prevention of and response to human trafficking.<sup>14</sup>

### **Prioritising cases of children**

In order to ensure prompt access to the asylum procedure, it is recommended that Dublin units as a rule prioritise requests for e.g. exchange of information involving unaccompanied children over cases involving adults.

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<sup>13</sup> See UN Committee on the Rights of the Child (CRC), *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)*, 29 May 2013, CRC/IC/GC/14, paras. 52-79 <http://www.refworld.org/docid/51a84b5e4.html>.

See also UNHCR, *Safe and Sound*, Box 12, p. 42.

See also European Union Agency for Fundamental Rights, *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, p. 75, para. 6.1 on risk assessments, [http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children\\_en\\_0.pdf](http://fra.europa.eu/sites/default/files/fra-2014-guardianship-children_en_0.pdf)

<sup>14</sup> See *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)*, para. 47; See also UNHCR *Safe and Sound*, Box 9, p. 35.

## Sharing of Information between Member States about assuming responsibility (Article 8(4)(d))

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UNHCR welcomes proposed Article 8 (4) (d) which provides for the Member State taking responsibility to inform other Member States. This allows Member States who had dealt with the case to close the case in their internal administration. This provision contributes to the clarity introduced by the proposed Article 8 (4) (a) and prevents abuse of the system, where the child moves on to another Member State for no other reason than to prolong his or her stay on EU territory.

## Conclusion

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UNHCR welcomes the fact that the Commission proposal goes beyond the strict remit of the CJEU ruling in MA and Others and addresses, in a pragmatic yet principled way, the request by the co-legislators to find a solution for the ambiguity in Article 8(4) of Regulation No 343/2003 (Dublin II).

The proposal that the child should stay in the Member State where he or she has lodged his or her current application unless this is not in the best interests of the child, regardless of the stage of the procedure, will ensure prompt access to the asylum procedure and it will also prevent problems surrounding transfers that have been recorded in the past.

**UNHCR Bureau for Europe  
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