

Bettering Best Interests in Migration Processes Affecting Children

Helen Stalford

ENM Finland Conference 10 November 2023



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European Children's Rights Unit

What we know about best interests: the legal positivist perspective



➤ Article 3 UN Convention on the Rights of the Child 1989

According to the UN Committee on the Rights of the Child (GC14, para 6) - Best Interests is:

- a **substantive right**, entailing an intrinsic obligation on all states ensure that the child's best interests are a **primary consideration** informing all decisions concerning the child;
- a **fundamental interpretative legal principle** requiring that if a legal provision is open to more than one interpretation, the interpretation that most effectively serves the child's best interests should be chosen; and
- a **rule of procedure** requiring procedural guarantees to be put in place to enable decisions around what is in the child best interests to actually occur and be evidenced in practice
- UNHCR [*Best interests procedure guidelines: assessing and determining the best interests of the child, 2021*](#)

The best of best interests

- It makes children **visible**: *“in a world run by adults, there would otherwise be a danger that children’s interests would be completely ignored.”* (Freeman, 2007)
- It helps to **navigate clashes** between seemingly competing interests, by prioritising the interests of the child
- It helps to **advance the interests of society** more widely
- It applies to and can be adapted to a **range of contexts**, to the individual or collective interests, to the present and the future, and to children of all ages and backgrounds.



The weaknesses of best interests

- It is susceptible to manipulation to pursue adultist agendas
- It is subjective and determined on the basis of (often erroneous) constructions of children and childhood
- It is commonly used to legitimise exclusion rather than inclusion
- It becomes more about procedure than substance

Pathways to bettering best interests

1. Enhancing best interests literacy – starting with the right to information

“There is a perceptible lack of excitement about the value of this entitlement... It is invoked dutifully rather than passionately.”
(Jenkins and Goetz, 1999: 608).

The right of information should be seen as a dialogue rather than a unilateral process, whereby children are enabled to generate and convey information about their specific needs and experiences to those with the power to respond to them. (Stalford and Clough, forthcoming)

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EU Settlement Scheme: Information for Children

If you want to stay in the UK, and you are from one of the European countries listed on this leaflet, you **must** apply to the EU Settlement Scheme by **30 June 2021**.

Now that the UK has left the European Union children and adults from other European countries who live in the UK need to apply for permission to stay. This is called 'pre-settled' or 'settled status' depending on how long you or your parents have lived in the UK. Once you have received permission, you can carry on going to school, college and university, access free healthcare and jobs, and travel in and out of the UK. Close family members who are EU nationals will also be allowed to come and live with you in the UK in the future.

How do I apply to the EU Settlement Scheme?
You need to apply online:
www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status
YOU DO NOT HAVE TO PAY ANYTHING.
You can apply yourself if you understand how to. Your parents or another adult who looks after you can apply for you.

How can I get help if I need it?
If you have a question about your application or need additional support, go to:
eu-settledstatus-enquiries.service.gov.uk
There is also a helpline:
0300 123 7379

Is there a deadline?
You must apply to the EU Settlement Scheme by **30th June 2021**.
If you don't apply by then you might not be able to stay in the UK. This may lead to problems when it comes to applying for college, university, jobs or other benefits in the future.

To apply, visit gov.uk/eusettlementscheme If you need any help, call **0300 123 7379**

2. Future-Proofing Children's Best Interests Decision-Making

The LOHST Project (Jan 2021-July 2023)

- **69** unaccompanied asylum seekers **16-25**
- **22** Female/ **46** Male / 1 unspecified
- **Country of Origin:** Albania, Kurdish (Syria, Iran and Iraq), Eritrea, Nigeria, Sudan, Somalia, Sri Lanka, Guinea, Uganda, Pakistan, Azerbaijan, Afghanistan
- **53 Practitioner interviews** (social workers, youth workers, Home Office staff, lawyers, civil society reps, educationalists, foster carers)
- Case summaries of 10 Eritrean unaccompanied children
- **13** peer researchers (7F/6M- 16-25)

LOHST

Lives on Hold, Our Stories Told



[Lives on Hold, Our Stories Told - PLAY VIDEO](#)

- [67% of unaccompanied asylum-seeking children in the EU are aged 16-17](#)
- [74% of unaccompanied asylum-seeking children in the UK are aged 16-17](#)
- By the end of 2021, two-thirds (66%) of unaccompanied asylum seekers were age-disputed in the UK
- 69% of age-disputed unaccompanied asylum seekers were assessed as adults in 2021
- 74% of asylum claims are delayed by more than 6 months
- 41% of the children interviewed for the LOHST project turned 18 before an initial decision was made on their claim.

LOHST

Lives on Hold, Our Stories Told





Vulnerabilities do not expire on turning 18...but services and support do.

The majority of EU Member States and Norway do not have a national strategy in place to support the transition to adulthood of unaccompanied minors.... In about a third of the EU Member States and Norway, the moment an unaccompanied minor reaches adulthood marks a cut-off point for the provision of any form of support and services that were specifically related to their age.

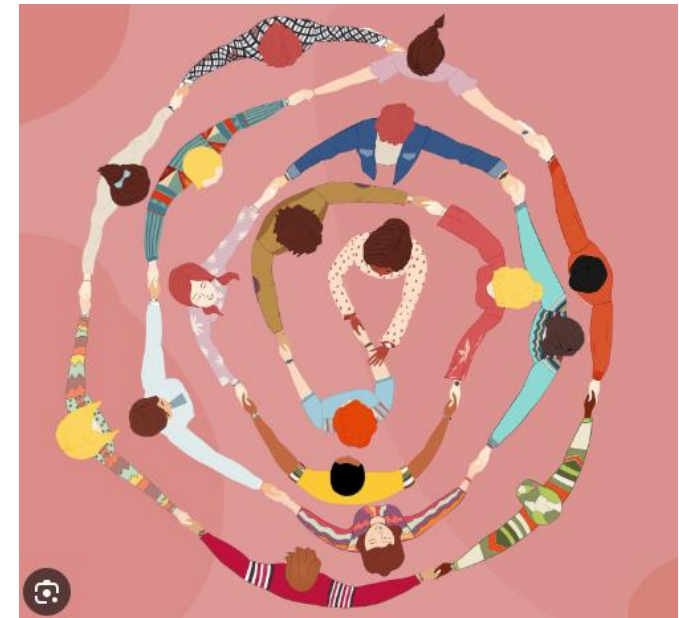
(ENM Inform, TRANSITION OF UNACCOMPANIED MINORS TO ADULTHOOD, November 2022)

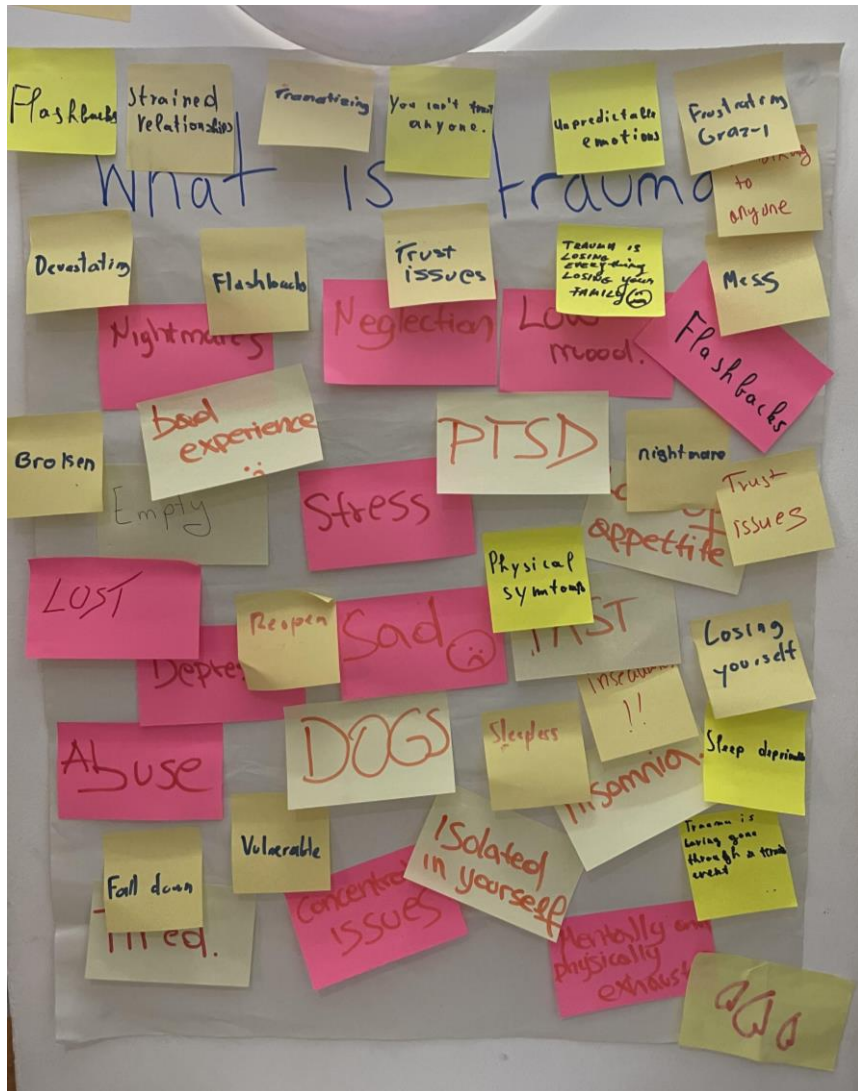
KA (Afghanistan) v. SSHD [2012] EWCA Civ 1014: The assessment of risk ...cannot be subject to a 'bright line' rule ... "persecution is not respectful of birthdays" (per Kay L.J, para. 18)

3. Adopting a trauma-informed approach to all best interests processes

Becoming T-I “entails becoming more astutely aware of how traumatised people have their life trajectories shaped by their experience and its effects, and developing policies and practices that reflect this understanding.” [Randall and Haskell \(2013, p. 501\)](#)

- Trauma has **multiple dimensions**:
 - **Biomedical** – standard definition
 - **Structural/systemic** – asylum regime
 - **Age** – adult versus child manifestations
 - **Cultural** – trauma and responses to it are culturally informed





Multiple Reflection Exercises

- Residential research visit West Wales – post-it notes, discussion sessions
- Weekly team meetings (researchers, peer researchers, charity staff)

Reflection Questions

- What is trauma?
- How did each of the research stages (proposal, training, design, fieldwork, analysis) make you feel?
- How can we make this better?


Analysis Approach

- Thematic analysis of these reflections to form the quantitative data for this reflection paper

Working definition of trauma

Trauma is a person's experience of an event, series of events, or set of circumstances that are physically or emotionally harmful or life-threatening. Trauma can have adverse effects on the individual's functioning and mental, physical, emotional, or spiritual well-being. **The nature and extent of those effects are informed by cultural and structural factors.**





Can we work together to create a T-I framework for research, practice and policy involving vulnerable child migrants?

- ❑ Specific resources are required to bring that to life:
 - Engagement of asylum seekers/ those with lived experience as co-collaborators;
 - Sensitive adaptation of methods
 - T-I training and ongoing mentoring/reflection for the staff;
 - Dedicated therapeutic support for the participants/practitioners

Helen Stalford
stalford@liverpool.ac.uk

www.liverpool.ac.uk/law/research/european-childrens-rights-unit/

livesonhold.org



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EMN Children in Migration report, 2021-2022

Preliminary Findings

Claire Rimmer
Senior Analyst, ICF



EMN

EMN

The European Migration Network (EMN) is an EU network of migration and asylum experts who work together to provide objective, comparable policy-relevant information and knowledge on emerging issues relating to asylum and migration in Europe in order to support policymaking in the European Union and its Member States.

It also shares such information with the wider public mainly through its website, social media accounts (Twitter (X), LinkedIn) and events.

EMN is a multi-level network

- EU level
- National level: National Contact Points (NCPs)



National Contact Points

The EMN consists of [National Contact Points \(NCPs\)](#) in the **EMN Member States** (= EU Member States except Denmark) and Observer Countries:

Norway

Moldova

Georgia

Ukraine

Montenegro

Armenia

Serbia

At the EU level, the EMN is coordinated by the European Commission (DG Home), assisted by a service provider (ICF).



EMN Outputs

- Ad-Hoc Queries
- Informs
- Studies
- Annual Report on Migration
- Glossary
- Conferences / Roundtables

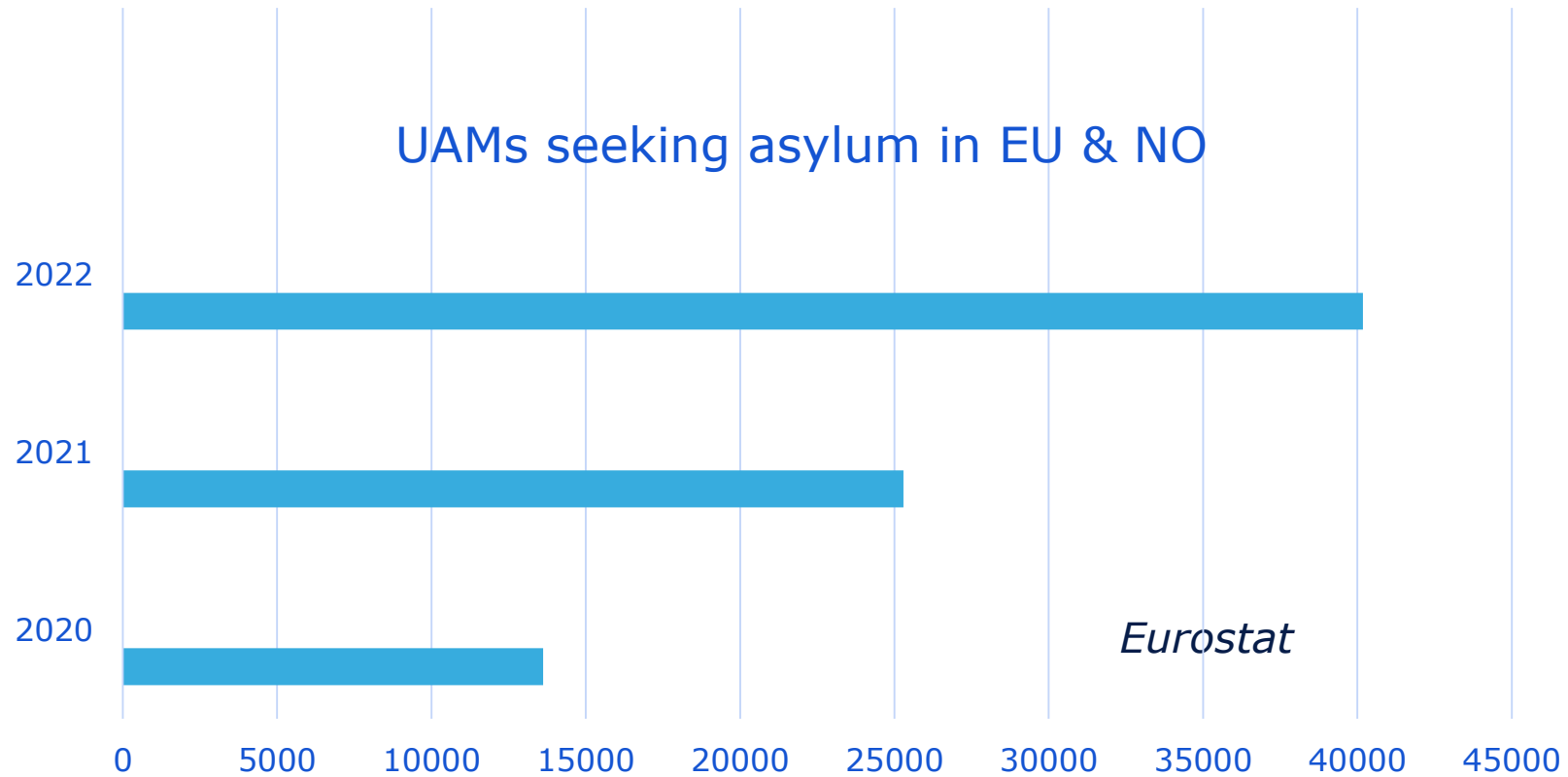


**Accompanied
children's right
to be heard in
international
protection
procedures**

European Migration
Network Inform
April 2023

Children in migration – numbers 2021-22

UAMs seeking asylum in the EU and NO, 2020-2022



UAMs registered in child protection systems but not necessarily in asylum systems in selected EU Countries

Italy 2022, 22 590 children. Data provided by the Ministry of Labour and Social Policies, which is responsible for monitoring the presence of UAMs in the Italian reception system. They refer to the presence of UAMs on 31 December 2021. In Italy, all UAMs have access to the reception system regardless of whether or not they have applied for international protection.

Spain 2022, 4 076 children. The numbers of unaccompanied minors within the child protection system regardless of whether they have applied for international protection in the asylum procedure or not.



Children fleeing Russia's war against Ukraine

In addition, in 2022 over 1.5 million children were beneficiaries of Temporary Protection in the EU and Norway, including nearly 9 000 unaccompanied minors.



Children in migration report

Background

The Children in Migration report maps the progress made by EU Member States, Norway, Georgia and Moldova from 2021-2022 in the implementation of the recommended actions laid down in the ***2017 Communication on the protection of children in migration.***

NGOs working with children in migration are also consulted, particularly for examples of good practice.





Report on the state of implementation in 2019 of the 2017 Communication on the protection of children in migration

March 2021



EMN report on the state of progress in 2020 of the European Commission communication on the protection of children in migration from 2017

January 2022



Background

This is the third report in this series developed by the EMN and follows on from earlier reports covering the periods 2019 and 2020.



Funded by the European Union

Scope

- *The scope of this report covers migrant children in the categories set out in the 2017 Communication:*
 - *Accompanied minors/families with children.*
 - *Separated children.*
 - *Unaccompanied minors, including those:*
 - *recorded within the asylum system;*
 - *not applying for asylum but recorded within other migration procedures; and*
 - *not applying for asylum, who remain outside the asylum/migration/(child) protection system, where information is available.*



Scope

- *The report does not focus on all the actions laid down in the 2017 Commission Communication on the protection of children.*
- *It focuses on a number of **priority areas**, that are topical at the time of drafting and are of specific interest in relation to the EU Strategy on the Rights of the Child. In 2021-2022 these included:*



Scope

- *Identification and registration;*
- *Providing adequate reception facilities;*
- *Alternative (non-institutional) care;*
- *Guardianship;*
- *Access to education (including early childhood education and care);*
- *Procedural safeguards (including access to legal aid);*
- *Detention for the purpose of return of unaccompanied minors and families with children;*
- *Transition to adulthood;*
- *Implementation of the Temporary Protection Directive with regards to children (2022).*



Scope

Developments in legislation
and policies

Examples of good practices



EMN report on the state
of progress in 2020 of
the European Commission
communication on the
protection of children in
migration from 2017

January 2022

Best interests of the child

Providing adequate reception facilities

In Bulgaria, in 2022, to ensure the best interest of the child, the State Agency for Refugees with the Council of Ministers (SAR), the “Social Assistance” Directorate, the Agency for Social Assistance and the “Child Protection” department collaborated on the accommodation of unaccompanied minors who have received international protection in social services.

Internal Regulations for the organisation of the accommodation of unaccompanied minors who have received international protection in foster care, social or integrated health and social service for residential care, were drawn up and approved by SAR to help apply an individual approach and take special care of unaccompanied minors, with a view to the best interest of the child.



Providing adequate reception facilities;

In Spain in 2022, a new law established the **standard operating procedures** framework for accommodation facilities for unaccompanied minors, with the aim of ensuring the best interests of unaccompanied minors and providing them with quality services.

A ministerial decision was adopted defining the Standard Operating Procedures and Licensing Framework of Accommodation Centres for Unaccompanied Minors, the Standard Operating Procedures of Supervised Apartments for Semi-Autonomous living and the Standard Operating Procedures of Emergency Accommodation Facilities.

It also provided for the development and observance of a **Code of Conduct** for the staff of the accommodation centres, as well as a comprehensive **Child Protection Policy** to be observed in the Accommodation Centres for Unaccompanied Minors.



Guardianship

In **Belgium in 2022**, an e-learning tool on psychosocial counselling for unaccompanied minors was developed for guardians. It has several modules (such as picturing the world of UAMs, building a trust relationship, the best interests of the child, resilience and community-based working). After following the e-learning, guardians can participate in a peer-learning exercise, where they can ask questions and discuss cases.

In **Greece in 2022**, a reformed national guardianship system for unaccompanied minors was established to ensure the best interests of unaccompanied minors, their overall well-being and the enjoyment and effective protection of their rights.

The new guardianship system is more flexible. The state exercises control and supervision, gives directions for the exercise of guardianship duties, and supports the implementation of the programme. NGOs, specializing in children protection, provide guardianship services, following their designation by the competent Prosecutor.



Guardianship

In **Lithuania in 2022**, new regulations sped up the process of appointing a guardian to ensure the best interests of the child.

In **Luxembourg** there is an advisory commission for the assessment of the best interests of unaccompanied minors. In **2022** a civil society representative was added to the commission. They must be a legal person under Luxembourg law, established with their registered office in the Grand Duchy of Luxembourg. The civil society representative needs a diploma attesting to the completion of a university course in educational and social sciences, pedagogy, or psychology, or at least ten years' professional experience in the field of child protection or the socio-educational supervision of children. This ensures that civil society is represented and provides an additional safeguard for the protection of children



Procedural safeguards (including access to legal aid)

In **Austria** the Federal Minister of the Interior adopted various measures in 2022 in response to the decision of 14 October 2021 by the National Council to improve the protection and legal status of refugee children.

A **new checklist** was introduced to guarantee the best interests of the child in procedures relating to asylum and the rights of foreign nationals, and to ensure the implementation of the recommendations of the Commission on the Best Interests of the Child. Developed by UNHCR, since February 2022 this has been provided to case workers at the Federal Office for Immigration and Asylum to use as a tool to facilitate the interviewing of minors.

A **training course** for case workers focussed on the legal foundations of the best interests of the child and relevant case law, as well as interviewing minors.

Guidelines on the best interests of the child in asylum and aliens law were published in summer 2022 for judges of the Federal Administrative Court to consult as a working aid, outlining the key criteria for assessing the best interests of the child, based on case law.



Procedural safeguards (including access to legal aid)

In **Finland** there were developments to ensure more systematic hearing of accompanied children under the age of 12 in the asylum procedure and ensuring that more attention is paid to persecution being evaluated from the child's point of view in asylum procedures. Work started on guidance during 2022 and the training will be held during 2023.

These were driven by legislation to improve procedural safeguards as well as the UNHCR Quality Initiative: An Assessment of Child-Sensitive Refugee Status Determination at the Finnish Immigration Service.

In **Greece** in 2022 work was carried out with UNHCR and the European Union Asylum Agency to create a system for harmonising the procedures for assessing the best interests of unaccompanied minors. The aim was to ensure a best interest's assessment in every step and circumstance of an unaccompanied minor's case.



Procedural safeguards (including access to legal aid)

In **Slovakia** there was more detail provided on the instructions to be given for applicants for international protection within an amendment to the Act on Asylum. A provision was in line with principle of the best interest of the child, that the instructions and information shall be provided in a manner which takes into account the age and the level of maturity of the minor.

In **Belgium**, in late October 2022, the Guardianship Service decided not to conduct age tests on young people whose self-declared minority was questioned by the Immigration Office and who did not receive reception.



Detention for the purpose of return of unaccompanied minors and families with children

Belgium reported developments in this area in 2021 and 2022 linked to alternatives to detention for families with minors.

In 2022 the UN Committee on the Rights of the Child ruled that in 2019 Belgium had not sufficiently considered alternatives to detention in the case of a family with two children:

“by failing to consider possible alternatives to the detention of the children, the State party has not given due regard, as a primary consideration, to their best interests, either at the time of their detention or when their detention was extended”.

In 2021 a new department “Alternatives to Detention” was established in the Immigration Office to promote voluntary return and individual case management and good practice was highlighted by NGOs on Belgium’s family-based case management system.



Implementation of the Temporary Protection Directive with regards to children

In Greece in 2022, the National Emergency Response Mechanism (NERM) of the Special Secretariat for the Protection of Unaccompanied Minors established a procedure and developed cooperation with the Police and relevant agencies for the identification and registration of minors arriving from Ukraine.

A Best Interests Assessment Team, composed of social workers and interpreters, was active at Promahonas Passport Control Point to assess the best interest of each separated and unaccompanied minor arriving and to draft a rapid assessment form to the NERM.

NERM referred cases of separated minors to Municipality Social Services for document checks and a social investigation if needed.

For unaccompanied minors without a support network in Greece, the Police at the Passport Control Point immediately referred them to NERM to sort out accommodation in an emergency accommodation facility.



Other best interest information provided in areas not covered by the report

Return

In **Finland** there was a change of practice due to a decision of the Supreme Administrative Court: If one family member is being deported from the country, reasons for deportation are given to the family member (spouse and children) in a separate document which is an appealable decision.

In **Spain**, the Manual of Voluntary Return was updated to reinforce the protection of minors and the authorisation needed when returning with one parent or a different relative. When only one parent has guardianship, it has to be legally proven.

Racism and discrimination

The government of **Georgia** approved a new “2022-2030 Human Rights Strategy”, which includes the protection of all children from various kinds of discrimination and a chapter on the rights of a child.





Claire Rimmer

Senior Analyst

Claire.rimmer@icf.com

emn@icf.com



www.ec.europa.eu/emn



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