

**JOINT SUBMISSIONS ON THE
DRAFT NATIONAL CHILDREN'S POLICY**



May 2012

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|------------------------------------|----------|
| INTRODUCTION | 3 |
| GENERAL RECOMMENDATIONS | 3 |
| SPECIFIC AREAS OF CONCERN | 3 |
| The asylum procedure | 3 |
| Our recommendations | 4 |
| Reception conditions | 4 |
| Our recommendations | 4 |
| Administrative detention | 4 |
| Our recommendations | 5 |
| Age assessment | 5 |
| Our recommendations | 5 |
| Care order and guardianship | 6 |
| Our recommendations | 6 |
| Trafficking in children | 7 |
| Our recommendations | 7 |

Introduction

Our input targets two parallel elements. Firstly, we would like to underline the need to adopt a horizontal reading of migrant child issues throughout the draft National Children's Policy¹. We believe this is central to ensuring that every measure and proposal in the policy is made applicable and accessible to all children, including migrant/asylum-seeking children, irrespectively of their legal status and situation.

We would like to encourage policy- and decision-makers to include migrant children more specifically throughout the new policy and we recommend a mainstreaming approach so that migrant child issues are addressed wherever appropriate, thus securing the best interests and well being of the children involved. Accessibility of the draft National Children's Policy measures also by migrant children is key to the document's success, and we therefore suggest that this be taken into consideration at the finalisation and implementation stages.

Secondly, we would like to present input and recommendations with regard to the inclusion of measures relating to the specific situation of migrant/asylum-seeking children. These areas of concern broadly include the following: the asylum procedure, reception conditions, administrative detention, age assessment, care orders and legal guardianship, and trafficking in children.

General recommendations

As stated above, we welcome the fact that the draft National Children's Policy has been developed on a rights-based approach. Our present input is also inspired by existing international and regional legal instruments relevant to children's rights, primarily the Convention of the Rights of the Child. Yet it is to be noted that several other human rights instruments are also of direct relevance, including: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention against torture and Other Cruel, Inhuman or Degrading treatment or Punishment, the Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedom and the European Social Charter.

Furthermore, the specific instrument relating to refugees, including refugee children – the 1951 Convention Relating to the Status of Refugees – also forms the basis of our input.

In this regard we would like to underline that the above-mentioned instruments apply to all persons within Malta's jurisdiction, irrespectively of nationality and other considerations. The core principle of non-discrimination is to be observed in all situations.

Specific areas of concern

Together with the above general recommendations recommendation regarding the horizontal mainstreaming of migrant children issues throughout the draft National Children's Policy, we have identified a number of specific areas that we feel should be taken into consideration when addressing the rights of the migrant child.

The asylum procedure

We welcome the fact that the Office of the Refugee Commissioner automatically grants Temporary Humanitarian Protection to all minor asylum-seekers, since this ensures their protection until they turn eighteen. The legal challenges presented by asylum-seeking children may be of a highly technical nature, often requiring a particularly meticulous analysis of the refugee definition. Furthermore, asylum-seeking

¹ Although reference to 'migrant children' should be interpreted as referring to all third-country national children, the majority of our specific recommendations relate to the situation of asylum-seeking children.

children often also present logistical challenges in terms of the skills required to interview them in what is by definition a sensitive and unfamiliar context.

Our recommendations

- In line with the principle that all persons dealing with children should be appropriately skilled and trained to do so, we recommend that all personnel of the Office of the Refugee Commissioner and of the Refugee Appeals Board receive appropriate induction and on-going training in dealing with the specificities of asylum-seeking children.

Reception conditions

The draft National Children's Policy outlines that children, including those entering Malta in an irregular manner should be provided with adequate ambiance and accommodation (p.26). We welcome this statement, but also believe that the Policy should emphasise its extension and applicability to the reception conditions in which children entering Malta in an irregular manner are detained.

Furthermore, whilst acknowledging the great efforts by the Agency for the Welfare of Asylum Seekers (AWAS) at accommodating children in appropriate facilities, we remain concerned at the use of facilities such as the Hangar Site (Ħal Far) and Ħal Far Tent Village to house families with children.

Our recommendations

- Improved reception conditions for migrant children, including the avoidance of their detention and of accommodating them in sub-standard reception facilities.

Administrative detention

In the draft National Children's Policy (p.26 and p.43) it is stated that detention of minors is unacceptable and that alternative methods should be resorted to. We fully support this position, noting that the detention of migrants, including adults, is strictly regulated by human rights law whereby a series of mandatory conditions should be present throughout the entire duration of a migrant's detention.

These mandatory conditions include that detention should be in accordance with national law, that national law and procedures should protect the individual from arbitrariness. To avoid arbitrariness the detention must be carried out in good faith, it must be closely connected to the purpose of preventing unauthorised entry or deportation, the conditions of detention must be appropriate (keeping in mind that the detainees have not committed criminal offences) and lastly the duration of the detention must not exceed reasonable length required for the purpose pursued.²

With regard to children – whether accompanied or unaccompanied – stricter compliance with these mandatory conditions is required due to the particular vulnerability of minors and the demonstrated psychological impact of detention of this category of migrants.

In relation to current practice, it is to be noted that despite a policy affirming the non-detention of children, all minors entering Malta in an irregular situation are automatically detained. Accompanied minors are detained with their families until required medical clearance is obtained for the entire family and placement in an Open Centre is possible. The placement may take a number of days and, under certain circumstances, weeks or months. The waiting time should be in an environment safe to children.

Persons claiming to be unaccompanied minors or separated children are detained throughout the age assessment procedure, a process that may last up to a number of months. We would also like to note that throughout this procedure, the minors are not detained in segregated sections but are kept with adults. We

² International Commission of Jurists (2011) *Migration and international Human Rights Law, Practitioners Guide no. 6*, p.150 and p.152

are concerned at the safety risks presented by this joint accommodation of adults and persons claiming to be minors.

Minors are exposed to an environment that is not only an obstacle to their personal and social development but also of serious detriment to their physical and psychological well-being. Detained children are kept within confined spaces, without adequate access to fresh air, sunlight, recreation and an appropriate age-sensitive diet. The environment is hostile and offers no space for the child to enjoy his/her right to privacy with his/her family. Furthermore, all detained children are denied access to education for the entire duration of their detention.

We would further like to add that delays have been noted between the decision on the minor age and the release of the child resulting in unnecessary duration in detention. Such delays could be related to the provision of required medical clearance, the issuing of a care order and the lack of availability of place in an Open Centre.

Our recommendations

- Stricter compliance with human rights standards to secure children from being detained;
- Minors should not be placed in detention – not even for a shorter period of time. We strongly urge the Policy to reaffirm the non-detention of minors and to insist on the exploration of alternatives.

Age assessment

All migrants claiming to be minors are processed by an Age Assessment Panel established by the Agency for the Welfare of Asylum Seekers (AWAS), with a view to determine whether the applicant is in fact a minor or otherwise. Persons found to be minors are released upon attainment of the required medical clearance.

In our view, the age assessment procedure is characterised by a lack of transparency and accountability, as well as a lack of consistency. The Age Assessment Panel is not regulated by publicly available, written rules including core issues such as procedural timelines, assessment criteria, Panel composition, etc. The procedural information provided to persons undergoing assessment is extremely limited. Written decisions (all provided in English) are never supported by reasons, with no real possibility of appeal or review. The person concerned can only ask for it to be reviewed, but do not have a guarantee for revision. There is no real possibility of any form of professional assistance or representation and inadequate guarantees of independence and impartiality.

With regard to the quality of the assessment, we are concerned that assessment is conducted on the basis of purely subjective methods of assessment and of medical tests, i.e. the wrist x-ray, which is notoriously unreliable in this context; even conservative sources estimate that there is a margin of error of at least two years in either direction.³

Although we do not have access to proper statistics, quite a number of claims to minor age are rejected (or accepted) simply on the basis of an interview. Credibility assessment obviously plays a large part in determinations made on the basis of one interview, and here the standards applied are anything but clear.

Moreover, we are concerned that the agency conducting the age-assessment is the same one requesting the child's release, accommodating the child once released, and providing legal guardianship, leading to potential conflicts of interest.

Our recommendations

- The Policy should include clear guidelines on the implementation of age assessment procedures for persons claiming to be minors;

³ ILPA (2007) *When is a child not a child?* p. 29

- Following the publication of policy guidelines, we further recommend the formalisation and publication of the age assessment procedure, containing clear statements on core elements such as the procedure's intended duration, panel composition, assessment criteria, appeal and review criteria and procedure, representation and assistance, conduct of the assessment, relevance of documentation, etc;
- All applicants should be duly informed, in a language they understand, of all aspects of the procedure, including information on their relevant rights and duties;
- All decisions should be provided in accordance with administrative requirements: clear, intelligible, motivated and reasoned;
- The persons concerned should be given the benefit of the doubt, as age assessment is by definition imprecise;
- Distinction in personnel between the persons carrying out the assessment of vulnerability and requesting for the child be released. An establishment of an independent body would be preferred.

Care order and guardianship

It is suggested in the draft National Children's Policy (p.44) that the care and custody of children, including unaccompanied children, should be the responsibility of a Board of Professionals instead of the Minister. We would like to stress the importance that such a board has a multidisciplinary competence in order to secure the most appropriate decisions for children with different needs, such as refugee children, children with disabilities, etc.

The highly technical issues related to children in a migration context further stress the importance of this multidisciplinary approach, particularly in view of issues such as: child-related persecution, child soldiers, FGM, culture sensitivity, etc.

Closely linked to the care and custody of the unaccompanied child, is the notion of legal guardianship. It is however not referred to in the draft National Children's Policy.

The legal guardianship of an unaccompanied migrant child should in our view be a one-to-one relationship, where the guardian has the responsibility of the well-being of the child. Several best practices may be observed in a number of EU Member States. In Denmark, for example, the Danish Red Cross⁴ functions as the coordinator of a corps of guardians (most deployed on voluntary basis, with some professionals). The Red Cross carries out the recruitment, training and referral of guardians to unaccompanied minors and seeks to match the guardian and the minor. The role of the guardian is primarily to offer support to the unaccompanied minor in the asylum procedure including contact with authorities, planning social activities and provision of general support.

In this regard, we are concerned that the current arrangements fail to ensure the appointment of legal guardians with sufficient expertise in asylum issues. Furthermore, since the legal guardians are also the social workers responsible for the children, we feel that the necessary distinction between the two roles is blurred. Whilst appreciating the resource limitation, it is also of concern that each legal guardian is responsible for a relatively large number of minors, with a possible negative impact on the quality of the service offered.

We would also like to express our concern at situations where unaccompanied migrant children travel abroad with the consent of the authorities, but never return to Malta. We understand the wish of providing the right of the minors to visit family/friends in other Member States, but are concerned at the possibility of the situation being classified as one of a missing child. In this regard, we would like to highlight the vulnerability of such children to human rights violations such as trafficking, child prostitution, slave labour, etc.

Our recommendations

⁴ In Denmark, the Danish Red Cross is hired by the State to operate most of the asylum centres, including the centres for unaccompanied minors.

- The suggested Board of Professionals should have a multidisciplinary composition;
- The Policy should contain clear policy guidelines on a system of legal guardianship for unaccompanied minors;
- Procedures should be established to ensure that every unaccompanied child does not go missing, locally or overseas.

Trafficking in children

As the draft National Children's Policy mentions there are a number of legal instruments issued to protect children from exploitation (p.42). However, we would like to add that the identification of potentially-trafficked children remains a concern, particularly in relation to migrant children. We are also concerned at the possibility of migrant children being vulnerable to being trafficked following their release from detention, primarily owing to their social, legal and economic vulnerability

Our recommendations

- Procedure for identification of victims of human trafficking should be implemented;
- Implementation of a risk-analysis for assessing the elements that could lead migrant children to being trafficked.