

**SEPARATED CHILDREN IN EUROPE PROGRAMME**  
**QUESTIONNAIRE FOR COUNTRY ASSESSMENT**

**COUNTRY: Spain**

**EVALUATION PERIOD: September 2002 – July 2003**

**RESPONDENT: Ani Mason<sup>1</sup>, Save the Children Spain**

**AGENCIES/ INDIVIDUALS CONSULTED :**

The research for this report was carried out in five of Spain's autonomous communities (Andalusia, Catalonia, Canary Islands, Madrid and Valencia), as well as in the two autonomous cities (Ceuta and Melilla)<sup>2</sup>.

Interviews were conducted with the following agencies, organisations and individuals:  
Child Protective Services<sup>3</sup>  
Care facilities  
Care professionals

Government Delegations  
National Police, Foreigners Section

Public Prosecutors for Children  
Ombudsmen  
Ombudsmen for Children (in Madrid only)

*Inter-governmental organisations, non-governmental organisations and university programs:*

Save the Children  
U.N. High Commissioner for Refugees

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Legal research was done by Almudena Rodríguez García and Jaime Aguilar-Álvarez González, graduate students at the Carlos III University in Madrid. A general revision of the legal content was conducted by Elena Arce, a private attorney. Isabel de las Casas reviewed the Asylum Section.

<sup>2</sup> Spain is composed of 17 autonomous communities: Andalusia, Aragon, Asturias, the Balearic Islands, the Basque Country, the Canary Islands, Cantabria, Castile and Leon, Castile-La Mancha, Catalonia, Extremadura, Galicia, La Rioja, Madrid, Murcia, Navarre, and the Valencian Community. Each autonomous community is, in turn, made up of various provinces. In addition to the 17 communities, there are two autonomous cities located in North Africa: Ceuta and Melilla.

The autonomous governments are the competent authority to address children's issues and needs in their community, and thus are the primary public figure responsible for separated children. When the arrival of separated children to Spain became apparent on a national level, circa 1998, there was initially serious discrepancy over whether it was the autonomous or national government that would supervise the protection of and intervention with these children. Since then, the autonomous government's role has been clarified, but the cooperation between the two (namely, the support from the national government to the autonomous governments, especially those with a relatively high number of separated children) is not always smooth.

<sup>3</sup> Because child welfare authorities have a different name in each autonomous community, they will be generically referred to as "Child Protective Services" for the purposes of this report.

APIC (Pro-Immigration Association of Cordoba)  
Colectivo Al Jaima (Al Jaima Collective)  
Algeciras Acoge  
AVAR (Valencian Association for Refugee Aid)  
Cáritas  
Casal del Infants del Raval (Raval Children's House)  
CEAR (Spanish Commission for Refugee Aid)  
CIDEAL (Foundation for Cooperation, Research and Development between Europe and Latin America)  
Comisión Diocesana de Migraciones de Ceuta (Migrations Commission of Ceuta)  
Cruz Roja Española (Spanish Red Cross)  
Fundación Jaume Bofill (Jaume Bofill Foundation)  
Fundación Tomillo (Tomillo Foundation)  
Human Rights Watch  
Médicos sin Fronteras (Doctors without Borders)  
Mensajeros de la Paz (Messengers of Peace)  
MPDL (Movement for Peace, Disarmament and Liberty)  
Padres Mercedarios (Merciful Fathers)  
PAIDEIA (Association for the Integration of the Child)  
Plataforma Ciudadana en Defensa dels Menors Immigrats Desemparats  
PRODEÍN (Pro-Children's Rights Association)  
Real Ilustre Colegio de Abogados de Valencia (Bar Association of Valencia)  
Sevilla Acoge  
SOS Racismo (SOS Racism)  
Universidad Autónoma de Madrid, Programa de Migración y Multiculturalidad (Autonomous University of Madrid, Migration and Multiculturalism Program)  
Universidad de Barcelona, Derecho Constitucional (University of Barcelona, Constitutional Law [program])

*Individuals not associated with organizations or programs:*

Elena Arce  
Tomás Partida  
Ana Pavón  
Irma Rognoni

## **DOCUMENTS USED OR REFERRED TO:**

### **NATIONAL LEGISLATION**

Spanish Constitution (*Constitución Española, aprobada por las Cortes celebradas el 31 de octubre de 1978, ratificada por el pueblo español en referendun de 6 de diciembre de 1978 y sancionada por SM el Rey ante las Cortes el 27 de diciembre de 1978.*)

Spanish Civil Code (*Código Civil Español, aprobado por Real Decreto de 24 de julio de 1889.*)

Spanish Penal Code (*Código Penal, aprobado por Ley 10/1995, de 23 de noviembre.*)

Spanish Minors Law (*Ley Orgánica 1/1996, de 15 de enero, de protección jurídica del menor, de modificación parcial del código civil y de la ley de enjuiciamiento civil.*)

Spanish Foreigners Law (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, reformada por Ley Orgánica 8/2000, de 22 de diciembre.*)

Implementing Regulation of the Foreigners Law (*Real Decreto 864/2001, de 20 de julio, por el que se aprueba el Reglamento de ejecución de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, reformada por Ley Orgánica 8/2000, de 22 de diciembre.*)

Spanish Asylum Law (*Ley 5/1984, de 26 de marzo, reguladora del Derecho de Asilo y la Condición de Refugiado, modificado por Ley 9/1994, de 19 de mayo.*)

Implementing Regulation of the Asylum Law (*Real Decreto 203/1995, de 10 de febrero, por el que se aprueba el reglamento de aplicación de la Ley 5/1984, de 26 de marzo, reguladora del Derecho de Asilo y la Condición de Refugiado, modificado por Ley 9/1994, de 19 de mayo.*)

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## **DEFINITION OF SEPARATED CHILD**

**a. give details of the definition(s) used in Spain.**

In Spain, the term used for “separated child” is *menor no acompañado*, or, “unaccompanied minor”<sup>4</sup>. Although there is no specific definition of separated children given in Spanish law, the definition advanced by Council Resolution of 26 June 1997 has national legitimacy<sup>5</sup>. As far as explicit recognition of separated children in proper Spanish legislation, the Foreigners Law and its Implementing Regulation come closest, establishing specific procedures (developed expressly for separated children) to be applied to “foreign children in a situation of disprotection”<sup>6</sup>.

One can draw on separated children’s various attributes in order to outline the national legislative framework applicable to them. Like all individuals in Spain, separated children are affected by legal provisions like the Spanish Constitution and Civil Code. Due to their age, they are protected by the Minors Law<sup>7</sup>. Because they are not Spanish citizens, separated children are also subject to procedures outlined in the Foreigners Law and its Implementing Regulation<sup>8</sup>. When they come to Spain to seek protection, the Asylum Law and its Implementing Regulation are applicable.

Highlighting the characteristics of the collective of separated children in Spain will provide a helpful and more relevant context through which to consider the laws, policies and practices affecting these children<sup>9</sup>. As an accurate reflection of the foreign adult population, separated children in Spain typically arrive in search of the opportunity to work and improve their standard of living (and that of their families). In many cases, their journeys to Spanish territory were supported tacitly [and sometimes vocally and even financially] by their parents<sup>10</sup>. The number of separated children who arrive to Spain and solicit asylum is very small<sup>11</sup>.

The great majority of separated children in Spain come from Morocco and are between the ages of 15 and 18. Increasingly, younger children (between 12 and 15 years of age) are beginning to make the journey to Spain on their own. There is also a small population of sub-Saharanans who form part of the larger community of separated

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<sup>4</sup> The translation of “separated child” as “*menor no acompañado*” stems from the fact that “*niño separado*” (the literal translation of “separated child”) carries a connotation of a child whose parents have separated as a result of matrimonial problems.

<sup>5</sup> Correspondence with [Spanish attorney] Elena Arce, 22 July 2003 [hereinafter Correspondence with Arce].

<sup>6</sup> Art. 35, Foreigners Law (FL); Art 62, Implementing Regulation of Foreigners Law (IRFL).

<sup>7</sup> Art. 1, Minors Law (ML). Minority is established at under 18 years of age, in accordance with the Convention on the Rights of the Child. Art. 9, Civil Code (CC).

<sup>8</sup> Art. 11, Spanish Constitution (SC); art. 17-28, CC; art. 1, FL.

<sup>9</sup> The work of Universidad Autónoma de Madrid, Fundación Jaume Bofill, and Mercedes Jiménez, among others, is particularly instructive in exploring the more anthropological aspects of this community.

<sup>10</sup> It is important to distinguish between parents’ belief that a host country can offer their child greater access to resources and opportunities that favour his personal well-being and development, and their desire that the child live apart from his family. Mercedes Jiménez, an anthropologist who has worked in Tangier with numerous families of separated children in Spain, confirms that no family has ever expressed *pleasure* at their child’s decision or need to migrate, but the majority do believe that the opportunities available to their child in Europe are superior to those that the family or the Moroccan government could offer.

<sup>11</sup> The Spanish Office of Asylum and Refugees (OAR) reported 2 asylum applications by separated children in 2001, though it is important to note that several of the OAR’s accounting policies are not fully consistent with the Statement of Good Practice’s definition of a separated child. In its annual report, Figure 3.30, “Unaccompanied Minor Asylum Seekers in 2001”, contained the following age categories for separated children: <10, 11-15 and 16-17. There was no allowance made for children between the ages of 17 and 18. OAR Annual Report, 2001, p. 84. (For more detailed information on the number of separated children in Spain, see the Data Collection section.)

children, a number of whom do solicit asylum. Recently, the number of Eastern European children, particularly Romanians, has also begun to increase. These last two communities –sub-Saharan and Eastern Europeans– seem disproportionately affected by trafficking mafias, whereas North African children tend to make the journey on their own.

In contrast to the media-driven stereotype that the majority of separated children arrive to Spain having lived on the street in their countries of origin, lacking strong family ties or are predisposed to violent crime, care workers confirm that separated children are generally right on par with Spanish children with regard to their level of maturity and potential for social integration.

**b. are children with siblings over 18 years of age considered to be separated?**

The more significant consideration in the context of being able to access assistance from the Spanish government is whether a child with siblings over 18 years of age would be considered in state of “disprotection” and thereby eligible for public protection.

A state of disprotection is linked to the quality of the protection provided to a child, and not necessarily to the provider of that protection (i.e., not negated by the mere presence of an adult relative). As such, a child accompanied by a sibling who was unable to care properly for him would be eligible for protection by the government. Following that same logic, though, if the adult sibling were able and suitable to assume proper care of the child, that child might not be considered in a state of disprotection<sup>12</sup>.

Though at the national level, the Public Prosecutor and the Ministry of the Interior, among others, officially acknowledge that the definition of separated children includes children who are accompanied but not properly cared for<sup>13</sup>, many child care professionals and government agency representatives reject the notion that children residing in Spain in the company of relatives, simply by virtue of being separated from their legal or customary guardians, would be eligible for government protection. General public opinion tends only to conceive of separated children as those who have come and remain totally alone or “unaccompanied”, a confusion which may stem in part from the limitation of the Spanish translation of the term.

**c. to what extent does this conform to the statement?**

- There is no definition of separated children in Spanish law. In its absence, the definition advanced by the Council Resolution of 26 June 1997 becomes applicable.
- The political definition of separated children at the national level is in keeping with the Statement of Good Practice.
- The functional definition of separated children does not always include children in the company of relatives or other adults unable to care for them.

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<sup>12</sup> Correspondence with Arce, 22 July 2003. Art. 303, CC.

<sup>13</sup> Office of the Public Prosecutor, Circular 3/2001, 21 December 2001 [hereinafter Circular 3/2001]. See also Sub-Office of Children and Families (Ministry of Labour and Social Affairs), *Informe sobre documentación aportada al grupo de trabajo de ‘menores extranjeros no acompañados’*, in “Reunión del grupo de trabajo sobre ‘menores extranjeros no acompañados’”, Observatorio de la Infancia, 22 March 2000 [hereinafter Observatorio Booklet], in which the Ministry of Labour and Social Affairs cites the definition advanced in the Council Resolution of 26 June 1997 as the correct definition to be used in Spain.

**d. are any changes needed? In relation to any first principle?**

- Spain should include the definition of separated children advanced by the Statement of Good Practice in its Minors and Foreigners Laws.

**1. ACCESS TO THE TERRITORY**

**a. please describe relevant law, policy and practice in Spain.**

In discussing the laws and procedures regulating access to Spanish territory through established border points, it is most important to distinguish between asylum seekers and economic migrants, as there is no distinction made on the basis of the age of a potential entrant.

Spanish asylum law recognises the right of all foreigners to request asylum<sup>14</sup>, though it does not automatically grant them entrance into Spanish territory. Asylum applicants who are confirmed to be separated and under the age of 18 –either according to the documentation they present or the results of the age test administered by Spanish authorities [in cases of doubt of the applicant’s age]– receive special treatment. They are immediately allowed to enter the territory and are remitted to the care of the regional Child Protective Services office to ensure that their basic needs are covered before making their asylum request<sup>15</sup>.

Because of the high incidence of entrances into Spanish territory by [non-asylum seeking] economic migrants and the focus of border guards on combating illegal immigration and trafficking, a young asylum seeker may not be correctly identified when trying to enter Spain and could be wrongly subjected to immigration control measures<sup>16</sup>. In Valencia, in May 2002, an individual, unaccompanied and potentially a minor and/or asylum seeker, was refused entry to Spanish territory by the national police in the port of Sagunto before being given the opportunity to solicit asylum. Attorneys’ insistence that he be allowed to receive legal aid either on the boat or in the port was not heeded. Border police maintained that because the individual was not officially in Spanish territory, Spain did not have the responsibility –or *right*, it’s unclear which– to offer entry to an illegal immigrant<sup>17</sup>. Valencia’s Public Prosecutor has since criticised the security forces’ actions and instructed them that in any intervention involving potential children or asylum seekers, the child’s best interests must be the primary consideration and the policy of *non-refoulement* must be respected.

In the case of economic migrants, the Foreigners Law calls for individuals to be denied access to Spanish territory if they are not in possession of the necessary entrance documents (i.e., passport, visa, proof of economic sufficiency, etc.)<sup>18</sup>. Additionally, if a

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<sup>14</sup> Art. 1, Asylum Law (AL).

<sup>15</sup> Interview with the Spanish Office of the United Nations High Commissioner for Refugees, 25 July 2003. A more detailed description of asylum procedure can be found in the Asylum or Refugee Determination Process section.

<sup>16</sup> Interview with Comisión Española de Ayuda al Refugiado [hereinafter Interview with CEAR], Madrid, 25 November 2002.

<sup>17</sup> Ana María Pavón Marín, “*Los menores extracomunitarios no acompañados, especial referencia a los solicitantes de asilo*”, Valencia, July 2002.

<sup>18</sup> Art. 25-26, FL; art. 30 IRFL. This policy is in keeping with the European Union’s Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries (97/C 221/03), which accepts, in its article 2, the legitimacy of Member States’s refusal to admit separated children “in particular if they are without the required documentation and authorizations.”

child arrives with an adult, he must be included in the adult's passport<sup>19</sup>; if the child arrives alone, he must possess authorisation from his parents that has been verified by the security forces of his country of origin<sup>20</sup>. Concession of entry to an individual who does not meet the standard criteria is allowed when there are, *inter alia*, humanitarian considerations that favour his entry<sup>21</sup>, though there are no known cases of non-asylum seeking separated children being allowed to enter Spanish territory on humanitarian grounds.

In reality, separated children rarely enter Spanish territory through established border points or with a proper passport or travel documents. The overwhelming majority of these children gains entrance to the territory by stowing-away undetected under a truck or on a boat en route to the peninsula (typically on their own initiative and without paying). A significantly smaller number pays trafficking mafias to travel to southern Spain or westward to the Canary Islands in small boats (*pateras*). Finally, and to an extent that is difficult to assess, children can cross at official border points with a family friend or relative who has legal permission to enter Spanish territory (e.g., posing as the child of someone crossing on the Tangier-Algeciras ferry or at Ceuta or Melilla's land border). All three methods leave the child vulnerable upon his arrival to Spanish territory.

**b. to what extent does this conform to the statement?**

- Once an individual is identified as a separated child seeking asylum, he is granted access to the territory. Some separated children seeking asylum may not be correctly identified and could be refused entry to Spanish territory [for immigration reasons].
- Separated children seeking asylum will be kept outside of Spanish territory until their minority is confirmed (either by way of documentation or an age test).
- Interviews with separated children seeking asylum at border points are typically short and carried out by an asylum authority.

**c. are any changes needed? In relation to any first principle?**

- The improvement of security forces' procedures to identify potential asylum seekers at points of entry would prevent separated children [seeking asylum] from being wrongly denied access to the territory.

**d. please indicate whether Spain has “carrier liability legislation” (i.e., airlines, train and boat companies can be fined if they bring someone without proper documentation). Is this applied to children and young people under the age of 18?**

Spain does have carrier liability legislation<sup>22</sup>. Currently, transport companies or professionals who facilitate, either knowingly or unknowingly, the arrival of individuals without legal permission to enter Spain commit a “very serious” violation of Spanish law and are subject to significant fines (between 6,000 and 60,000€, approximately)<sup>23</sup>.

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<sup>19</sup> Children under the age of 16 can be included in their parents' passports. Because the trafficked children bore some resemblance to the trafficker's own children, they were accepted as such at the border.

<sup>20</sup> Correspondence with Foreigners Section of Spanish National Police, 22 July 2003.

<sup>21</sup> Art. 27, IRFL.

<sup>22</sup> Art. 54.2, FL; art. 30.3-30.6, IRFL.

<sup>23</sup> Art. 55.1c, FL.

Because minors do not have the same level of criminal responsibility as adults<sup>24</sup>, there have been reports of mafias exploiting their immunity and presenting them as owner or captain of a boat carrying illegal immigrants, in order to escape punishment if they are caught by the police.

Transport professionals are expected to ensure that all passengers' travel documents are valid, must inform the Spanish government of those passengers who do not use their return tickets, and are considered responsible for the return of any passenger who, upon arrival to Spain, is deemed inadmissible<sup>25</sup>. Only if the foreigner in question presents an *admissible* asylum application upon his arrival to Spanish territory will the transport professional be considered immune from the aforementioned sanctions.

While these measures have been adopted in the name of combating illegal immigration, they pose a serious problem for genuine asylum seekers. Transport professionals –by profession, *not* specialists in asylum issues– cannot be expected to evaluate the legitimacy or merit of an individual's asylum claim. Nonetheless, the current foreigners legislation punishes them for bringing an asylum seeker whose case the government deems inadmissible.

To compound matters, the government is in the process of reforming the Foreigners Law<sup>26</sup>, which will include increasing requirements on transport professionals and toughening penalties for those who fail to meet them. An agreement has already been reached with the Romanian authorities whereby Romanian transport companies will provide Spain with the name of all passengers as well as the number of their identification and travel documents *before* reaching the Spanish border<sup>27</sup>. Other amendments include stiffer sanctions for those found guilty of smuggling<sup>28</sup>. One of the primary reasons cited for this reform is the strengthening of the fight against illegal immigration and the mafias that benefit from it.

## **1.2 TRAFFICKING**

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<sup>24</sup> See Minors Criminal Responsibility Law. Correspondence with [Spanish attorney] Diego Lorente, SOS Racismo, 21 July 2003. Interview with [Spanish attorney] Carmen del Molino, Save the Children Spain, 28 July 2003.

<sup>25</sup> Art. 30.3-30.6, IRFL. Susana López, “*Reforma Ley de Extranjería: la propuesta del Gobierno de Mayo 2003*”, United Left (Spanish political party), 28 May 2003. Accessed online: <http://www.extranjeria.info/inicio/index.htm> [hereinafter López].

<sup>26</sup> In September 2003, shortly before publication of this report, the two principal Spanish political parties reached an agreement as to how they would reform the Spanish Foreigners Law mentioned above. The approved text focused on the following changes: the establishment of one visa as the only document needed to enter into and study and work in Spanish territory; the reinforcement of sanctions for individuals or groups involved in “illegal immigration”; the requirement that airlines hand over to the Spanish government a list of their passengers before take-off; the requirement that municipalities keep their local records/census (*padrón*) current so as to provide the Interior Ministry with any information necessary its migration control efforts; the expedition and reinforcement of the expulsion procedure for those migrants who attempt to enter Spanish territory outside of official border points; the discontinuation of the potential family reunification “domino-effect” (i.e., an individual is reunited with his spouse, who requests reunification with her parents, who in turn request reunification for their parents, etc.). J.A.R., “Reforma legal para cumplir una sentencia del Supremo,” *El País*, 12 September 2003.

<sup>27</sup> Jorge A. Rodríguez, “Las empresas de autobuses rumanas darán sus listas de viajeros a España”, *El País*, 28 May 2003 [hereinafter Rodríguez].

<sup>28</sup> L.R. Aizpeolea, “La reforma de la Ley de Extranjería fija multas de 60.000 euros a los transportistas”, *El País*, 24 May 2003. See also López and Rodríguez.

**e. are you aware of any children being trafficked for purposes of exploitation into your country? If so please give brief example(s) stating, if possible, the country of origin and nature of trafficking. Please also give examples where children have travelled along trafficking routes in order to apply for asylum.**

Trafficking mafias are unquestionably involved in bringing separated children to Spain for the purposes of their exploitation. Prostitution rings are perhaps the most common form of exploitation; especially visible are those victimising Eastern European women and girls<sup>29</sup>. In the past year, police investigations have exposed various mafias operating in singles bars (*clubes de alterne*) located, for the most part, in the autonomous communities of Valencia and Andalusia, both of which are popular tourist destinations.

Generally, victims were recruited in Romania and transported by van to Spain, lured by the promise of papers and a decent job. Upon their arrival in Spanish territory, they were forced to exercise prostitution in order to “repay” the debt assigned to them by the individuals who had facilitated their journey, coerced by physical, sexual, and psychological violence (including threats against their families). Mafias often took their victims’ passports in order to deter them from attempting to escape<sup>30</sup>. In addition to the rings of Eastern European women and girls run primarily along Spain’s eastern coast, there are various groups that exploit sub-Saharanans in different Spanish cities, there is less media coverage of [police intervention against] these groups.

Childcare professionals and government officials in Madrid, Catalonia, Valencia, Andalusia and the Canary Islands expressed serious concern for the minors caught within these prostitution rings, citing their near total privation of contact with child welfare authorities and the very limited number and capacity of private organisations intervening in their cases.

Prostitution rings are not the only form of exploitation that affects separated children in Spain. Isolated cases of children being trafficked into Spain for labour exploitation have also surfaced. There is an unknown number of girls in domestic service, who, having far less contact with the general public than the girls in prostitution rings, are exceedingly difficult to detect<sup>31</sup>. In Barcelona, a Bangladeshi man was detained and accused of exploiting twelve separated children from Bangladesh, whose parents had each paid nearly 14,000€ to send them to Spain. The accused brought the minors into the country by falsifying their passports and making them pass as his own children. Once in

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<sup>29</sup> In 2002, the Committee on the Rights of the Child expressed concern over “reports of child prostitution in the suburbs of large cities and in holiday resorts...”. Observation 48, Concluding Observations of the Committee on the Rights of the Child: SPAIN, (CRC/C/15/Add.195), 7 June 2002.

<sup>30</sup> See *El País* articles: “Cinco menores, entre 17 rumanas liberadas de una red de proxenetas” (21 November 2002), “Detenidos 39 rumanos que prostituían a menores de edad en clubes de alterne de Alicante y Tarragona” (30 March 2003), “Prostitutas a puñetazos” (19 May 2003), and “La policía desarticula una red de tráfico de personas y detiene a 45 implicados”.

<sup>31</sup> In Spain, there is scant control of the domestic service sector, which is primarily composed of women and girls of foreign nationality (most commonly Latin American and, more recently, Eastern European). Although Moroccan girls are infrequently found to be victims of sexual exploitation by mafias in Spain, they *can* be vulnerable to labour exploitation as domestic workers. See Jesus Prieto, “Niñas marroquíes esclavas en Melilla,” *Andalucía Libre*, Correo No. 96, 2001, as cited in Human Rights Watch, “Nowhere to Turn: State Abuses against Unaccompanied Migrant Children by Spain and Morocco”, *A Human Rights Watch Report*, New York, May 2002 [hereinafter HRW, *Nowhere to Turn*], p. 4.

Barcelona, they were forced to work in pitiful conditions, while the accused appropriated their wages, supposedly until they repaid their “debt” to him<sup>32</sup>.

A similar case was detected in the autonomous community of Asturias where a family brought minors from Ecuador to Spain, promising them a decent job. Once in Spain, the minors were forced to work twenty-hour shifts in the production of typical Ecuadorian products. They regularly slept on the floor or in a van, and when they did not bring in a sufficient amount of money, they were submitted to physical and psychological abuse. The most worrying aspect of this case is that the children had been to various police stations in Asturias and Navarre in search of assistance, but had not been helped<sup>33</sup>, a serious indication that outreach to and detection of child trafficking victims does not always function properly.

Care professionals and asylum experts confirmed that trafficking routes are also used by separated children to arrive to and seek asylum in Spain<sup>34</sup>.

**f. Have any measures been taken by the State to combat trafficking of any sort?**

Human trafficking [of both adults and children] is considered a “very serious” violation under Spanish law<sup>35</sup>. In addition to outlining the punishment for those who “induce, cause, favour, or facilitate, as part of a lucrative organisation, the clandestine immigration of persons”, the Foreigners Law also offers protection to trafficking victims. In exchange for testimony against traffickers, victims are given immunity from immigration sanctions and offered temporary residence and work permits, as well as assistance in social integration<sup>36</sup>.

It is unclear to what degree the Spanish government has managed to collaborate with its European neighbours and foreign countries of origin in the fight against trafficking in children. Political measures such as the launch of Operation Ulysses in late January 2003 have been heralded by government officials as international weapons in the common fight against trafficking and the mafias that profit from illegal immigration. While there is no doubt that many undocumented immigrants, especially those who arrive to Spain in small boats, have been assisted and exploited in their journey by trafficking mafias, many individuals and organisations consider Operation Ulysses (as well as SIVE, a high-tech security system built to detect boats in the waters between North Africa and Spain<sup>37</sup>) an attempt to fend off the arrival of the immigrants themselves rather than to protect them from traffickers. In part, this interpretation would grow out of the strong governmental concern, as represented by the topics on which legal revisions and political discourse are centred, for immigrants’ well-being *before* they reach Spanish territory. There seems to be noticeably less [public] attention given

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<sup>32</sup> Miguel Noguer, “Detenido en Barcelona un hombre acusado de explotar a 12 menores”, *El País*, 14 December 2002.

<sup>33</sup> EFE, “Detienen a una red de menores ecuatorianos”, *La voz de Asturias*, 17 March 2003.

<sup>34</sup> At the Padres Mercedarios group home in Madrid, the director explained that while asylum seekers under his care in the past had undoubtedly arrived to Spain with the help of traffickers, it was extremely difficult to elicit details from them about the trafficking groups that had facilitated their journey.

<sup>35</sup> Art. 54.1b, FL. The corresponding sanctions for very serious violations are detailed in art. 55.1c, FL.

<sup>36</sup> Art. 59, FL; art. 98, IRFL.

<sup>37</sup> In the opinion of immigrants’ advocates, the SIVE system has significantly increased the death toll in the waters between Africa and Spain. The trafficking mafias now direct their cargo to areas of the coast that are far more dangerous, in order to remain undetected. Correspondence with Arce, 22 July 2003.

to Spanish police efforts and operations to route out mafias and individuals exploiting separated child and adult immigrants *within* Spain.

Within Spain, child welfare authorities consider it the responsibility of the police to identify and reach out to potential minors caught in prostitution rings or other exploitative mafia operations, an intervention which is heeded by various factors. To begin with, prostitution victims are often petrified of the consequences that will befall them and their family members if they escape from the mafia. For instance, in order to stay out of the centres of protection, minors will claim to be adults<sup>38</sup>, which is easily supported by false documentation and not easily disproved by the inaccurate age assessment system. In the event that the minority of a prostitution victim is confirmed, the mobility of the mafias running these rings becomes the next serious hurdle. If a ring suspects outside assistance to have reached one of its victims, that individual is quickly transferred to another locale, in another city. Without sustained contact with a victim, it is impossible to carry out a meaningful intervention.

Once security forces succeed in detecting a child victim, (s)he will most usually be remitted to the system of protection. In one autonomous community, the director of a reception centre revealed that each year several victims of trafficking and sexual exploitation arrived to the centre through the intervention of the police and/or private associations, from where arrangements were made with the authorities of their countries of origin for their family reunification. In some instances, the victims remained in hiding in the houses of the individuals or associations that had reached out to them, never entering a Spanish protection centre, while child welfare authorities coordinated the child's return home.

Neither the Public Prosecutor for Children<sup>39</sup> nor the Ombudsman<sup>40</sup> in different communities pointed to having done significant work on the problem of child trafficking, though they expressed willingness to investigate any related complaints that reached them. All parties recognised the heightened vulnerability presented by child trafficking victims and acknowledged that their needs were not being sufficiently met, due in part to the extreme difficulty of carrying out a successful intervention with them.

## **2. IDENTIFICATION**

### **a. Please describe relevant law, policy and practice in Spain.**

While there is no special mention in Spanish law of the procedures that ought to be put in place to identify separated children, border guards pay special attention to rigorously establishing the nature of the relationship between a child and the adult accompanying

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<sup>38</sup> The Spanish legal and child welfare systems can be easily misrepresented by the traffickers to make girls fear the consequences of admitting their minority.

<sup>39</sup> For a concise, clear explanation of the Public Prosecutor in Spain, see HRW, *Nowhere to Turn*, p. 10. The Public Prosecutor for Children has a confusing and sometimes paradoxical role to play in the ambit of child protection. He can "prosecute" on behalf of or against a separated child. The PPC is responsible for both protection the rights of children under the protection of the state and the prosecution/assigning of punishment to child who has committed a crime. The PPC also has the power to investigate complaints that reach his office.

<sup>40</sup> For a concise, clear explanation of the Ombudsman in Spain, see HRW, *Nowhere to Turn*, p. 10. The Ombudsman's office in each community plays a "watchdog" role. It is responsible for investigating the complaints that reach its office and can pass complaints on to the Public Prosecutor.

him<sup>41</sup> and are instructed to be especially vigilant for potential victims of exploitation (e.g., prostitution, drug or organ trafficking, etc.).

As mentioned in the Access to the Territory Section, reports revealed that children can enter the country in the company of extended family members or with traffickers or family friends posing as relatives and are subsequently left in a state of disprotection inside Spanish territory (as they are either abandoned, left in the care of someone who is unable to care for them properly, or caught in the grasp a mafia). For instance, police in Ceuta caught a Moroccan woman bringing children in from Morocco, passing them for her own at the border, and leaving them to fend for themselves once in Spanish territory<sup>42</sup>. It is also believed that many of the girls brought to Spain by traffickers enter Spanish territory with a male member of the mafia posing as their uncle or brother.

The majority of Spain's separated children are identified by security forces once they settle inside Spanish territory. Ideally, members of the special police squad trained to work with children (GRUME) should detect separated children and turn them over to child welfare authorities. In reality, in many autonomous communities, the GRUME does not have sufficient resources to make up an effective detection force, and children can be identified by the local, regional or national police, or the civil guard. Some autonomous communities, including Madrid and Catalonia, employ "street educators" (*educadores de calle*) to assist in identifying undetected separated children and facilitating their entrance into the system of protection<sup>43</sup>.

**b. To what extent does this conform to the Statement? Please outline in brief.**

- Spanish procedure for identifying separated children conforms to the SGP, though the identification of asylum seekers by border police may not always function successfully.

**c. Are any changes needed in relation to any first principle?**

- Procedure for identifying potential asylum seekers should be communicated to individuals in frequent contact with separated children, particularly upon their arrival to Spanish territory (e.g., security forces and reception centre professionals).

### **3. APPOINTMENT OF GUARDIAN OR ADVISER**

**a) Is a guardian or adviser appointed ?**

By virtue of being under the age of 18 and separated from their legal or customary caregiver, separated children are considered [by Spanish law] to be in a state of disprotection<sup>44</sup>, which requires the immediate assumption of the child's legal

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<sup>41</sup> Correspondence with Foreigners Section of Spanish National Police, 22 July 2003 [hereinafter Correspondence with Police].

<sup>42</sup> Interview with the Government Delegation in Ceuta, 26 March 2003.

<sup>43</sup> Ceuta is a city with a relatively high number of separated children living on the street, but lacks a street educators program. Child Protective Services had initiated such a program with Médicos sin Fronteras, which would have made a positive difference for these particularly vulnerable children, but signature of the final contract was paralysed by the government.

<sup>44</sup> Art. 172.1, CC; art. 18, ML. A state of disprotection arises from the legal guardian's or customary care giver's "failure, or impossible or insufficient exercise of the protective duties established by law for the care of children, when the children are deprived of the necessary moral or material assistance." Children

guardianship by the government (through the child welfare authorities in the autonomous community in which a child is detected)<sup>45</sup>. Custody of the child is subsequently transferred to the director of the centre or group home with responsibility for the child's care.

**b) If so, what is their role ?**

In theory, the figures of the legal guardian, custodian and care professional should collaborate to ensure the effective performance of the responsibilities listed in the Statement of Good Practices.

According to the law, through the assumption of a separated child's legal guardianship, Child Protective Services takes on the responsibility to protect and promote the best interests of the child<sup>46</sup>, ensure that the child has proper care (including food, clothing, housing, and attention to health needs)<sup>47</sup>, see that the child has access to adequate education and training<sup>48</sup>, provide legal or interpretation assistance when necessary<sup>49</sup>, promote the child's successful re-capacitating and social insertion<sup>50</sup>, and facilitate the participation of the child in all decisions affecting him<sup>51</sup>.

The component of legal guardianship that includes ensuring suitable care, accommodation, education, medical attention and language support is often ceded to private entities (including non-governmental organisations, religious associations and, most recently, businesses) who are financed by Child Protective Services. Although an adviser, per se, is never appointed, the care professionals at the centre or home where the child resides assume that role on an informal basis.

It is important to note that a well-functioning relationship between care professionals and Child Protective Services is both integral to the success of work with these children and often problematic, due to their inherent inequality, their frequent differences of opinion over which decisions are in a child's best interests and care professionals' limited influence over said decisions, and discrepancies over a sometimes inadequate division of labour between the two entities.

Care professionals (e.g., educators, care givers, social workers, interpreters)<sup>52</sup> at residential centres and group homes, through their close, daily contact with the child,

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separated from their legal or customary guardians clearly fall into this category. Correspondence with Arce.

<sup>45</sup> Art. 172.1, CC. "The public entity to which, in the respective territory, the protection of children is assigned, when it becomes aware of a child in a situation of disprotection, has by order of the Law the legal guardianship of that child...."

Circular 3/2001, p. 43.

<sup>46</sup> Art. 2 and 11.2, ML.

<sup>47</sup> Art. 10.3 and 11.1, ML; art. 9, 12, and 14, FL.

<sup>48</sup> Art. 9, FL; art. 269, CC.

<sup>49</sup> Art. 15.4, Implementing Regulation of Asylum Law (IRAL); art. 22, FL. In the case of asylum seekers, the legal guardian will oversee and help the child through the processing of his asylum application. In the case of non-asylum seekers, legal assistance with immigration claims should be provided by the same body.

<sup>50</sup> Art. 269, CC.

<sup>51</sup> Art. 9, ML.

<sup>52</sup> The general difference between an educator (*educador*) and a care giver (*cuidador*), both of which will be referred to as "care professionals" for the purposes of this report, is that an educator typically works with a child on his personal development, while a care giver limits his intervention to helping cover the child's basic needs.

tend to have an intimate understanding of his individual circumstances and needs. As such, their opinion on how to proceed in a certain child's case can be at odds with certain government decisions, which are sometimes informed by political concerns and an only cursory, removed understanding of the child's situation. But, because care professionals are dependent on the financial support of the government to carry out their intervention with the child, open opposition to the government's policies or actions is an uncomfortable position for them. This hierarchical working relationship impedes the ability of the individuals with the deepest understanding of a child's situation to freely share their opinion with the child's legal guardian and helping to ensure that all decisions taken are in the child's best interests. When care professionals do voice their disagreement with a decision taken by Child Protective Services (their employer), their influence over the treatment a child receives from the government is very limited, especially in the selection of durable solutions.

A second and equally worrisome element of the relationship between Child Protective Services and the care professionals they employ is the sometimes unclear and overlapping division of labour. There is a tendency to leave the organisations with physical custody of the child (i.e., care professionals) with the additional responsibility of ensuring that his best interests are protected at an administrative and legal level. Legal and administrative support is a responsibility of the legal guardian (i.e., the government), which may benefit from additional assistance by private attorneys, but must not fall to individuals with neither the legal preparation nor the time to offer a separated child real support. Nonetheless, because care professionals are typically personally and professionally implicated in the success of a child's personal project, they will often take it upon themselves to make up for the failure of other entities to work effectively in the child's best interests. For instance, while it may be Child Protective Services's duty to represent a separated child in immigration proceedings, it is often the organisation with the child's custody that actively follows and promotes the resolution of such proceedings in the way most favourable to the child's best interests.

**c) How soon after arrival are they normally appointed ?**

Spanish law is straightforward with regard to the timeline for the appointment of a legal guardian. As mentioned above, it should happen immediately, automatically, once a child is found to be in a situation of disprotection. Nonetheless, the official acknowledgement of this guardianship varies depending on the autonomous community. In some autonomous communities, the declaration can take several days to a month to reach centres. In others, practices of deterring a child's entrance in the system of protection, unreasonably delaying the declaration of his disprotection or legal guardianship, or not declaring disprotection or legal guardianship altogether can seriously threaten a separated child's right to holistic protection by the government. While the assumption of custody by the government provides a child with food, clothing, and shelter, it does not ensure key legal rights (e.g., the regularisation of his situation in Spain) and is thus both insufficient and in violation of the law.

When a separated child is first detected, he undergoes an initial interview at the reception centre<sup>53</sup> to which he is brought and sometimes in the office of Child

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<sup>53</sup> In the Spanish system of protection, there is a distinction between reception centres, where the child will be placed directly after being detected to be identified and observed, and residential centres and group homes, where children are assigned for a more long-term placement once their situation has been assessed by the care professionals at the reception centre (in theory, after a maximum of one to two

Protective Services, depending on the community. In the course of that interview, in at least two of the autonomous communities investigated, there was evidence that the system of protection was intentionally presented in a way that intentionally did not correspond to the child's needs or expectations. Specifically, children were told that by entering the system they were agreeing to be repatriated and that the eventual regularisation of their situation in Spain was unlikely. Clearly, this sort of description acts as a deterrent to a child who has come to Spain carry out a migratory project, in which case he signs a form without the presence of an attorney expressing his rejection of the right to legal guardianship, thus remaining excluded from the protection offered by the government. In one autonomous community, there were reports from several years ago of reception centre personnel encouraging children to leave the centre by offering them a free metro ride to return to wherever they were currently living.

If a child elects to enter the system of protection, he can encounter further impediments to an integral protection with the delayed declaration of disprotection (which, in turn, delays the declaration of legal guardianship). Although a state of disprotection clearly presents itself when a child's legal or customary caregivers live in another country, many autonomous communities (including Catalonia<sup>54</sup>, Valencia<sup>55</sup> and Andalusia<sup>56</sup>), delay the declaration of disprotection, citing their need to "investigate" whether the child is in an actual state of disprotection or not<sup>57</sup>. One of the criteria for this declaration in at least one of the communities was the impossibility of repatriating the child. In another community, CPS personnel looked for a child's ability to integrate successfully into the system of protection before declaring disprotection and legal guardianship. In a third, the government waited to see whether the child would establish long-term residence in their territory. While it is reasonable and responsible to ensure that a child's parents are not looking for him, that he has not run away from home without their consent, the unnecessary prolongation of such an "investigation" violates a child's right, by virtue of his obvious state of disprotection, to a holistic protection by the government through its official recognition of his vulnerability and assumption of his legal guardianship.

Even more troublesome were reports that in 2002 that in at least two autonomous communities, there was an official order counselling the Child Protective Services workers *not* to declare the disprotection of separated children entering that community's system of protection and to assume only the custody of the child. Both of these

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weeks). In communities or cities that are small and/or whose resources do not meet the needs of the resident population of separated children, some centres serve both reception and residential functions. In these all-purpose centres, carrying out a meaningful educational project with a long-term resident is particularly difficult due to the consistently high level of instability.

<sup>54</sup> See David Moya, "La intervención sobre los menores inmigrantes desamparados en Cataluña. Reflexiones desde la Constitución." *Migraciones*, N. 12, December 2002 [hereinafter Moya], p. 117.

<sup>55</sup> Interview with Child Protective Services, 10 December 2002.

<sup>56</sup> Correspondence with Arce. At the level of autonomous legislation, see, for example, art. 18.2 of Andalusian Decree 42/02 of 12 February on the regimen of disprotection, legal guardianship and administrative custody, which codifies additional [illegitimate] criteria to be fulfilled before the declaration of disprotection can proceed.

<sup>57</sup> Spanish attorneys interviewed in the course of our research explained that in *all* cases involving separated children, their state of disprotection and the assumption of legal guardianship by Child Protective Services were automatic, regardless of whether CPS chose to declare them or not.

The majority of Child Protective Services offices justified the delay in recognizing disprotection and legal guardianship by citing that they could not exercise guardianship over a child whose situation they did not fully understand.

communities often serve as temporary stopping points on separated children's journey through Spain or Europe; the average stay in their reception centres is shorter than that of other communities. In these cases, the high mobility of separated children became a disincentive to the immediate assumption of a holistic, long-term approach to the child's care by the autonomous governments<sup>58</sup>.

**d) What kind of background and expertise do guardians/advisers have ?**

Many care professionals have studied social work. Beyond that, it is difficult to offer a general description of the background and expertise of all the individuals who work with separated children in Spain.

Across the board, the importance of proper training –both in separated children's culture, language and religion, as well as in work with children in general– has become increasingly apparent. Legal training in the correct application of the laws concerning children is also lacking. There are numerous government representatives whose interpretation of certain laws (especially the Foreigners Law and its Implementing Regulation) is misguided, though in many instances the individuals are merely repeating policy that has been communicated to them by national government officials<sup>59</sup>.

Various autonomous communities have also emphasised the importance of the intercultural mediator in working effectively with separated children.

**e) To what extent does this conform to the Statement ? Please outline in brief.**

- Children can be excluded from legal guardianship by the government.
- The law does not call for an adviser appointed to separated children. Care professionals often play the role informally.
- The efficacy of the adviser/care professional figure is hindered by limited participation and a lack of influence in the decisions that most seriously affect the child (e.g., regularisation and repatriation). The hierarchical distribution of power can make it difficult for care professionals to speak out against their employer, Child Protective Services, when necessary.
- The de facto division of labour between the government and those who care for the child often leaves too much responsibility to the centre director and care professionals.
- Some care professionals have not received proper training in children's cultural, religious and linguistic needs, while others lack childcare expertise.
- Custodians and care professionals do provide the child with suitable care and provide a link between him and the organisations that provide services to him.
- Separated children lack an advocate to look out for their best interests, inform them of their rights, etc. who has the ability to influence decisions taken on the child's situation.

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<sup>58</sup> In one of the autonomous communities, a Child Protective Services representative said that declaring the disprotection and legal guardianship of each separated child would amount to a bureaucratic nightmare, considering that many of them left the autonomous community after only a brief stay and that the rules regarding the annulment of legal guardianship had yet to be clarified by the Public Prosecutor. An additional deterrent to automatic assumption of legal guardianship cited by the CPS representative was the proclivity of other autonomous communities to return responsibility for a separated child to the first community that had assumed his legal guardianship, which put the burden disproportionately on the communities through which the majority of children entered.

<sup>59</sup> See Observatorio Booklet.

**f) are any changes needed? In relation to any first principles?**

- Legal guardianship of a separated child should be declared by the government immediately. The potential annulment of that decision, were it to be found incorrect, could be examined over time, as the legal guardian came to interview and learn more about the child<sup>60</sup>.
- Care professionals working closely with the child should have a more pronounced role and influence over the decisions taken by the government on the child's behalf.
- The assignment and completion of each entity's duties should be more closely monitored.
- All care workers must be trained in both work with children in general and in separated children's unique linguistic, cultural, and/or religious needs.
- An independent figure capable of taking a child's case before a judge (e.g., an independent attorney or the Public Prosecutor for Children) needs to be far more involved in the attention to separated children in order to protect the child's best interests.

#### **4. REGISTRATION AND DOCUMENTATION**

**a) Please describe relevant law, police and practice in your country**

*Register*

The foreigners legislation calls on the Foreigners Section of the National Police to create and maintain a national database containing basic information on "foreign children in a situation of disprotection" residing in Spain, purely for identification purposes<sup>61</sup>.

According to the Implementing Regulation of the Foreigners Law and the Public Prosecutor's guidance<sup>62</sup>, the database of separated children in Spain would contain the following information:

- a. the child's name, his parents' names, his birthplace, nationality and last place of residence
- b. his fingerprint
- c. his photograph

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<sup>60</sup> According to Spanish attorneys, the requisite for annulling legal guardianship of a child is simply to explain through a new resolution to the Public Prosecutor how the situation of disprotection in which the child found himself no longer exists. Correspondence with Arce, 22 July 2003.

In its Circular 3/2001, the Office of the Public Prosecutor names the reaching of adulthood, the situations listed in article 276 of the Civil Code or departure from Spain as legitimate justification for the annulment of the legal guardianship of a child.

In a meeting of the Working Group on Unaccompanied Minors at the Observatorio de la Infancia on 4 April 2003 [hereinafter Observatorio Meeting], various Child Protective Services representatives called for the Public Prosecutor's office to clarify the correct procedure for ending legal guardianship of a separated child, repeating a request that had been made at the meeting of the same group on 22 March 2000 (See Observatorio Booklet.). They claimed that the Civil Code and the Public Prosecutor had failed to address potential instances of children leaving a residential centre for an unknown destination (e.g., the street, another autonomous community or another European country). The fundamental question was the following: when an autonomous community has lost track of the child, and he *may* be in another country, for how long does it remain his legal guardian?

<sup>61</sup> Art. 60.2, IRFL.

<sup>62</sup> Circular 3/2001, p. 49.

- d. the name of the residence centre or group home where he is currently living
- e. the name of the public entity with responsibility for his custody
- f. the result of his age test
- g. any other piece of information relevant to identifying the child.

Although the Foreigners Law and its Implementing Regulation came into force in 2001, the implementation of this database has been slow; it is just now being put in working order across Spain<sup>63</sup>. The Foreigners Section of the National Police, through its regional offices in each autonomous community, in coordination with the local security forces that detect separated children as well as with the autonomous community's reception centres. Either before or directly after a child is detected by police and transferred to a reception centre, members of the Foreigners Section will conduct a basic interview with him in an attempt to gather the information listed above and uncover any additional information on that child that might exist in a national or foreign child welfare agency. Police officers are currently working to collect information on children who entered the system of protection prior to the functioning of the database, as well.

Though the law clearly stipulates that a national database of separated children is to be used solely for identification purposes, there is preoccupation on the part of care professionals that the information contained in this database could be used against certain children<sup>64</sup>, especially those whose behaviour has been classified as "conflictive" by Child Protective Services or who have been involved in criminal proceedings. There is also some doubt that children will be willing to share accurate information (other than their fingerprint and photograph, which are unavoidable) if they understand the finality of the database to be repatriation. Police sources interviewed firmly denied that the database would be used for any purpose other than the one mandated by law; they clearly have little control over whether children provide them with accurate information or not.

Once the child is transferred to the care of the child welfare authorities, the interviews carried out by his care professionals will be of a more thorough nature. Their aim is to uncover and confirm the child's story and all possible information on his background<sup>65</sup>. The first centre to receive the child, along with the Child Protective Services office in certain communities, will attempt to collect information on the child himself, his family, and the situation in his country of origin through interviews. Once the child is transferred to a residential facility, the team of care professionals will work on constructing a more in-depth psycho-social profile of the child, which will be transmitted to Child Protective Services and should ideally influence decisions made on durable solutions for the child.

### *Documentation*

The Minors Law calls on the Spanish government to give foreign minors documentation that accredits their situation in Spain<sup>66</sup>, but it leaves the more detailed development of what this documentation is to be to its Implementing Regulation. As there is yet no

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<sup>63</sup> Correspondence with Police.

<sup>64</sup> Lázaro González, Isabel, *Los menores en el Derecho español*, Editorial Tecnos, Madrid, 2002 [hereinafter Lázaro], p. 463.

<sup>65</sup> Art. 62.4 IRFL calls on child welfare authorities to share with the Government Delegation "any information it may have in relation to the minor or his or her family, country or place of residence, as well as indicating any steps that have been taken to locate the minor's family".

<sup>66</sup> Art. 10.4, ML.

Implementing Regulation for the Minors Law, the exact nature of the documentation envisioned remains unclear. The Foreigners Law and its Implementing Regulation offer more detail, calling for separated children to be granted a residence permit once the impossibility of their repatriation has been confirmed<sup>67</sup>.

As most separated children arrive completely undocumented to Spain, the first centre to receive the child will begin trying to collect documentation from his country of origin (e.g., passport, national identity card, family book) through direct contact with the child's family. The task is often passed to the residential centre or group home to which the child is transferred, as it can be a slow process. While the receipt of these documents can significantly expedite the regularisation process, their absence does not paralyse it. Separated children who cannot obtain documentation from their countries of origin can be issued a *cédula de inscripción* in substitution.

Some centres issue an identification card to children in their care, independent of the child's regularisation process.

**b) To what extent does this conform to the Statement ? Please outline in brief**

- With the creation of a national database, the system of registration of separated children conforms to the Statement.
- It is unclear whether police officers who are not members of the *GRUME* would have appropriate training in collecting basic information from a separated child upon his detection.
- Care professionals do attempt to collect a more in-depth personal profile and history of each separated child.
- There are major problems in the documentation of separated children, which will be treated more in-depth in the Durable Solutions Section.

**c) Are any changes needed ? In relation to any first principle ?**

- All interviewers should be trained on the special needs and vulnerabilities of children.
- Since the process of resolving separated children's cases is usually protracted (during which they lack any uniform type of documentation) a national identification card would prove particularly useful in verifying their identity or facilitating their access to school diplomas, health care, or vocational training in the interim. (See the Interim Care Section.)

## **5. AGE ASSESSMENT**

**a) Please describe relevant law, policy and practice in your country**

When security forces detect an individual whose minority is uncertain (i.e., lacks a passport, a travel document, or a valid national document of identification<sup>68</sup>), they will communicate the identification of a possible minor to Child Protective Services and the Public Prosecutor for Children (PPC)'s office. The PPC's Office will order an age test

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<sup>67</sup> For the great majority of separated children in Spain, the most significant forms of documentation are a residence permit and, for those over 16, a work permit. Their concession is particularly complex and controversial and will be treated in depth in the Durable Solutions section.

<sup>68</sup> Art. 4.1, IRFL.

to be carried out, which is almost always a bone scan of the left hand and wrist<sup>69</sup>. Security forces will escort the child to the appropriate health institutions, and once the test results are available, the PPC will officially declare the child's age<sup>70</sup>.

While neither the Foreigners Law nor its Implementing Regulation give further direction or detail on the "appropriate health institutions", the Public Prosecutor's Instruction 2/2001 indicates that it is best to work with health centres that have an emergency radiology service available twenty-four hours a day to allow for the rapid administration of a bone exam. According to the same Instruction, individuals should only be transferred to a centre of protection once the bone test has determined their minority, so as not to jeopardise the centre's work and the resident children's safety by allowing the potential entrance of an adult. It also cautions that such tests can only establish approximate age, and that it is important to assume that a subject's age falls on the lower end of the range given by health professionals<sup>71</sup>.

In June 2002, the Spanish Commission for Refugee Aid published a thorough report detailing the many limitations of the test, and there is no shortage of anecdotal examples of tests wildly over- or underestimating a subject's age<sup>72</sup>. There have also been worrisome accounts from care professionals and government officials in various autonomous of individuals not adhering to the Public Prosecutor's direction to assign a range of possible ages and instead selecting to declare a subject's "exact" age. Considering the inaccuracy of the test, this practice could have negative repercussions on a limited number of children. In reality, it has been more often the case that the medical is overly generous in reading the test results and assigns the child an age lower than his own.

The most consistent public criticism of the age assessment practice in Spain is that its inaccuracy is exacerbated by its ethnic irrelevance. The scarcity of medical professionals with expertise in the typical physical development of non-European children (whose presence is neither required by law nor recommended by the Public Prosecutor) compounds the problem of accuracy. While the exam is neither forced nor culturally inappropriate, it could hardly be deemed ethnically sensitive, as it uses the average bone development of middle-class white males from seventy years ago to determine the age of sub-Saharan or North African children today<sup>73</sup>.

Another concern raised by care professionals was the absence of an attorney to explain to a child his right to refuse the test. Although the Public Prosecutor's Office acknowledges that the age test comprises a privation of liberty, it does not consider an

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<sup>69</sup> Comisión Española de Ayuda al Refugiado, "*Informe sobre la situación de la determinación de la edad a menores no acompañados en España*", CEAR, Madrid, 10 May 2002.

<sup>70</sup> Art. 35, FL; art. 62.1, IRFL. "Spanish security forces, upon locating an undocumented foreign national of whose minority they are uncertain, will call on the Public Prosecutor's Office to provide a determination of the subject's age, with the collaboration of the appropriate health institutions. These health institutions are charged with prioritizing and carrying out the necessary age test examinations."

<sup>71</sup> Office of the Public Prosecutor, Instruction 2/2001, 28 June 2001 [hereinafter Instruction 2/2001]. Lázaro, p. 463.

<sup>72</sup> In perhaps the most extreme case, a woman of Eastern European descent was, at 39 years of age, determined by the bone test to be a minor. For individuals of certain ethnicities (i.e., those whose typical physical development is slower or smaller than that of the white individuals of European descent whose results form the basis of the interpretation table), achieving a diagnosis of minority is not difficult.

<sup>73</sup> Pedro Ramiro, "*Las pruebas de edad: prácticas y garantías*", Third Conference of the National Platform on Separated Children, Valencia, 14-15 March 2003 [hereinafter Ramiro].

attorney's presence necessary<sup>74</sup>. An additional concern is that there is little room for meaningful participation from the child in the age assessment process. For example, there is minimal credence given to a minor's claim to be a certain age, as it is assumed that all individuals claim to be between 16 and 18 years of age in order to remain in the system of protection and be able to work. On a few occasions, when a separated child actually presented identification documents, the rampant corruption in the child's country of origin was cited as reason to assume that they were false<sup>75</sup>. In some instances, individuals presenting documents as adults have nonetheless been given the benefit of the doubt and treated as minors after taking an age test.

Perhaps the most serious problem that could arise as a result of an inaccurate age assessment system would be that a child were wrongly denied the protection to which he, as a minor, was entitled. This does not often happen, in part because the physical development of the majority of the test subjects falls behind that of the North American children around whom the test was designed, and also due to the generosity of test interpretations, as mentioned above. It is common knowledge that individuals over the age of 18 can be easily declared minors and thus live with actual children in protection centres. Many of these individuals simply use the declaration of minority to avoid being detained and expelled as "illegal" adults and often leave the protection centres shortly after their arrival.

This practice reveals the more common problem of the faulty test and its inexact interpretation system is that they can mix 12-year olds with children seven years their senior. These significant gaps in physical and emotional maturity among groups of children in care facilities complicate the attempts of professionals in the centre to work effectively and make it particularly difficult on the younger children, who must defend themselves in a potentially hostile and dangerous environment.

**b) To what extent does this conform to the Statement ? Please outline in Brief**

- Individuals performing the test and interpreting its results seldom have expertise in the physical development typical to children in the subject's country of origin.
- Test results sometimes affix an exact age to a separated child.
- The age test, despite widespread recognition of its inaccuracy, has been valued over documentation in isolated instances.

**c) Are any changes needed in relation to any first principle ?**

- Physicians should be knowledgeable about the child's ethnic/cultural background.
- Test results should always be considered rough estimates.
- The interview with child and the information that police are able to collect from him should be considered alongside the test results in the Public Prosecutor's final determination of his approximate age.
- Documentation from the child's country of origin should not be discounted automatically, simply because corruption exists in his country of origin. Police can be called on to examine the documentation presented if doubts about its authenticity should arise. The benefit of the doubt should be given to the child.

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<sup>74</sup> Instruction 2/2001, p. 3.

<sup>75</sup> See Observatorio Meeting. Interview with the Asociación Valenciana de Ayuda al Refugiado, 9 December 2002.

- Children should have access to legal consultation before administration of age test, if they so desire.
- If the child does not agree with the results of the first test, the option to take a second test should be given<sup>76</sup>.

## **6. FREEDOM FROM DETENTION**

### **a) Please describe relevant law, policy, practice in your country.**

There are very limited instances in which children might be detained for reasons indirectly related to their status as non-citizens.

At the border, if separated children present an asylum claim, they have to wait until their minority is confirmed to be granted access to Spanish territory and handed over to Child Protective Services. This period of time should never exceed a few days. Currently, two social workers from the Spanish Red Cross assist asylum seekers and people whose entry has been denied while waiting at Madrid's airport. (See Access to the Territory Section.)

As discussed in the previous section, individuals within Spanish territory who claim to be children but cannot prove their minority must take the age test before entering a protection centre for minors. The time separated children spend in the custody of the security forces awaiting the results of their test is considered to be a brief detention. (See Age Test Section.) Worryingly, in the Canary Islands in the spring of 2003, there were four cases of separated children who were not taken to a protection centre until five days after their age test results came back confirming their minority<sup>77</sup>. With regard to typical procedure, centre directors confirmed that police sometimes elected to transfer the child to their care before receiving his age test results, most commonly used if the child was going to have to spend a night in police custody and his appearance was obviously that of a minor<sup>78</sup>.

In May 2002, the Catalanian parliament passed a controversial law (indirectly related to immigration status as it was designed specifically for separated children) by which "conflictive" minors under the government's care can be detained in a closed section of an open centre<sup>79</sup> for up to thirty days without going before a judge or being assisted by an attorney. The detention need only be communicated to the Public Prosecutor for Children. Many care professionals see this law as an attempt to mollify public alarm and unrest over the arrival of separated children to Catalonia, and its dubious constitutionality has been brought under scrutiny<sup>80</sup>. It passed with unanimity – minus two abstentions – in the Catalanian parliament. According to Child Protective Services

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<sup>76</sup> See Ramiro.

<sup>77</sup> The results of the children's age tests were signed and dated on 28 March, and their entrance into the one reception centre on the island to which they arrived was not signed and dated until 2 April.

<sup>78</sup> Art. 62.3, IRFL. This action could be justified under Spanish law by citing the child's immediate need for care.

<sup>79</sup> All protection centres are "open", in the sense that the child's movements are not limited, nor is he obligated to be there. Children may leave open centres whenever they please.

<sup>80</sup> See Moya for a thorough examination of the legal reform's questionable constitutionality due to "the potentially excessive duration of the [internment] measure, the insufficient guarantees recognized to children submitted to internment (extendable, month-long periods) as well as the deficient regulation of essential procedural elements".

in Catalonia, the detention resource has only been used in a very limited number of instances.

In December 2002, there were reports from care professionals in Barcelona that in the repatriation of three separated children, one of the children was detained in a centre for adult immigrants for three days, awaiting his transfer to Moroccan territory<sup>81</sup>. Once in the custody of Moroccan police, children are nearly always subject to detention in inappropriate and cruel conditions<sup>82</sup>, an issue that will be addressed in greater detail in the Durable Solutions Section.

**b) To what extent does this conform to the Statement ? Please outline in brief.**

- There are limited instances in which the law allows for a separated child to be detained for reasons relating to his immigration status, at the border or in police custody during age tests.
- There were isolated reports of children being detained excessively during the age test process.
- The Catalan law 8/2002 allows for “conflictive” children in the system of protection to be detained in a closed room in an open centre.
- Detentions of children during the repatriation process are not sanctioned by law, but have been known to occur in isolated cases.

**c) Are any changes needed in relation to any first principle ?**

- Police and centre personnel should be able to exercise their discretion over whether to allow a pre-age test entrance, an alleged minor.
- The constitutionality of Catalan law 8/2000 should be reviewed.
- A clear limit to the amount of time a child can be in police custody awaiting his age test results should be published by the Public Prosecutor.
- Children should not be detained during the repatriation process.
- Children should not be detained with adults.

## **7. RIGHT TO PARTICIPATE**

**a) Please describe relevant law, policy, practice in your country**

The Spanish Minors Law calls for children to be heard in both in their family environment as well as in any administrative or legal procedures that affect them directly or could lead to an alteration in their personal, familial or social life<sup>83</sup> and recognises the legitimacy of the intervention on their behalf by other individuals or entities<sup>84</sup>. Among the actions a child can take in his own interest whose legitimacy is explicitly recognised by Spanish law are a) requesting access to legal guardianship by

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<sup>81</sup> Interview with the Plataforma Ciutadana en Defensa dels Menors Immigrats Desemparats, 11 December 2002.

<sup>82</sup> Colectivo Al Jaima, *Synopsis of report on separated children returned by Spain to Morocco*. Received by email on 11 July 2003 [hereinafter Al Jaima repatriations report].

<sup>83</sup> Art. 9.1, ML.

<sup>84</sup> Art. 9.2, ML. The child can exercise his right to be heard on his own or through the person he chooses to represent him. His opinion can be conveyed by his legal representative only when the representative is independent and does not have interests that go against those of the child. The child can also be heard through individuals who by profession or a particularly close relationship with the child can convey his opinions objectively.

Art. 20.3, FL. Immigrant defence organizations can intervene on behalf of immigrants in administrative processes.

Child Protective Services, b) making the Public Prosecutor aware of any situation of that violates the child's rights, c) lodging a complaint with the Ombudsman, and d) requesting the social resources made available by the public administrations<sup>85</sup>.

The solicitation and incorporation of children's views are fostered at varying levels depending on the sensibility and functioning of child welfare authorities in the different autonomous communities. In certain communities, separated children will be interviewed directly by Child Protective Services representatives upon their arrival to the system of protection. Their more meaningful participation, though, is facilitated through interviews and interactions with staff at their care facilities, particularly with care givers whom the child has come to trust. Information collected by care workers is relayed back to Child Protective Services in periodic reports. This indirect form of learning about the child and his circumstances was cited by several CPS representatives as legitimate means of allowing a child to "participate" in decisions affecting him.

An integral part of meaningful participation is being informed, which makes separated children's limited access to information on their situations particularly troublesome. In the opinion of many care professionals, children have such limited contact with their legal guardians that they would likely be unable to identify their legal guardian or the location of its office, let alone explain the more ambiguous legal concepts that affected them (e.g., their right to participation). Not all government officials agree with this assessment. They pointed to certain children's advanced understanding of the protection system as evidenced by their ability to find their way directly to the Child Protective Services office or reception centre before being picked up by the police. In this context, it is important to distinguish between an awareness of office and centre locations and an understanding of more abstract legal concepts, like the government's obligation to listen to the child or the intricacies of the repatriation or regularisation processes.

It also is instructive to consider the difference between being heard and being influential in a decision-making process. Despite a clear legal mandate and an infrastructure decently constructed to seek out and include children's views, there is reticence on the part of many adults who intervene with separated children, particularly at the government level, to actually incorporate the child's views into their decisions on his future. A common sentiment among government officials is that nearly all of these children want the same thing (which is at odds with what the government wants) and almost none of them know how to make choices in their own best interests. For a variety of factors, then (e.g., lack of political will, lack of shared information, difference of opinion between children and their legal guardian), there is little evidence that children have any real influence over the many decisions that affect them, especially those that affect them most significantly (i.e., repatriation and regularisation).

**b) To what extent does this conform to the Statement ? Please outline in brief.**

- Most children do not get a meaningful opportunity to participate in the processes or decisions that affect them.
- Separated children lack information on their situation in Spain.
- Government entities (i.e., Child Protective Services, Government Delegations) do not show evidence of always taking children's views into consideration,

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<sup>85</sup> Art. 10.2, ML.

especially when their opinion or desire is at odds with the solution that the government determines preferable.

**c) Are any changes needed in relation to any first principle ?**

- The national and autonomous governments should clarify how they intend to listen to separated children and what weight is given to their opinions.
- Children must be offered independent legal assistance to ensure that they are thoroughly informed of their situation and rights in a completely unbiased manner from the beginning of their entrance in the Spanish system of protection.
- When an organ takes a decision against a child's expressed wishes, the burden should be on that organ to make clear its reasoning in taking said decision. Children should be able to determine with whom they choose to share this information.

## **8. FAMILY TRACING AND CONTACT**

**a) Please describe relevant law, policy, practice in your country**

Family tracing and contact, which is briefly mentioned in the Implementing Regulation of the Foreigners Law, is one of the first tasks carried out by Child Protective Services with the triple aim of informing the child's family of his whereabouts (and ensuring that he has not run away), facilitating contact between the child and his family, and compiling information on the family to be transmitted to the government delegation and used in deciding whether to return the child to his country of origin.

In the case of non-asylum seekers, the contact between separated children and their families usually happens rapidly. As mentioned in the Definition Section, many children made the journey with the knowledge, if not consent, of their families and are in frequent touch with them. Centres are always proactive in facilitating this contact, which tends to have a positive, calming effect on the children. In some cases, children can be initially reluctant to divulge accurate information about their family and home if they understand family tracing as a step in the direction of repatriation.

There were no reports of cases in which children's families were put in danger due to the search for them conducted from Spain. This owes in part to the fact that the majority of separated children in Spain have come as economic migrants and not fleeing persecution in their countries of origin. There have been instances, though, in which families have reported being pressured or coerced by Moroccan police forces to agree to accept the repatriation of their child<sup>86</sup>.

The International Social Services (ISS) office in Spain is run by the Spanish Red Cross, though it handles only a limited number of cases involving family tracing and evaluation. Their work is carried out in coordination with ISS offices in countries of origin. The input from these reports is only sporadically included in Child Protective Services's report to the Government Delegation (and only for in cases in Madrid, to our knowledge)<sup>87</sup>.

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<sup>86</sup> See Al Jaima repatriations report. The repatriation process will be treated in more detail in the Durable Solutions section.

<sup>87</sup> See Al Jaima repatriations report. CPS representatives claimed that the content of the few family evaluations received had varied little: profiled families were typically poor and doubted their ability to

In the case of separated children seeking asylum, family tracing and contact is consistently carried out through both International Social Services and the International Committee of the Red Cross<sup>88</sup>.

**b) To what extent does this conform to the Statement ? Please outline in brief**

- Family tracing and contact (by residential centres) takes place smoothly in the majority of cases, especially where children arrive to Spain already in contact with their families. (The difficulty of “official” tracing and contact, which is carried out by the country of origin’s government, will be addressed in the Durable solutions: Return Section.)
- Detailed reports by ISS are only performed on a limited number of children living in Madrid.

**c) Are any changes needed in relation to any first principle ?**

- The process of family tracing should become more systematic on a national level. For example, it would be helpful to consistently go through an organisation like ISS.
- ISS’s current resources would need to be greatly increased to have sufficient capacity to take on a new level of work.

## **9. FAMILY REUNIFICATION IN A EUROPEAN COUNTRY**

**a) Please describe relevant law, policy, practice in your country**

The Spanish Foreigners Law and its Implementing Regulation allow for a separated child to be reunited with family members in a third country<sup>89</sup>, though in practice the process can move very slowly<sup>90</sup>. For instance, in the Canary Islands, there was a case of a Western Saharan child (not seeking asylum) who claimed that his uncle lived in nearby European country. The uncle, in turn, submitted to the Spanish authorities all the documentation required to prove his relationship to and assume legal guardianship of the child. Despite desire and pressure from the child, the uncle, and childcare professionals, the Spanish authorities did not grant the child travel papers or transfer legal guardianship to his uncle. In the end, the child left the Canaries for the peninsula – it remains unclear how he managed to arrive without proper documentation– and set off on his own to find his uncle.

**b) To what extent does this conform to the Statement ? Please outline in brief**

- The process of family reunification in a third European country can sometimes be excessively slow, though it is always advisable to sacrifice expediency for thoroughness and rigor in investigating the individual(s) who proposes taking over responsibility for a separated child.

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offer their children the same opportunities for personal growth and development as they hoped would be offered in the host country.

<sup>88</sup> Interview with UNHCR, 25 July 2003.

<sup>89</sup> Art. 35.3, FL; art. 62.4, IRFL.

<sup>90</sup> The Committee on the Rights of the Child criticized the delays in family reunifications of recognized refugees caused by the Foreign Affairs Ministry, due to its slow issuance of requisite visas and travel documents. Observation 34, Concluding Observations of the Committee on the Rights of the Child: SPAIN, (CRC/C/15/Add.195), 7 June 2002.

**c) Are any changes needed in relation to any first principle ?**

- The national government should facilitate an expeditious and thorough evaluation of the reunification of separated children whose family members reside in other European countries.
- If the reunification of a separated children with family members in Europe were found to be favourable, it ought to be carried out as swiftly as possible.

## **10. INTERIM CARE, HEALTH, EDUCATION AND TRAINING**

### **10.1 Interim Care**

**a) Please describe relevant law, policy and practice in your country**

As mentioned in the Appointment of a Guardian or Adviser Section, the assumption of legal guardianship of a child involves assigning the custody of that child, which includes the obligation to look out for that child, to have him in the custodian's company, to feed him, to educate him and to provide him with necessary attention and training<sup>91</sup>. In an attempt to ensure that these tasks are properly carried out, Spanish law calls for Child Protective Services to exercise special vigilance over centres where children reside, paying particular attention to their physical condition, level of hygiene and safety, the number and qualifications of personnel employed at the centre, the educational projects offered to and carried out with the children, and the facilitation of children's participation in the functioning of the centre, as well as all other conditions that help to ensure the respect of children's rights<sup>92</sup>.

For separated children in Spain, the two most common care arrangements are residential centres and group homes. The use of foster families (*acogimiento familiar*), regardless of whether the family is related to the child or shares his nationality, has been widely unsuccessful. A third tier of options –hostels and night centres– has ignited debate over the adequacy of certain care arrangements for individuals who, despite their maturity, are still minors.

The current condition and oversight of residential centres and group homes present a number of worrisome trends<sup>93</sup>. Among the characteristics most detrimental to the long-term well-being of a separated child are: the remote location of certain centres and the creation of separate centres solely and permanently for separated children<sup>94</sup>, making it

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<sup>91</sup> See Appointment of a Guardian or Adviser section.

<sup>92</sup> Art. 11.1 and 21, ML.

<sup>93</sup> In 2002, both the Committee on the Rights of the Child (Observation 44c) and the international human rights organization Human Rights Watch (see HRW, *Nowhere to Turn*) criticized the residential centres housing separated children in Ceuta and Melilla. Specifically, they cited the facilities' generally poor conditions, overcrowding, and abuse by staff and other children as the most worrisome and potentially dangerous characteristics of these centres.

<sup>94</sup> For example, La Esperanza Centre in Ceuta is used to house only separated North African children. Separated sub-Saharan children are housed in a separate facility, together with Spanish nationals under the care of the autonomous community.

Beyond Ceuta, there is widespread sentiment among child welfare authorities that separated children do best when kept separate from national children, due primarily to the differences in their background (e.g., language, culture, religion) and plans for the future (i.e., the majority of separated children in Spain have a clear migratory project at a younger age than Spanish children). See Lázaro, p. 459.

In Andalusia, when separated children first began arriving, they were attended to in the regular protection centers, side by side with nationals. Child Protective Services in Andalusia found that to be a problematic set-up, in part because of the cultural, linguistic and religious differences between separated children and

difficult for the children to properly integrate into the host society; the creation of macro-centres, which are far inferior to group homes or smaller residential centres in providing children with a semblance of family life, a right consistently underscored by government officials<sup>95</sup>; overcrowding and pressure on centre directors to accept more children than they have capacity to provide adequate care for; too few care professionals or care professionals with insufficient training; the co-habitation of separated children with large differences in age or integration processes, which can pose a serious threat to smaller, weaker children or children with more advanced, stable educational projects in progress; frequent change in the concession of custody contracts, which seriously harms continuity in the educational projects of the children living in the affected centre, or the concession of custody contracts to organisations or businesses with no relevant expertise in work with children<sup>96</sup>.

In addition to the more traditional care arrangements, child welfare authorities around the country have created varying degrees of alternative resources to respond to the arrival of separated children. Such resources can be positive, but only when their intention is to respond effectively to certain children's unique needs and foster the child's ultimate integration into the Spanish system of protection and society. Once they become a default solution for all separated children, based more on nationality than on personal situation, they run the risk of seriously hindering the integration of these children and become a punitive resource.

Hostels are perhaps the most widely used "alternative" resource, which is generally considered appropriate for two types of children: those with a higher level of independence and maturity and those whose behaviour is more violent and conflictive<sup>97</sup>.

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Spanish children and in part because of the unique needs of separated with regard to their unresolved administrative situation and their need for less care than Spanish nationals. Now, separated children are sent to reception centers that are specifically designed to receive foreign nationals. Once they achieve a certain level of integration in Spanish society, they can be transferred to protection centers with Spanish nationals.

Care professionals are often at odds with this policy, though some admit that mixing foreign children with nationals has proven extremely difficult. Those in favour of integration argue that while separated children may present a different personal profile than national children with regard to background and life project, their basic needs are similar. Also, in the interest of facilitating their integration in the host society, the more time children spend with the Spanish language and culture, the more quickly they begin to feel comfortable with it.

<sup>95</sup> The one reception and residential centre for separated children in Fuerteventura (Canary Islands) was built to house 40 children, though its director acknowledged that they would have to admit as many children as arrived to the island (which could exceed 40) for lack of other resources. During a visit to this centre on 7 May 2003, there were only four adults present to supervise and interact with the children. The environment was impersonal and, at times, chaotic.

In a visit to Melilla in April 2003, Child Protective Services representatives described the construction of a new residential centre with a capacity of over 100 children, where all separated children will be sent to receive care.

Fuerteventura and Melilla offer interesting case studies, as the arrival of separated children to these cities, due to their geographic location, is relatively high compared to their population and physical size and has resulted in a negative reception of separated children by a population generally hostile to immigration. The tendency in both places, as well as in Ceuta, has been to create one large care facility for all separated children, located outside of the centre of the city.

<sup>96</sup> In the Canary Islands, the control of a residential centre passed from the non-governmental organization CEAR in 2001, to the Red Cross in 2002, to the business Aeromélica Canaria in 2003.

<sup>97</sup> Both Madrid, through the MIVI program, and Catalonia, through its SAEMI program, offer pension placements for children they consider highly independent and mature, as well as for those who are having trouble adapting to life in a centre or shared flat.

The logic behind offering these two groups of children alternative placement is that they either do not need the twenty-four hour support of a team of care professionals to carry out their personal educative project or they are unable to adapt to community life to such an extent that their presence impedes effective work with fellow centre or group home residents. The level of support they offer to a minor (i.e., frequency of contact with a care professional, development of a personalised educational plan, assistance in the process of regularisation, etc.) varies by community.

Catalonia provides an interesting case study in this area. In the Catalonian system of protection, children who are considered conflictive or do not seem to adapt well to life in a residential centre are placed in night centres<sup>98</sup>, where they are given dinner, a bed, and breakfast in the morning, but where they cannot remain during the day. This partial resource relies on day centres in order to provide a child with a complete protection, particularly because that is when the bulk of his educational project will take place. The government does not officially recognise legal guardianship of children in the night centre/day centre circuit.

While the government maintains that children in this alternate circuit receive the same level of intervention as children in residential centres or shared flats, tailored to their lower capacity to adapt to rules and norms of residential life, care professionals in Barcelona criticise the deteriorating quality of educational programs carried out at a decreasing number of day centres. Recently, the last day centre in Barcelona, “Gavina”, was shut down due to its inability to continue operating without timely payments from Child Protective Services. Children residing in the Red Cross’s night centre must now travel outside of the city during the day to be attended to at a centre in the mountains. Care workers [from other centres] worry that there is little to no development of personalised educational projects for these children<sup>99</sup>.

In theory, programs that attempt to reach out to and work with a child in his environment, at his level of abilities, are positive<sup>100</sup>, but the justification of the creation of alternative resources for separated children by pointing to their conflictive behaviour can overlook possible triggers of behavioural problems inherent to the system of protection itself. In fact, an overwhelming number of care professionals insist that conflictivity on the part of a child is often a response to the system’s failure to meet his needs. Thus, attempting to improve a child’s behaviour by isolating him from the protection system may be the wrong solution. A critical evaluation of the *source* of a child’s conflictivity (e.g., the absence of a well-tailored educational project or the chronic uncertainty surrounding the child’s administrative situation) must form part of any intervention with the child.

**b) To what extent does this conform to the Statement ? Please outline in brief**

- Children are found care placements immediately.
- Siblings are kept together when possible<sup>101</sup>.

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<sup>98</sup> There are two night centres in Barcelona, one run by the Red Cross and a second, significantly larger, run by a company called APIP. The activities of children in the larger night centre are largely unknown.

<sup>99</sup> Phone interview with the Plataforma Ciutadana, 26 June 2003.

<sup>100</sup> For example, the autonomous community of Madrid has recently created a program of intervention with separated children living on the street.

<sup>101</sup> Art. 172.4, CC.

- Care facilities are, in some cases, inadequate (e.g., isolated from the host society, overcrowded, very large).
- In certain communities, children over the age of 16 (with “sufficient” maturity) are candidates for the less demanding, less involved regiment of placement in hostels.
- Relatives not always carefully assessed for their ability to care for child. (See Durable Solutions: Remaining in a Host Country section.)
- It is unclear whether regular reviews of care arrangements are performed.
- It is unclear how links with a child’s ethnic community are maintained.
- There is a general awareness among centre directors and workers of the problem of trafficking.

**c) Are any changes needed in relation to any first principle ?**

- Care facilities should be smaller, well-integrated into their host city, and not overcrowded.
- Guidelines for minimum support to children in hostel settings as well as criteria for those who should be eligible for such settings need to be defined.
- Adequate financial assistance from the national government is crucial to providing separated children with effective care, particularly in autonomous communities and cities that receive a disproportionately high number of immigrants, relative to their local population and social services budget.
- For information on training needs, see the section on Appointment of a Guardian/Adviser.

## **10.2 Health**

**e) Please describe relevant law, policy and practice in your country**

Generally speaking, the attention that separated children receive from Spanish health care authorities is satisfactory. The Foreigners Law recognises the right of all foreign minors to health care in the same conditions as Spaniards, independent of their administrative situation<sup>102</sup>. The Minors Law circumscribes this right, though, limiting access to health care services to those foreign children in situations of risk or who are under the legal guardianship or care of the public administration<sup>103</sup>.

For some children, health care access can be tricky. In a medical study published by Médicos sin Fronteras (MSF), researchers found that separated children in Ceuta who had been detected by authorities but had not established stable residence at La Esperanza Centre were not issued a health care card and therefore could not access the health care system for continued or non-emergency treatment<sup>104</sup>. Considering the significant number of children in Ceuta who never establish a stable residence in the reception centre, living instead on the street or making use of the porous land border to

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<sup>102</sup> Art. 12.3, FL.

<sup>103</sup> Art. 10.3, ML.

<sup>104</sup> Liliana Marcos, “MSF denuncia una absoluta falta de voluntad política para ayudar a los niños de la calle”, *Canal Solidario*, June 2003. See HRW, *Nowhere to Turn*.

In 2002, the Committee on the Rights of the Child expressed concern over “denial of access to health care and education, although guaranteed by law”. Observation 44d, Concluding Observations of the Committee on the Rights of the Child: SPAIN, (CRC/C/15/Add.195), 7 June 2002.

move frequently between Spanish and Moroccan territory, this amounts to a serious problem.

Not surprisingly, the MSF study also found that 100% of the children living on the street in Ceuta demonstrated symptoms of anxiety and fear, which is indicative of another widespread problem: mental health. While it is natural for any child adapting to a new society and culture, in a situation of administrative uncertainty, show signs of distress and worry, there are individual minors struggling with legitimate psychological problems. As this issue has become increasingly visible to care workers and government officials alike in recent years, it has, in turn, revealed the insufficiency of current mental health care resources (for nationals and non-nationals alike). To compound matters, separated children often have difficulties expressing themselves in Spanish and have sometimes been brought up in cultures where the intervention of a mental health professional is less accepted than it is in Europe.

In many instances, poor mental health can be tied to other health problems, like drug abuse. Inhalants like dissolvent and glue have a seriously detrimental effect on the child's physical and mental well-being, not to mention the ability of care professionals to work with him. Children who have spent time on the street, outside of care facilities, are disproportionately affected by this condition. While separated children are guaranteed health care in the same conditions as national children, much like in the case of mental health, there is a general lack of sufficient programs to address these drug addiction problems<sup>105</sup>. As mentioned in the previous section, many care professionals believe that a child's behavioural problems (including drug abuse) stem from anxiety and frustration in response to the system of protection's failure to meet his needs or expectations. Their conclusion is that the most effective antidote to drug abuse would be the resolution of the problems hindering the realisation of many of these children's personal projects or the confirmation of durable solutions for them<sup>106</sup>.

**f) To what extent does this conform to the Statement ? Please outline in brief**

- Not all separated children are able to access health care resources for continued or non-emergency treatment. This problem is particularly notable among separated children living outside of the Spanish system of protection (e.g., not stable residents in a centre, living on the street).

**g) Are any changes needed in relation to any first principle ?**

- Government authorities should endeavour to address the aspects of the protection system that are negatively affecting children in order to prevent the development of behavioural or health problems.
- In order to offer separated children treatment that is respectful of culture differences (including possible aversion to psychological support) their visits to health care services in Spain should be facilitated and initially accompanied by an intercultural mediator.

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<sup>105</sup> Both Andalusia and Catalonia cited plans to create drug treatment programs for the children under their care.

<sup>106</sup> Various care givers with experience in substance abuse treatment seriously doubted the efficacy of any substance abuse program for serious addictions that allowed children to attend and participate at their will. They cited the inability under Spanish law to detain a child as an impediment to carrying out an effective drug treatment program with him.

### **10.3 Education, language, training**

#### **h) Please describe relevant law, policy and practice in your country**

All individuals in Spain have the right to education<sup>107</sup>, and the Minors Law guarantees all foreign nationals access to both obligatory and non-obligatory education in the same condition as Spaniards<sup>108</sup>. The Foreigners Law circumscribes those guarantees by qualifying the type of education to which foreign children have a right –“basic, free and obligatory”– and allowing access to non-obligatory education (i.e., infant education and higher secondary education) and social integration education solely to foreign nationals with legal residency<sup>109</sup>.

Despite general recognition of the right of all children to education in equal conditions,<sup>110</sup> a child’s administrative situation ends up having a significant effect on his access to education and training. Separated children whose residency in Spain has not been officially recognised as regular (i.e., documented with a residence permit) can be excluded from certain aspects of the national educational program. For instance, in Madrid, researchers and care professionals highlighted the difficulties children encountered in receiving official, documented recognition (i.e., degrees or certificates) from school or training courses because they lacked an official identification number (“NIE”, in the case of non-nationals), which all documented residents and nationals would have<sup>111</sup>. In Canarias, a number of separated children enrolled in the local school were initially prevented from going on a school field trip because of their administrative situation. In a scenario which is representative of the troublesome division of labour between the legal guardian and the child’s care givers (and informal advisers), the responsibility fell to the care workers to ensure that the children could participate despite the plainly administrative nature of the problem.

In reality, relatively few separated children in Spain are enrolled in school. The majority are over 16 and their desire is nearly always to work in order to send money home.

While there are relatively few separated children enrolled in school, the successful insertion of those who are obliged to go (i.e., children under 16 years of age) is not easy. To begin with, the language barrier can be difficult, though once children are immersed in Spanish, they tend to learn very quickly. Apart from language, few separated children arrive to Spain having achieved an advanced level of studies in their countries of origin. Many are far behind their Spanish contemporaries, due either to differences in their country’s curriculum or to their having left school at a young age. Also, the arrival of separated children is rarely in keeping with the academic calendar. Entering a class half or three-quarters of the way through the school year makes successful integration especially hard.

As a result, separated children are not always placed immediately into a Spanish classroom. To compensate for what would be lost time in their education, residential centres, depending on their size, often offer in-centre instruction, especially in language.

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<sup>107</sup> Art. 27, SC.

<sup>108</sup> Art. 10, ML.

<sup>109</sup> Art. 9, FL.

<sup>110</sup> After a sharp increase of foreign students in the 1990s, the system is in what could be considered a period of adaptation.

<sup>111</sup> Giménez, Carlos and Pérez, Chus, “*Los menores de origen extranjero*”, *Somos*, n.3, Spring 2003, p. 36.

Sometimes, the larger centres will set-up a small school and offer classes (beyond language instruction) to the children residing there.

Despite the many challenges presented by the integration of separated children in the Spanish educational system, there are children for whom remaining in school is the best option. In that respect, the Padres Mercedarios program in Madrid is exemplary in responding to the individual needs and desires of each child. It works to ensure that separated children who are interested in continuing their studies are able to do so, even through university, by offering them part-time employment through the program, thereby providing them with sufficient money and justification to legally extend their stay in Spain.

For the overwhelming majority of separated children, the most valuable aspect of educational resources offered in Spain is the access to labour training. Unfortunately, on a national level, there is an insufficient number of openings in these courses relative to the number of people who want to gain access to them. This problem is especially noticeable in smaller autonomous communities, like the Canary Islands, and in the two autonomous cities, Ceuta and Melilla. Even when there is available space for separated children to participate in a training program, those whose residency has not been officially regularised will not be admitted to the internship segment of the course, which is when most business owners will make job offers. Finally, if a separated child's residency has been officially regularised, but his work permit has not yet been conceded, the businesses interested in contracting him is unlikely to be willing to wait out the typically-long regularisation process.

**i) To what extent does this conform to the Statement ? Please outline in brief**

- Children whose residency has not yet been officially regularised and children whose work permit has not yet been conceded do not have equal access to educational and training opportunities (e.g., prevention from receiving school diplomas and participating in the internship part of training programs).
- Mother-tongue teaching is generally not available in the Spanish school system, though these children come at an old enough age to still maintain their native language when they start learning Spanish.

**j) Are any changes needed in relation to any first principle ?**

- The government should ensure on a national level that children awaiting the official regularisation<sup>112</sup> of their residency or the processing of their work permit are not excluded or discriminated against in school or in labour training courses.
- Separated children must be documented quickly to avoid the discrimination that accompanies an irregular situation of residency.

## **11. THE ASYLUM OR REFUGEE DETERMINATION PROCESS**

While Spanish asylum law makes no distinction based on the age of an asylum applicant, it does specify that requests for asylum of separated children "will be processed in compliance with the criteria included in the international conventions and recommendations applicable to requests of asylum submitted by minors"<sup>113</sup>. Thus,

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<sup>112</sup> "Official regularization" can be understood as the official (i.e., documented) recognition of a child's legal residency in Spain, which will subsequently enable that child to receive "official" permission to work at age 16, an integral part of being able to remain in the host country beyond his 18<sup>th</sup> birthday.

provides legal support for respecting all the child's rights which are enshrined in international law and a national level<sup>114</sup>.

### **11.1 Access to Normal Procedures**

#### **a) Please describe relevant law, policy and practice in your country**

Spanish law recognises the right of all foreigners to seek asylum in Spain<sup>115</sup>.

The reform of the Asylum Law in 1994 introduced an accelerated admissibility procedure for all applications, including those filed both at border points and within Spanish territory<sup>116</sup>. In order for an applicant's case to be thoroughly evaluated, it must first be admitted to the regular Refugee Status Determination (RSD) procedure. Among the criteria that can be used to justify the inadmission of an asylum application –equally applicable to minors– factor the “safe third country”, “manifestly unfounded”, and “safe country of origin” considerations<sup>117</sup>.

The Asylum Law also explicitly recognises the role of the UNHCR, as well as that of refugee assistance organisations, to participate in the admissibility and evaluation process. "Submission of requests for asylum will be reported to the United Nations High Commissioner for Refugees. The High Commissioner has the right to be informed of the situation of the requests and to be present at the hearings of the asylum-seeker. The High Commissioner, or a Representative agent chosen for this purpose, can also submit verbal or written reports to the Minister of the Interior. Furthermore, legally recognised associations pursuing such objectives as providing advice and aid to refugees will be allowed to submit reports to the Ministry of the Interior"<sup>118</sup>.

Recently, the few asylum requests that have been submitted by separated children have, for the most part, been admitted to regular status determination procedure. There have been cases, though, in which separated children's asylum requests were denied admission, including applications by children coming from situations of well-known difficulty, for failing to present in their application the requested criteria for the recognition of refugee status.

#### **b) To what extent does this conform to the Statement ? Please outline in brief**

- Separated children seeking asylum may not always be identified by border guards (e.g., those who arrive to Spanish territory in small boats) and could be denied access to Spanish territory. See Access to Territory Section.

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<sup>113</sup> Article 15.4, IRAL.

<sup>114</sup> Spain ratified the CRC on 30/11/90 and the Optional Protocol on the involvement of Children in Armed Conflict and the Protocol on the Sale of Children, Child prostitution and Child Pornography on 6/09/00.

<sup>115</sup> Article 1, AL; art. 13.4, SC.

<sup>116</sup> See Second Additional Provision, “Emergency Situations”, IRAL. If, due to a severe conflict or disturbance, an overwhelming number of individuals arrive at the border or the Spanish territory to the extent that normal asylum procedure is rendered insufficient and unpractical, Spanish authorities will first attend to the “immediate human needs” of the group. Once the “emergency phase” is over, they will take a decision on the individuals' conditions and the appropriate short-, medium- and long-term measures for the cases, keeping in mind both their personal situation as well as the situation of the group. This provision would apply to children and adults alike.

<sup>117</sup> Art. 5.6, AL

<sup>118</sup> Art. 5.5, AL.

- Separated children are legally subject to the same special admissibility considerations as adults and are thus not necessarily granted access to the asylum process.

**c) Are any changes needed in relation to any first principle ?**

- Security forces that come into contact with separated children during or upon their arrival to Spain should be trained in identifying possible asylum seekers among foreigners. See Access to Territory Section.
- Personnel that have regular contact with separated children should be trained in identifying potential asylum seekers. See Identification Section.
- All separated children should be admitted to regular status determination procedure.

## **11.2 Legal Representation**

**d) Please describe relevant law, policy and practice in your country**

Both the Asylum Law and its Implementing Regulation acknowledge the right of all asylum seekers to legal assistance<sup>119</sup>. According to asylum legislation, "the legal guardian assigned to the minor will represent him throughout administrative processing of his file"<sup>120</sup>.

In Spain, Child Protective Services offices do not have expertise in asylum, asylum procedures, or in child-specific forms of persecution. In fact, in separated children's asylum cases, their involvement is absolutely minimal. Children's access to legal counsel with expertise in asylum issues is, thus, of paramount importance.

There are two conditions that in practice serve to impede this qualified legal assistance. First, legal assistance is not mandatory in administrative [as opposed to judicial] proceedings. Because children are already adequately represented in all such proceedings by their legal guardian (in theory, though not always in practice), outside legal assistance (e.g., from non-governmental organisations, independent attorneys, etc.) is considered all the more superfluous. Whereas in the case of adult asylum seekers, the importance of qualified legal assistance is more widely acknowledged, the lack of proper training in asylum issues for those individuals working with minors can be a serious problem. Because the complex nature of asylum makes it rare for individuals without special training to recognise the child's potential for an asylum application (and thus his need for legal representation), the crucial step of facilitating contact between the separated child and an organisation that specialises in offering legal assistance to asylum seekers is often not made. Children thus run the serious risk of never having anyone recognise and evaluate the potential for an asylum application in their case.

Only when separated children seeking asylum are placed in the few residential facilities with experience in the asylum process<sup>121</sup> do they have a chance of receiving qualified legal representation for their case.

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<sup>119</sup> Article 5.4, Asylum Law; articles 5.2 and 8.4, Implementing Regulation of Asylum Law. The right of the UNHCR and legally-recognised associations to intervene in an asylum-seeker's case, as mentioned above, is acknowledged and protected in article 5.5 of the Asylum Law.

<sup>120</sup> Art. 15.4, IRAL.

<sup>121</sup> Padres Mercedarios runs a house for separated children seeking asylum in Madrid. CEAR (Spanish Commission for Refugee Aid) has residence centres in various autonomous communities, including the

Due in part to the extremely small number of asylum applications submitted by separated children each year, there are few experts in representing children in asylum cases, and in child-specific forms of persecution. Two notable exceptions are the Spanish Commission for Refugee Aid (CEAR), the pre-eminent organisation offering legal assistance and aid to asylum seekers and refugees across Spain, which has a department specialising in legal assistance to minors, and, on a regional level, the Valencian Association for Refugee Aid (AVAR), which works only in Valencia.

**e) To what extent does this conform to the Statement ? Please outline in brief**

- Neither legal representatives nor care givers have expertise in asylum issues.
- Except for children living in residences specially designed to attend to asylum seekers, minors are not put in contact with attorneys qualified to assist them with their asylum claims.

**f) Are any changes needed in relation to any first principle ?**

- Both legal guardians and care givers should be aware of the need for qualified legal attention to separated children seeking asylum.
- Contact with attorneys who are capable of assessing and filing an asylum claim should be facilitated to call children in care facilities. It should not be left up to the care personnel, the centre director or the Child Protective Services office to assess a child's potential for lodging a successful asylum claim.

### **11.3 Minimum Procedural Guarantees**

**g) Please describe relevant law, policy and practice in your country**

Decisions on separated children's asylum applications like any other asylum claim are taken by the Office of Asylum and Refuge (OAR)<sup>122</sup>.

According to Spanish asylum legislation, an asylum applicant can file a judicial appeal against denials of admissibility as well as refugee status decisions.

Separated children whose applications are denied admission to the asylum determination process or whose applications have been ultimately rejected or denied international protection after the regular status determination procedure are entitled to lodge a judicial appeal to the National High Court within a two-month period. This appeal does not have a suspensive effect unless the applicant so requests to the National High Court, and the Court deems appropriate to suspend the expulsion.

Apart from the judicial appeal, any individual whose request for asylum has been rejected may at any time request that the Ministry of the Interior re-examine his file, if he can produce new evidence to support his case or if he believes that the grounds for the rejection are no longer valid<sup>123</sup> and the situation described in his application has changed.

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Canary Islands. AVAR (Valencian Association for Refugee Aid) oversees long-term residential care flats in Valencia.

<sup>122</sup> Art. 5.6, AL; art. 19-20, IRAL.

<sup>123</sup> Art. 9 AL.

The Office for Asylum and Refuge does not necessarily prioritise its administrative decisions on separated children's applications. On the other hand, the Asylum Law does call for preferential processing of all judicial appeals concerning asylum<sup>124</sup>.

**h) To what extent does this conform to the Statement ? Please outline in brief**

- Decisions on asylum applications are taken by a competent authority.
- Children do have a right to appeal the decision on their case within a reasonable deadline.
- Decisions on children's applications are not consistently prioritised.

**i) Are any changes needed in relation to any first principle ?**

- Special attention should be paid to the prioritisation of and timely decisions on separated children's asylum applications, with emphasis always on the best interest of the child.

### **11.4 Independent Assessment**

**j) Please describe relevant law, policy and practice in your country**

There is neither legal stipulation, nor policy nor practice calling for a separated child seeking asylum to be assessed by an independent expert to determine his ability to express a well-founded fear of persecution.

Various organisations involved in the asylum process have called for the introduction into the application process of a child psychologist with experience in asylum applications and child-specific persecution.

**k) To what extent does this conform to the Statement ? Please outline in brief**

- The procedure in Spain with regard to an independent, expert assessment of a child's ability to articulate a well-founded fear of persecution does not conform to the Statement, as such assessment does not exist.

**l) Are any changes needed in relation to any first principle ?**

- The analysis of an independent expert figure should be introduced into the process of evaluating a child's asylum claim.

### **11.5 Interviews**

**m) Please describe relevant law, policy and practice in your country**

The Minors Law highlights the right of every child, both in person and through a designated representative, to participate in and be heard during all procedures affecting him [including, clearly, the asylum process]<sup>125</sup>.

Neither the OAR office in Madrid nor the Foreigners Police Departments in other autonomous communities has a staff person who specialises in the processing of children's files. A child's first interview is conducted by a police officer or an administrative technician, who will prepare the file for review by an "examiner". This second figure will review the child's case and decide whether to extend the child an interview. If the examiner feels that the information in the technician's report is

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<sup>124</sup> Art. 21.1, AL.

<sup>125</sup> Art. 9, ML

sufficient to take a decision on the child's case without interviewing him, a decision will be taken.

If the child is granted an interview with the examiner, he will be allowed to be accompanied by his legal guardian<sup>126</sup>. As mentioned earlier, the legal guardian figure is only minimally involved in the asylum process; it is actually the care professionals who accompany the child to his interview. In fact, one of the primary areas of concern expressed by organisations and individuals with experience in working with separated children seeking asylum is the nature of the interviews carried out in the OAR. According to them, there have been a number of interviews in which the atmosphere was both tense and exhausting.

**n) To what extent does this conform to the Statement ? Please outline in brief**

- Officers are not always trained in interacting appropriately with children.
- Children are not always interviewed by the examiner before a decision is taken on their case.
- Interviews are not always conducted in a child-friendly or child-sensitive manner.
- Children are allowed to be accompanied by their legal representative or legal counsel.

**o) Are any changes needed in relation to any first principle ?**

- Clear guidelines should be introduced on how to conduct child-friendly interviews to all those who may have to interview a child asylum seeker.

**11.6 Criteria for Making a Decision on a Child's Asylum Application**

**p) Please describe relevant law, policy and practice in your country**

As mentioned above, the Implementing Regulation of the Asylum Law does indicate that separated children's requests for asylum will be processed "in compliance with the international conventions and recommendations applicable to requests of asylum submitted by minors". However, in practice, the UNHCR's Handbook and 1997 Guidelines are not considered legally binding and therefore they are not necessarily followed.

Asylum applications by separated children are generally given special consideration. Although the recognition of refugee status is extremely rare, child-specific forms of human rights violations have occasionally been decisive. Up until the recent amendments of the aliens legislation, separated children who were not eligible for international protection would have been granted a special sort of humanitarian status by the asylum decision-making body<sup>127</sup>, which entitled them to a residence and work permit, depending on their age. The current practice in cases in which the child is not eligible for international protection is that the application is denied without being granted any legal status or special permission to remain in the country.

**q) To what extent does this conform to the Statement ? Please outline in brief**

- UNHCR guidelines are not regularly regarded.

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<sup>126</sup> Art. 15.4, IRAL. Minors in a situation of disprotection will always be represented by their legal guardian throughout the processing of their asylum file.

<sup>127</sup> Art. 17.2, AL.

**r) Are any changes needed in relation to any first principle ?**

- International conventions and recommendations must be systematically taken into account in the processing of separated children's asylum claims.

**11.7 Young People who Become Adults during the Asylum Process**

**s) Please describe relevant law, policy and practice in your country**

There is no distinction in treatment of young people who become adults during the asylum process. However, the age may be a distinctive element to take into consideration while deciding on the application.

**t) To what extent does this conform to the Statement ? Please outline in brief**

- Unnecessary delays that can result in a child gaining maturity during the process are not always avoided.

**u) Are any changes needed in relation to any first principle ?**

- There should be special treatment given to all minors in the asylum process.

**12. DURABLE SOLUTIONS**

A primary consideration in making any decision on a child's situation must always be the child's best interests, weighed alongside the principles of non-discrimination, maximum survival and development, and the right to participation<sup>128</sup>. Spain's policy on selecting durable solutions for separated children is thus problematic in that the focus of government officials and legislators at the national and regional level is, first and foremost, on one solution (i.e., returning children to their countries of origin) over others (e.g., official regularisation of the child's residency in the host country), and there is no emphasis on the primacy of the child's best interests<sup>129</sup>.

**12.1.1 Remaining in a Host Country/Country of Asylum**

**a) Please describe relevant law, policy and practice in your country**

Separated children can remain legally in the host country in primarily three ways: with a concession of refugee status, with a concession of humanitarian status, or through the official recognition of their inherently legal residence and the subsequent concession of permission to work.

Only the first of those three options can truly be considered "durable", as it awards the recipient with the most stable and complete level of protection: permanent permission to reside and work in the host country<sup>130</sup>. Asylum is extremely and increasingly difficult to attain<sup>131</sup>, though, and thus is seldom an option for separated children.

Humanitarian status, like asylum, provides the recipient with authorisation to reside and work legally in the host country. It was designed to protect those individuals who do not

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<sup>128</sup> Elena Rozzi, "The evaluation of the best interests of the child in the choice between remaining in the host country and repatriation: a reflection based on the Convention on the Rights of the Child," Save the Children Italy [hereinafter Rozzi].

<sup>129</sup> Art. 35, FL; art. 62, IRFL. See Observatorio Booklet. Lázaro, p. 466.

<sup>130</sup> Art. 13, AL; art. 29-30, IRAL.

<sup>131</sup> The percentage of asylum seekers [adults and children alike] granted refugee status was 5.1% in 2000, 3.4% in 2001 and 2.6% in 2002. UNHCR Spain Data, "Refugee Status recognition and granting of Humanitarian Status in Spain, 1990-2002".

meet the criteria for refugee status (or legal entry into Spain as aliens), but whose return to their country of origin would pose a serious risk to their well-being<sup>132</sup>. It, too, is becoming increasingly difficult to obtain<sup>133</sup> and presents the added weakness of being a medium- and only *potentially* durable arrangement, as it is a temporary concession, subject to annual renewal for the first five years after concession<sup>134</sup>.

Separated children who do not qualify for either of the two previous categories (i.e., the overwhelming majority) can and often do remain in Spanish territory until the age of 18 without resolving any additional administrative processes. This is possible because all children under the guardianship of Child Protective Services are considered to be legal residents of Spain, regardless of how they entered the territory or whether they have an official document attesting to their legal residency<sup>135</sup>. This tacit legality is no durable solution, though, for it lasts only while the child is under the guardianship of CPS. Once he reaches adulthood, a separated child will need not only a residence permit, but proof of means of supporting himself (i.e., a job). Without a residence permit to renew and a job to support its renewal, a former separated child will go from a regular situation to an irregular one at the age of 18, with no better long-term prospects in Spain than the average undocumented immigrant.

In order to avoid being thrust into a situation of extreme vulnerability [to labour exploitation and expulsion from Spanish territory] upon adulthood, a former separated child must be able to work before he turns 18. This requires a work permit<sup>136</sup>, which is only granted if the child can demonstrate a job offer. Because job offers are typically made by businesses or individuals who have worked with the child, they are unlikely to befall a child who has not participated in a labour training course, particularly in the

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<sup>132</sup> Art. 17.2, AL. “This is especially applicable to individuals who, as a result of grave conflicts or disturbances of a political, ethnic or religious nature, have been forced to abandon their country...” Interview with CEAR.

<sup>133</sup> The percentage of asylum seekers [adults and children alike] granted humanitarian status was 5.2% in 2000, 2.9% in 2001 and 1.19% in 2002. UNHCR Spain Data, “Refugee Status recognition and granting of Humanitarian Status in Spain, 1990-2002”. The extremely low refugee and humanitarian status concession rate discourages individuals from applying for international protection. Especially in the case of a child, whose minority [theoretically] makes regularizing his situation easier than that of an adult’s, the value of even claiming asylum is questionable. A child is far more likely to regularize as a minor (though it be a temporary concession) than to be granted refugee or humanitarian status. In response to this potential deterrent to the solicitation of international protection, Spanish attorneys and asylum experts suggest that a child be allowed to apply for asylum and regularization of his residency at the same time. Thus, if he is denied refugee or humanitarian status, he will have the same opportunity as other minors to regularize his legal residency and solicit a work permit, if he so desires. There have been reports of cases in which the denials of children’s requests for international protection were received close enough to those children’s 18<sup>th</sup> birthdays as to make their regularization impossible.

<sup>134</sup> Interview with CEAR. Correspondence with Diego Lorente, 28 July 2003. The legal residency that is granted with the concession of humanitarian status (17.2) must be renewed annually for five years before becoming permanent. Many individuals encounter problems with their renewal requests being denied. Also, the granting of humanitarian status does not usually include permission to work, although permission can be obtained separately (and must also be renewed annually for five years).

<sup>135</sup> Art. 35.4, FL. “The residence status of minors under the protection of a public administration is considered to be regular in all respects.”

<sup>136</sup> Art. 40j, FL. While the residence permit conceded to separated children under the guardianship of Child Protective Services is no longer valid once CPS ceases to be the child’s guardian, a work permit does not become invalid upon the loss of legal guardianship by the community. Its concession, as stipulated in the article cited above, is dependent on “the impossibility of the repatriation of the minor has been verified”. The legislation on foreigners advances this restrictive condition for both the concession of residence and work permits to the child.

internship part. In order to gain access to this important part of a training course, the child needs a residence permit<sup>137</sup>. In short, a separated child needs a residence permit to get complete professional training to get a job offer to get a work permit (all before the age of 18), the last two of which will allow him to renew his residence permit after he is no longer under the guardianship of Child Protective Services. Thus, if a [non-asylum seeking] separated child is to remain in Spanish territory beyond his 18th birthday, he must begin the official regularisation process long before he reaches legal adulthood. Additionally, both residence and work permits must be renewed annually for five continuous years before becoming permanent, hardly an easy durable solution<sup>138</sup>.

While the Minors Law<sup>139</sup> and the Foreigners Law<sup>140</sup> explicitly recognise the separated child's right to document his legal residence in Spain, the Implementing Regulation of the Foreigners Law places several conditions on the concession of documentation. Still, official regularisation is, in theory, a far less conditioned process than asylum. The legal requirement for concession of official regularization is simply being under the guardianship of Child Protective Services and having the child's permanence in Spanish territory be considered in his best interests. Unfortunately, in practice, it is neither as efficient nor consistent as it ought to be.

There are a number of aspects of the regularisation process that thwart smooth functioning and ultimately work against the promotion of the child's best interests. To begin with, the processing of a child's residence and work permits is the shared responsibility of Child Protective Services (to solicit) and the Government Delegation (to concede) in the autonomous community in which the child resides. This system is nearly always problematic, as it often lacks strong inter-organisational coordination and can lead to delay and passing of blame on both sides<sup>141</sup>. In the Canary Islands, where both CPS and the Government Delegation acknowledged that they could point to no separated child who had managed to leave the system of protection with legal residence, the situation was particularly worrying. CPS described submitting children's files to the Government Delegation for processing and never hearing back from them. The Government Delegation claimed that would receive consistently incomplete files from CPS and, upon notifying them of the problem, would never receive a response. Children in the Canaries would thus reach the age of 18 and be expelled from the protection system without any documentation of their legal residence or opportunity to find a job<sup>142</sup>.

A principal source of delay and controversy within and between different autonomous communities, based on varying interpretations of the Foreigners Law and its

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<sup>137</sup> Art. 40, FL; art. 71h, IRFL. In Spain, children can begin working at age 16. Foreign children under the legal guardianship of Child Protective Services are exempted from the foreign workers quota and the national employment situation.

<sup>138</sup> Correspondence with Diego Lorente, 28 July 2003. With regard to separated children, most have to renew their residence and work permits (which come together in the same "normal" residence concession) after the first year, after the third, and then one final time after the fifth year, in order to obtain permanent residence. Separated children who had residence permits but lacked permission to work will not be able to count their years as legal residents toward the five-year wait for permanent residency.

<sup>139</sup> Art. 10.4, ML.

<sup>140</sup> Art. 35.4, FL.

<sup>141</sup> For example, in Observation 44b, the Committee on the Rights of the Child criticized the failure, due to CPS's not having placed the proper request with the government delegation, to provide separated children with temporary legal residency status.

<sup>142</sup> Art. 35, FL; art. 62 IRFL; Circular 3/2001.

Implementing Regulation, is the debate over when Child Protective Services ought to initiate a separated child's official regularisation process<sup>143</sup>. Some autonomous communities begin the process once a child's repatriation is clearly not in his best interests, which is undoubtedly the most favourable policy. In most communities, CPS waits nine months before initiating regularisation, regardless of the child's potential for return. Still others ignore set timeframes altogether and wait to ensure that the minor is adapting well to the system of protection, which can entail a wide variation in wait periods. In one autonomous community, Child Protective Services cited the need to prove a child's repatriation *impossible* (as distinct from acknowledging that it may not be in the child's best interests) before being able to legally proceed with his official regularisation<sup>144</sup>. Any interpretation ignoring the nine-month deadline has been refuted by the Public Prosecutor, among others<sup>145</sup>.

The time limitations on the Government Delegation's completion of a child's regularisation process are also a subject of debate and concern. The most generous policy calls for a child to receive his residence permit before or upon completion of nine months under the guardianship of the autonomous community. When there is political will behind the process, it can move surprisingly rapidly<sup>146</sup>. In reality, though, few communities are willing to shut the door on the possibility of repatriation before nine months have passed. As mentioned above, most communities begin processing the child's paperwork *after* nine months and choose to set other deadlines for its completion<sup>147</sup>. In Madrid, for instance, care professionals and attorneys lobbied the government to cut the processing time down to 15 months<sup>148</sup>; the same organisations have documented up to a 25-month wait, in practice<sup>149</sup>. Even in the best of cases, then,

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<sup>143</sup> Art. 35.4, FL: "At the request of the agency that provides this protection [Child Protective Services], and upon accreditation of the impossibility of the minor returning to his or her family or country of origin, the minor will be granted a residence permit with effects retroactive to the date on which the minor was put under the care of the service for protection of minors." Because the Government Delegations only allow Child Protective Services to solicit a child's residence permit (excluding even those with custody of the child), children are at the mercy of the Autonomous Communities and Cities' will to regularise their stay in Spain.

Art. 62.5, IRFL: "Nine months after the minor has been put under the care of the competent services for the protection of minors [CPS]...and after attempts have been made to repatriate the minor with his family or to his or her country of origin, if this has not been possible, the minor will be granted the residence permit referred to in article 35.4 of [the Foreigners Law]...."

<sup>144</sup> The only autonomous community that waited longer than nine months to begin a child's regularization process was the Canary Islands. CPS's procedure there was to ignore the amount of time that a child had spent under its guardianship and wait until he was nine months away from reaching adulthood to solicit his residence permit. This delay did not allow enough time for a child's residence to be legalized, leaving him in an irregular situation on his 18<sup>th</sup> birthday. Meeting with Child Protective Services, Canary Islands, 8 May 2003.

<sup>145</sup> Circular 3/2001, p. 46-47. Lázaro, p. 468.

<sup>146</sup> In Catalonia and Valencia, care professionals confirmed that for the select group of children that Child Protective Services and the Government Delegation were willing to regularize, the processing itself could take as little as one month.

<sup>147</sup> In these communities, a child who enters the system of protection after the age of 17 years and 3 months is unlikely to receive documentation of his legal residency.

<sup>148</sup> Teresa Arranz, "Working Group of Entities offering Training or Care to Separated Children in Madrid", Second Conference of the National Platform on Separated Children, Barcelona, 18-19 October 2002 [hereinafter Arranz]. The 15 months consisted of a nine-month wait while the child was under the community's guardianship (while his repatriation was being investigated and, in some cases, attempted), three months to process the child's residence permit, and another three months to concede the work permit [to those minors over the age of 16].

<sup>149</sup> Olivia Salimbeni, *MinMig: The Risk Group of Unaccompanied Minor Migrants: Experiences of the Concerned Youths and Need for Political Action*, University of Florence, February 2003, p. 20.

children entering Madrid's protection system over the age of 16 years and 9 months, despite a full year of legal residence, would not have the opportunity to remain legally in Spain as an adult. Perhaps the worst policy (with regard to its effect on separated children) are those communities in which no deadline is set for the process's completion.

Considering the generally long wait time that the regularisation process entails, it is particularly worrisome to note the confirmation from a number of Government Delegations that any official regularisation request not been resolved by the child's 18<sup>th</sup> birthday would be denied (regardless of when the procedure had been initiated or how much time the child had spent under the legal guardianship of the community)<sup>150</sup>. Thus, limitations governing acceptable waiting periods for the initiation and completion of a child's regularisation process are particularly significant (and controversial), because the length of procedure can easily determine whether or not a child can expect to remain legal at the age of 18.

The state of regularisation policies and practices in Spain is representative of the larger system of protection in that it is difficult to make generalisations on a national level. Different autonomous communities offer separated children different degrees of protection, depending on their political will and legal interpretations. A minor who enters one system of protection at the age of 17 could leave at the age of 18 in a situation of irregularity, while the same minor, had he entered another community's system, might have managed to achieve documentation. Within the same communities, sometimes within the same care facilities, one policy can have very different results. Some children manage to attain a residence permit in a matter of months, while others withstand over a year's wait before being documented, if they are documented at all.

Generally speaking, younger children are more protected than older children, as they have more time [before reaching adulthood] to await resolution of their regularisation process. Well-integrated children are also more fully protected. Those who do not establish a stable residence in one community lose valuable time (having to start the 9-month wait period over again in each new community) and risk reaching adulthood with no durable perspectives for life in the host country. Care workers' theories often indicate that efforts are made to keep "conflictive" children from officially regularising their stay in Spain. This principle was confirmed by numerous government officials who cited good behaviour and/or positive integration in the host society as prerequisites for processing a child's papers. Ultimately, it is unclear what children will be chosen for regularisation and why.

The unpredictable treatment of separated children depending on a variety of factors can only serve to imbue the system of protection with a sense of chaos and injustice. Children have a difficult time comprehending and withstanding the long, inexplicable wait for documentation accrediting a residence that the law already explicitly recognises as legal. They are inclined to either move to a new autonomous community in search of a better resolution or give up on their personal project entirely. When the regularisation of a child's situation in Spain is not conceded expediently, it becomes a practically insurmountable impediment to a successful educational project. When regularisation is

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<sup>150</sup> Government Delegation representatives explained that the documentation a separated child would solicit (i.e., proof of his legal residence, by virtue of being under the legal guardianship of the community) would automatically be denied once he was no longer under the community's guardianship.

not conceded at all, the minor in question is relegated to the underground economy and left in Spain in a situation of complete vulnerability at age 18. Not only, then, is the challenge and randomness of attaining long-term legal status in Spain a serious rights violation, but also a plain waste of the money and resources an autonomous community invests in its system of protection and in its intervention with separated children.

The attitude of many of government officials is dangerously narrow on the subject of securing of durable prospects for a separated child in the host country. While the legal guardian's responsibility to a child is finite under the law, legal guardians *are* bound to look out for the child's best interests before he reaches adulthood. If permanence in the host country is deemed in the child's best interest, his legal guardian must seek to offer him the most stable and beneficial legal resolution. This means ensuring that the child has access to a residence and work permit as rapidly as possible and not showing indifference to the child's [slim] prospects for legal residence as an adult. More often than not, workers at the care facilities, who ought not to be responsible for the resolution of the child's administrative situation, find themselves serving as the child's desperately-needed advocate during this difficult process.

*Nota bene:* Even when official regularisation and permission to work are granted, a separated child can always be returned to his country of origin if the government considers it to be in his best interests. Neither the residence nor work permit impedes repatriation. While it would be hard to imagine that repatriation could be considered in the best interests of a child whose residence in Spain was regularised and who was working legally, the process is highly subject to political will. Thus, the possibility of return constantly looms. At the age of 18, if separated child is lucky, he trades the uncertainty of a possible repatriation for the uncertainty of a tenuous and temporary legal residence.

**b) To what extent does this conform to the statement ? Please outline in brief**

- If an asylum seeker's request for international protection is denied, he may not be left with sufficient time to regularise his administrative status in Spain as a minor (due to the length of the asylum determination and official regularisation procedures).
- Because the legal and political emphasis [for non-asylum seekers] is strongly on return, regularisation of a child's stay in the host country is a secondary option.
- There is little consistency in when the government starts and finishes the child's regularisation process: different autonomous communities follow different timelines.
- There is an unreasonable processing delay of regularisation in some communities.
- Children can be discriminated against on the basis of their age, behaviour or the community in which they reside, as a result of the different communities' and offices' policies and operating procedures.
- The selection of certain children for the official regularisation process seems to follow an unpredictable logic and can be arbitrary.
- Despite official regularisation, a child can be repatriated whenever the government deems the return to be in his best interests and thus never establishes a real degree of stability.

**c) Are any changes needed in relation to any first principles ?**

- Separated children should be allowed to request asylum and official regularisation simultaneously, so as not to find themselves completely undocumented if they are denied refugee and humanitarian status.
- The emphasis on respecting the principle of the child's best interests must be clarified at top political levels.
- A national policy outlining specific, detailed procedures *with time limits* to be followed in regularising a separated child is needed. It could potentially be connected to the national database of separated children.

### **12.1.2 Family reunification in a host country**<sup>151</sup>

#### **d) Please describe relevant law, policy and practice in your country**

Upon concession of refugee status, the asylum legislation recognises the right of all refugees to apply for family reunification in Spain<sup>152</sup>. According to Spanish law, which seems to have been written to accommodate adult refugees, "asylum will be granted to the parents, children and spouse of the refugee...except in the case of a legal separation, a *de facto* separation, divorce, adulthood or independence from the family. In these cases, the situation of each member of the family will be taken into consideration separately." Extended family members are not considered to be eligible for reunification.

Applications for family reunification are generally only accepted once an individual has been granted refugee status. When a person has family members that he wishes to regroup in the host country, he must provide proof of their relation to him (e.g., through birth certificates, passports). In the absence of such documents, an individual may provide an affidavit attesting to the relations between him and the individuals he proposes bringing. In the case of refugees who have fled areas of violence and conflict, this affidavit may be sufficient verification of family relations for reunification purposes.

There have, up to this point, been no reports of family reunification by virtue of the concession of refugee status to a separated child.

Without refugee concession, separated children are not likely to have the opportunity to bring their family members to the host country, unless the child can demonstrate their dependency on him<sup>153</sup>. The Implementing Regulation of the Foreigners Law outlines the following additional parameters for such a reunion: the individual must have legal residence in Spain, be able to support himself and the family members he proposes to regroup financially, have sufficient access to health care and live in decent conditions<sup>154</sup>. Few [non-asylum seeking] separated children meet these requirements.

It is not as difficult to reunite separated children with family members already residing in the host country. In fact, there can be a worryingly undemanding attitude toward turning over the child's custody. In several cases described by centre personnel, the

<sup>151</sup> See María José Aldanas, Carlos Giménez Romero and Manuel Pozo, *Country Assessment: Spain, Separated Children in Europe Programme*, November – December 1999 [hereinafter Aldanas, Giménez Romero and Pozo], section 12.1.2.

<sup>152</sup> Art. 10, AL, art. 27 and 29, IRAL.

<sup>153</sup> Lázaro, p. 188-189.

<sup>154</sup> Art. 17-18, FL; Art. 54, IRFL.

relation between the child and the adult was not officially, meticulously confirmed, and the adults were only questionably able to care for the child. One director of a large reception centre suggested that the fact that an adult came to pick up a child at the centre and that both the child and adult confirmed their relation would suffice to release a child into the custody of that person. He did not think that the adult's residency in Spain (i.e., regular or irregular) should be an issue, judging that a child was better off with any family member who wanted to take him, regardless of the legal situation in which that family member found himself.

**e) To what extent does this conform to the statement ? Please outline in brief**

- Applications by economic migrant children for family reunification in the host country are unlikely to be resolved positively because of strict requisites imposed on the child and his family members.
- The family reunification of separated children with relatives in Spain can be too informal and lacks needed safeguards.

**f) Are any changes needed in relation to any first principles ?**

- Special consideration should be given to separated child refugees when they apply for family reunification. An exception should be made to allow their parents or customary care givers to join them.
- Sufficiently stringent requirements for the family members who offer to take over care of the separated child should be introduced with the end of ensuring that the child will be properly cared for.

### **12.1.3 Integration**

**g) Please describe relevant law, policy and practice in your country**

Although the Spanish Constitution recognises the right of children to social integration education, the Foreigners Law limits social integration to aliens with legal residency<sup>155</sup>. While some autonomous communities have more developed integration programs than others, care professionals should always be working on a child's integration into the host society. There are certainly cases in which, due to the concession of asylum or humanitarian status, or the regularisation of a child's residence or work status, care workers and authorities elect to adapt their intervention with the child in any number of ways. More often, though, the division between attention to the child before and after the concession of asylum or humanitarian status or the official regularisation of his residency is not terribly pronounced. In the case of economic migrant children, even when their paperwork is resolved, their situation sufficiently unpredictable as to rarely warrant a "long-term" placement. In the very few cases of child asylum seekers, the deliberation and evaluation period takes long enough as to warrant nearly long-term placement and treatment from the beginning of their stay.

Most autonomous communities have limited programs to help facilitate the re-integration of young people over 18 into the community, but there are not sufficient resources to attend to the needs of all former separated children.

**h) To what extent does this conform to the statement ? Please outline in brief**

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<sup>155</sup> Correspondence with Arce. Art. 9, FL.

- There is rarely a significant change in care professionals' intervention with separated children once they are allowed to remain in Spanish territory.
- Most communities attempt to offer some children support at least minimal support after they leave the system of protection. Still, there are insufficient resources, and the majority of children are obligated to integrate very quickly into the community upon their 18<sup>th</sup> birthday.
- See Interim Care Section for more detailed information on care facilities and placements.

**i) Are any changes needed in relation to any first principles ?**

- See Remaining in the Host Country Section.
- See Interim Care section.
- Increase resources for programs assisting children integrate into the community and assume autonomy at the age of 18.

**12.1.4 Adoption**<sup>156</sup>

**j) Please describe relevant law, policy and practice in your country**

Spanish legislation does allow for separated children to be adopted. In reality, adoption is rarely sought as a solution for separated children in Spain for primarily two reasons: age and nationality. Most children are between 15 and 18, which is significantly older than the typical age sought by adoptive parents. In addition to being adolescents, the great majority of these children are Moroccan, and the personal law of their country of origin must be respected in adoption decisions. Because Moroccan law does not recognise the institution of adoption, Moroccan children are ineligible<sup>157</sup>.

**k) To what extent does this conform to the statement ? Please outline in brief**

- In theory, Spanish legislation conforms to the Statement, though there have been no cases by which to evaluate the correspondence of Spanish practice.

**l) Are any changes needed in relation to any first principles ?**

- N/A

**12.1.5 Identity and nationality**<sup>158</sup>

**m) Please describe relevant law, policy and practice in your country**

Recognised refugees need five years of legal residence in Spain to acquire Spanish nationality. There are also certain countries (e.g., the Latin American countries) from which individuals need only two years of legal residence to attain Spanish nationality, which applies to refugees and economic migrants alike. Children who have been under the legal guardianship of a Spanish institution or individual for two years are also eligible to apply for nationality<sup>159</sup>. Spanish nationality is granted at the discretion of the government, which allows for the government to refuse nationality to an individual who fulfils all the legal requirements.

<sup>156</sup> See Aldanas, Giménez Romero and Pozo, section 12.1.4.

<sup>157</sup> Correspondence with Arce.

<sup>158</sup> See Aldanas, Giménez Romero and Pozo, section 12.1.5.

<sup>159</sup> Art. 22, CC.

Spanish legislation bases its concession of “documentation” to stateless individuals on the article 27 of the Convention relating to the Status of Stateless Persons<sup>160</sup>, there are no known cases of stateless separated children in Spain.

**n) To what extent does this conform to the statement ? Please outline in brief**

- Spanish legislation conforms to the Statement, though there have been no known cases by which to evaluate the correspondence of Spanish practice.

**o) Are any changes needed in relation to any first principles ?**

- N/A

**12.2 DURABLE SOLUTIONS (IN THE COUNTRY OF ORIGIN OR A 3<sup>RD</sup> COUNTRY): Return to Country of Origin**

As mentioned earlier, the return of non-asylum seekers to their country of origin is the focus of Spanish Foreigners legislation as well as government policy at the national and regional level<sup>161</sup>. It is justified using the “family reunification” principle, which states that a child is generally best off with his family and that his reunification with them ought to be supported by the government, so long as it is not contrary to his own best interests. In the case of separated children residing in Spain, the family reunification principle is used to justify not only of the minor’s return to his family but also of his return to the child welfare authorities of his country of origin (in the absence of his parents).

**12.2.1 Voluntary return**<sup>162</sup>

**p) Please describe relevant law, policy and practice in your country**

When a child demonstrates his desire to return home, there is widespread support in the governmental and non-governmental camps for respecting his wishes, once the viability of the situation to which he is being returned has been confirmed<sup>163</sup>. These cases are so infrequent, though, as to hardly merit mention, primarily because the overwhelming

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<sup>160</sup> Art. 13.4, SC; art. 34, FL: “[Stateless individuals] will be granted the documentation called for in article 27 of the aforementioned Convention [relating to the Status of Stateless Persons]”.

See also, the Implementing Regulation 865/2001 on stateless individuals.

<sup>161</sup> See Observatorio Booklet:

Sub-office of Regulation of Immigration and Interior Migration, Office of Migration Management, Ministry of Labour and Social Affairs: “There is a very restrictive legal framework , by which unaccompanied minors, in principle, unless they are asylum seekers, so long as their request remains unresolved, must be repatriated.” 19 October 1999.

Office of Interior Policy, Ministry of the Interior: “4. Repatriation: the foreigners legislation establishes the necessity to repatriate to their countries of origin minors who find themselves unaccompanied in Spain, so long as no risk exists to their well-being or that of their families and they are turned over to their family members or the child welfare authorities of their country.” 19 October 1999.

<sup>162</sup> Voluntary return is called *retorno*, as distinct from *devolución*, which is repatriation before an individual reaches Spanish territory, as distinct from *expulsión*, which is removal from Spanish territory, with return forbidden for a number of years. There has been some confusion surrounding the definitions and legal applications of these terms. For instance, despite the clear instruction from the Public Prosecutor that children cannot be expelled, a Public Prosecutor for Children in one of Spain’s autonomous communities claimed to be working on carrying out the “expulsion” of one of the separated children in his region.

Voluntary return is subject to the same legal framework and principles as non-voluntary return.

<sup>163</sup> The minimum criteria for return will be developed in the next section.

majority of children have come to Spain with a clear migratory project and the intention of staying. In only a few instances has opposition from the Public Prosecutor for Children, the Government Delegation or the country of origin's consulates prevented the voluntary return of a separated child.

**q) To what extent does this conform to the statement ? Please outline in brief**

- The voluntary return of separated children is not facilitated in every instance.

**r) Are any changes needed in relation to any first principles ?**

- Government entities should not categorically oppose/grant the return of separated children to their country of origin. They should investigate the merits of each child's case and take decisions individually.
- Countries of origin should cooperate to the extent they are able with the Spanish government in evaluating and promoting the best option for a separated child.

**12.2.2 Conditions that must be fulfilled prior to return**

**s) Please describe relevant law, policy and practice in your country**

*The Law: Guiding Principles*

The Minors Law and Civil Code clearly state that the most important condition to be fulfilled prior to returning a child to his country of origin –prior to taking *any* action affecting the child– is that the return be considered in the child's best interests<sup>164</sup>. The Foreigners Law and its Implementing Regulation are preoccupyingly less clear on the primacy of the best interests principle, as both texts give explicit priority to the child's repatriation over his permanence in Spain.

The Implementing Regulation [of the Minors Law] does advance two concrete requisites for proceeding with repatriation: the location of a family member or child welfare organisation in the country of origin who will accept responsibility for the child's care and the confirmation that there exists no risk or danger to the well-being of the child or his family upon his return. While these conditions may help determine whether repatriation is feasible, their fulfilment is not sufficient justification for the return of a child. The evaluation of whether repatriation can be considered preferable (i.e., in the child's best interests) is far more complex than simply confirming that the child will be received by a competent person or entity and that there is no risk of his persecution<sup>165</sup>. Two aspects of this process merit examination: the way in which a child is selected for return and the way in which the return is carried out.

*The decision-making process*

The national administration (through its Government Delegations and Sub-Delegations in the autonomous communities and cities) is the body ultimately responsible for deciding whether or not a separated child will be returned to his country of origin<sup>166</sup>, though in practice, it has been relatively passive in this role. In many autonomous communities, Government Delegation (GD) representatives openly insisted that they

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<sup>164</sup> Art. 2, 11.2 and 18.4, ML. Art. 172.4, CC. "The CPS will look out for the best interests of the child and attempt, so long as it is not contrary to his best interests, to reunite him with his family. . . ."

<sup>165</sup> See Rozzi.

<sup>166</sup> Art. 62.4, IRFL. "The national administration...will decide what action should be taken to return the minor to his country of origin...or, failing this, what action shall be taken regarding his permanence in Spain."

were not competent to evaluate a repatriation. According to their interpretation of the law, they were simply to carry out the request made by the child's legal guardian, whom they considered the logical figure to decide whether or not repatriation was in a child's best interest.

Although the law is unequivocal in assigning decision-making responsibility to the national administration, the Government Delegations are not the ideal entity to evaluate and select durable solutions for vulnerable children<sup>167</sup>. They are neither specialists in children's issues, nor independent from the Interior Ministry's focus on immigration. Perhaps in tacit [though non-binding] recognition of these limitations, the Implementing Regulation of the Foreigners Law calls for the GD's decision to be taken after having heard from the child and from Child Protective Services, both of whom will lend invaluable insight into which solution would best suit a child. It also outlines a system of [ultimately ineffectual] guarantees by calling for the Public Prosecutor for Children, whose responsibility it is to look out for the child's best interests in all matters affecting him<sup>168</sup>, to be kept abreast of all repatriation proceedings<sup>169</sup>. Significantly, there is no legal stipulation that any individual or entity need to be in agreement with the national administration's decision for the repatriation to proceed. Their level of actual influence in the decision-making process is revealing.

Without question, the facilitation of a child's participation is an integral part of making a decision on his situation. Despite a clear legal mandate in support of this tenet<sup>170</sup>, there is no evidence of any child ever having been received in person by a Government Delegation to be interviewed about his potential repatriation. At most, Government Delegation representatives indicated that children had the opportunity to be heard indirectly, through their legal guardian's report. As demonstrated in the Right to Participation section, a child's ability to participate depends entirely on the will of Child Protective Services to inform the child and seek out his opinion, which seldom happens<sup>171</sup>. Even were a child's views to be acknowledged and incorporated by Child Protective Services, their influence on the government's final decision on his future is dubious<sup>172</sup>.

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<sup>167</sup> Child welfare authorities, while specialists in children's issues and politically independent of the Interior Ministry's immigration control mandate, cannot be considered fully unbiased either, as the repatriation of a child means a financial and work-load relief for them. Indeed, CPS has, in many communities, been the most active promoter of repatriation. The Public Prosecutor, through the special Office of the Public Prosecutor for Children (located in each autonomous community), would be the ideal candidate to decide on a child's potential repatriation, for both his independence and expertise in children's issues.

<sup>168</sup> Art. 174, CC.

<sup>169</sup> Art. 62.4, IRFL.

<sup>170</sup> Art. 9, ML. Art. 62.4, IRFL. "The national administration...having heard the child...will decide what action..."

<sup>171</sup> For instance, one Child Protective Services representative explained that no separated children wanted to return home, which only served to decrease their credibility as potential participants in the decision-making process and justified deceiving them in order to proceed with the decision that was taken. See Observatorio Meeting.

<sup>172</sup> The majority of children sent home from Spain know nothing of their repatriation in advance, oppose it upon its execution, and return or endeavour to return to Spain shortly afterward. In March 2003, a group of non-governmental organisations brought before the Public Prosecutor of the High Court (*Tribunal Superior*) in Madrid the cases of seven separated children who had been repatriated to Morocco [hereafter Madrid cases]. In the four written reports submitted by these groups, none of the children cited having been consulted at any point about their potential repatriation, nor were they in agreement with the repatriation. See also Al Jaima repatriations report.

Generally speaking, Child Protective Services commands more respect from the Government Delegations than the children for whom it assumes responsibility, though the contents and influence of the reports it is called upon to submit are unclear and vary by community. One preoccupying trend among CPS representatives is the legal interpretation that their obligation is *always* to request the repatriation of separated children under their guardianship, leaving the Government Delegation to evaluate each repatriation's merits as it sees fit. In light of this, the aforementioned tendency of various Government Delegations to transfer responsibility for evaluating a repatriation to Child Protective Services entails a serious risk of no real review of repatriation ever being carried out.

In this context, the distinction between CPS's responsibility to call on the Government Delegation to *evaluate* a child's potential repatriation (markedly different from an automatic request that the repatriation be carried out) and their report examining whether that repatriation could be considered in the child's best interests cannot be overemphasised. In addition to the data explicitly highlighted for inclusion in CPS's report (i.e., all information found on the minor and the minor's family, country or place of residence, as well as a description of the steps taken to locate the minor's family<sup>173</sup>), CPS should include a thorough assessment of whether it considers return to a child's country of origin to be in his best interests. While the law may not explicitly call for such an evaluation, CPS's role as the child's legal guardian and the national government's lack of qualification to evaluate a child's best interests certainly do.

When Child Protective Services chooses to participate in the evaluation process, the criteria it uses in supporting or opposing the child's potential return—including the age of the child, his behaviour and progress in the system of protection, and his family's situation in the country of origin—vary by community. Despite being the child's legal guardian, Child Protective Services is in no way completely unbiased. In fact, the overwhelming majority of CPS offices are strongly and openly in favour of the return of separated children<sup>174</sup>. This priority, which is typically at odds with the desires of separated children, can explain the reticence of certain CPS offices to recognise a child's views in their recommendation to the national administration.

Due to the absence of genuine influence or independence of children and Child Protective Services in the decision-making process, the Office of Public Prosecutor for Children ought to play a vital role in reviewing each case<sup>175</sup>. While the PPC's opinion is not legally binding, it is often effective, as government entities generally avoid direct

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<sup>173</sup> Art. 62.4, IRFL.

<sup>174</sup> See footnote 171. Child Protective Services personnel consistently cited the right of a child to family life as the basis for their general support for separated children's return to their country of origin. A few openly [and incorrectly] pointed to the children's status as "illegal immigrants".

Care professionals speculated that the genuine motivation of CPS's enthusiastic defence of a child's "right to family life" (even in cases where he would definitively *not* be returned to his family, but to the child welfare authorities of his country of origin) grew out of the workload reduction that repatriation would mean for them.

<sup>175</sup> Art. 174, CC. As part of its mandate, the Public Prosecutor for Children can and should intervene on the child's behalf if he becomes aware of a repatriation that does not appear to favour that child's interests.

Circular 3/2001, p. 47, assigns to the Public Prosecutor the responsibility to ensure that the decision taken is in the child's best interests and that the nine-month time limit is not exceeded.

conflict with one another<sup>176</sup>. In practice, though, the office of the PPC has been involved in the review of very few repatriation cases<sup>177</sup>.

#### *Fulfilling the minimum criteria*

Considering the minimal participation in and review of the decision-making process by key individuals and entities coupled with the strong political support for repatriation, it would seem likely that nearly all separated children in Spain would be returned to their countries of origin. In reality, few repatriations take place. The explanation for this lies in the difficulty the Spanish government has encountered in fulfilling the two basic criteria –absence of risk and location of family or child welfare authorities– laid out by the Implementing Regulation of the Foreigners Law.

It is important to highlight that the law at no point calls for an evaluation of the *conditions* of the child’s family or the child welfare authorities and their ability to care for the child; their “location” is considered sufficient. This seriously handicaps the possibility for a thorough evaluation of the child’s return. Knowing the family’s conditions and opinion is fundamental to understanding whether the situation to which the child will be returned can be considered better suited to his interests than the one he has established in Spain.

However disputable, in the overwhelming majority of these cases, the “safety” of the child’s return [to Morocco, in nearly every case] is established early on. It is, rather, the confirmation that a family member or the country’s child welfare authorities will care for the child upon his return that has proven difficult to obtain<sup>178</sup>. This may seem counterintuitive, considering that contact with separated children’s families is often initiated without problems by Child Protective Services [through the care facilities]. But, the repatriation process requires an “official” contact with the family [or child welfare authorities, in their absence], which must be facilitated through the country of origin and has historically been where the Spanish government has run into problems.

Both Government Delegations and the Foreigners Section of the National Police explained that the requests made at the Moroccan consulates to confirm the identity and location of a separated child’s family were nearly always left unfulfilled<sup>179</sup>. The nine-month period allowed for attempting a child’s repatriation would thus run out without a response from the Moroccan authorities. It is unclear whether this hold-up was caused

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<sup>176</sup> Circular 3/2001, p. 48. The PPC does have authority to take a questionable decision before a Contentious-Administrative Court, whose decision *would* be legally binding.

<sup>177</sup> Typically, the Public Prosecutors for Children are so focused on children in the criminal system (as opposed to the protection system) that their involvement in the administrative processes affecting separated children is minimal. There are only isolated communities in which Public Prosecutors have actively reviewed and/or spoken out against repatriation decisions. In case of the latter, their opposition was based on the fact that Spanish authorities returned separated children to their country of origin’s security forces rather than to child welfare officials.

PPC involvement in the repatriation process is usually initiated by the submission of a complaint by individuals or non-governmental entities who oppose a certain aspect of a child’s repatriation. (See, for example, Madrid cases.)

See Moya, p. 116-117, on the insufficiency of the “review” by the PPC to guarantee respect for the rights of separated children.

<sup>178</sup> In order to avoid the debate over whether child welfare authorities or a child protection system exist at all in Morocco, and thus whether a child without family able to take over his care can legally be returned to Morocco, the focus of this section will be on cases of children *with* family in their country of origin.

<sup>179</sup> Interview with Foreigners Section, National Police, May 2003.

by a lack of political will or the insufficiency of the infrastructure in Morocco to carry out such a task. In the limited instances in which the Moroccan government has sent someone to confirm the family's location, the investigation was carried out *not* by child welfare authorities, but by the police.

Ideally, an organisation like International Social Services (ISS) would work to locate and make contact with the family. Its report on their condition and ability to care for the child would be communicated to the Government Delegations and would inform the decision-making process. As there is no requirement in the law, in general, for a thorough investigation of the child's family, there is consequently no specific call for ISS to be involved in the process. Nonetheless, on a very limited number of occasions, they have participated<sup>180</sup>.

#### *Carrying out the return*

The selection of the child for return is not the only part of the return process that is problematic. When the national government decides to proceed with the repatriation, the guarantees provided to the child *during* the repatriation are insufficient (e.g., no explicit stipulation that he be allowed to make prior contact with the individual who will receive him in the country of origin, nor be accompanied by a trusted adult, nor take his belongings with him). The return itself is carried out by the Foreigners Section of the National Police (i.e., police agents will take the child on the plane or ferry, or walk him across the land border), though some police agents may not have proper training in work with children<sup>181</sup>.

Once in the country of origin, the Implementing Regulation of the Foreigners Law fails to stipulate with whom the Spanish police officers are required to leave the child. Its emphasis on locating either a family member or the country's child welfare authorities implies that only they would be acceptable to receive the child, though in practice, separated children are left with the security forces of their country of origin. This policy has been criticised by the U.N. Committee on the Rights of the Child and the Public Prosecutors for Children in various autonomous communities<sup>182</sup>.

#### *Repatriations: 2002-2003*

There have been few returns in the last year that conformed to Spanish legislation, let alone to the Statement of Good Practice. In 2002, repatriations of separated children from Spain were the subject of strong criticism by organisations including the United Nations Commission on the Rights of the Child, Human Rights Watch, Amnesty International, PRODEÍN, SOS Racismo, the Plataforma Ciudadana, and Colectivo Al Jaima. In 2003, non-governmental organisations, care professionals, academic

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<sup>180</sup> Interview with Red Cross, April 2003. See also Al Jaima repatriations report attesting that ISS works only in limited cases with the Hortaleza Reception Centre in Madrid.

<sup>181</sup> See Madrid cases and Al Jaima repatriations report.

The Committee on the Rights of the Child criticized "mistreatment by police during forced expulsion, sometimes without access to legal assistance or interpretation". Observation 44a, Concluding Observations of the Committee on the Rights of the Child: SPAIN, (CRC/C/15/Add.195), 7 June 2002. See HRW, *Nowhere to Turn*.

<sup>182</sup> The Committee on the Rights of the Child criticized "expulsions not ensuring reunification with the child's family or social welfare authorities in his country of origin". Observation 44c, Concluding Observations of the Committee on the Rights of the Child: SPAIN, (CRC/C/15/Add.195), 7 June 2002. See HRW, *Nowhere to Turn*.

Interview with PPC's office in Melilla, 5 April 2003. Interview with Government Delegation in Sevilla, 18 March 2003.

researchers and other individuals across Spain documented and lodged complaints against repatriations in violation of national and international law<sup>183</sup>.

The following case studies, based on the complaints filed before the Public Prosecutor in Madrid (“Madrid cases”), reveal nearly all of the troubling practical aspects of the repatriation process. Their criticism has centred on both the selection of which children to return (procedure and results) and the conditions in which the returns were carried out.

### **Case One**

*After two years of residence in Spain, B. was repatriated on 18 February 2003, four months before his 18<sup>th</sup> birthday. In Madrid, B. lived in a group home run by a Spanish NGO and participated in labour training classes in construction and cooking. He also had relatives in Madrid.*

*In December 2002, B. underwent surgery on his left eye, after which the doctor prescribes a series of medications and “complete rest”. B. also had to sleep in a special way and walk with his head tilted down so that his eye did not hurt him.*

*On 11 February 2003, B. had a medical check-up, at which his doctor confirmed that he needed to continue coming for “periodic revisions” for three months after the surgery (i.e., until 25 March 2003). At 06:00 the next day, 12 February 2003, B. returned to see the same doctor, due to an intense pain in his eye. The doctor prescribed “complete rest, without any serious physical effort, avoiding physical activities like sport and travel for at least 3 months after the surgery, when he will be released by the Hospital”.*

*At 09:30 the same day, 12 February 2003, B. was taken to Barajas airport in Madrid and returned to Morocco. B. requested permission to make a phone call, which was denied. He and another minor were accompanied in the aeroplane by three secret police officers.*

*Upon his arrival to Tangier, B. was taken directly to the police station, where he was informed that he would have to pay a fine for illegal emigration. He was then left in the street and told to make his way home on his own. B. took a taxi home.*

*B.’s parents had not been informed of the return of their son by Spanish or Moroccan authorities and were surprised to see him.*

*B. was taken several days later before a judge and sentenced to pay a fine of 500 Dirhams for illegal emigration.*

*As of 6 March 2003, B. confirmed suffering from serious eye pain and a severe conjunctivitis. Although he has tried to follow the prescriptions of the Spanish physician, he has no access to free health care or medical centres that could assist him with treatment.*

### **Case Two**

*After one year and four months residence in Spain, M. was repatriated on 30 October 2002, a little under a year before his 18<sup>th</sup> birthday. M. had spent time in Algeciras, Almeria and Murcia before arriving to Madrid.*

*In Madrid, he entered the Hortaleza Reception Centre in April 2002, where he stayed for a month. He was then transferred to a residential centre, where he spent his last seven months in Spain. M. was involved in labour training courses, including a plumbing workshop, until the day of his return to Morocco.*

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<sup>183</sup> See, for example, Al Jaima repatriations report or Madrid cases.

*During 2002, M. was in bad health. He had a blood analysis done at a hospital in Madrid on 4 October 2002, which revealed that he was suffering from anaemia. M. was prescribed a medical treatment with iron, and his doctor called for a study to investigate the cause of his iron deficiency.*

*On 29 October 2002, a different doctor at the same hospital carried out a gastroscopy and biopsy, which ruled out the possibility of an ulcer, but revealed a type of fungal throat infection (candidiasis esofágica), which required a test for Hepatitis B and C as well as HIV. Before having had time to carry these tests out, M. was repatriated.*

*On 30 October 2002, around 09:00, two police officers entered M.'s room and told him that they were going to take him to the police station to resolve an issue with his paperwork. M. left his room in shorts and a shirt, leaving behind his belongings, documentation, medical reports, and the medicine for his anaemia. M. was taken not to the police station but directly to the airport and repatriated. M. was not allowed to make any phone call.*

*M. arrived by plane to Casablanca, which is 300 kilometres distance from his house in Dubar (13 kilometres from Marrakech), and was turned over to the airport police. The airport police transferred M. to the Casablanca police station, where he remained for three days in a cell without being allowed to eat or drink. M. was then released onto the street and told to "go home", without any assistance whatsoever. He had to beg for money on the street to be able to buy a ticket for a bus that would take him to Dubar.*

*M.'s family had at no point been alerted to his return by either the Spanish or Moroccan authorities and were surprised to see him.*

*On 18 February 2003, M. explained [to the Spanish NGOs lodging the complaint on his behalf] that he never wanted to leave Spain and was particularly worried about his health. On 18 February, he described suffering from chest pain, nausea, and difficulty breathing at night. On 6 March, he confirmed that he was urinating blood, losing weight and it was difficult for him to swallow. M. and his parents live in an extremely impoverished area outside of Marrakech and do not have economic means to finance medical treatment for him. To compound matters, M. was never given the medical reports from the attention he received in Spain, nor was he told what medicine he needed to take for his anaemia or his fungal throat infection.*

While the fragile physical state of the two cases outlined above is in no way typical, the failure of the decision-making process to select appropriate candidates for repatriation, the non-participation of the child, his care professionals, doctors, or family members in the process, and the frightening and dangerous way in repatriations are carried out is representative of recent repatriations.

The Al Jaima Collective has documented forty cases of repatriation, from October 2002 to June 2003, including separated children from Cadiz, Malaga, Granada, Barcelona, Madrid, and Bilbao. None of the children sent home wanted to return to Morocco. Their families were not consulted, but for two cases in which the consultation was carried out by Moroccan police. Among this group were children who had been in Spain for more than a year and were well-integrated and involved in literacy and labour training classes. On the day of their return, the children were picked up by Spanish police at dawn from their respective residences. Once in Morocco, they were turned over to the Moroccan

police, where they were abused in a variety of ways (e.g., cutting their hair, taking their shoes and throwing them into the water, laying them down and hitting the bottoms of their feet with an iron bar, and keeping them at the station for up to two days without food or water). They were often required to pay a fine to be released, and many have already returned or are attempting to return to Spain.

**t) To what extent does this conform to the statement ? Please outline in brief**

- Spanish law does require that it be safe for a child to be returned to his country before that return is carried out.
- The child's guardian is included in the decision-making process, but does not always evaluate whether the return is in the child's best interests. It should be noted that the guardian can not be considered an unbiased body in assessing returns.
- The participation and influence of other (non-Child Protective Services) individuals in the decision-making process is dubious. In the overwhelming majority of returns, care givers' opposition to the national administration's decision had no effect on that decision.
- There is no consistent assessment carried out of the child's family or child welfare agencies in his country of origin.
- The participation of the child's family or the child welfare agency is very rarely facilitated. In some cases, families have been interviewed by police, which can influence the opinion they express on their child's return.
- Children are not consistently informed at all stages of the review and repatriation process. Their input is generally disregarded (citing that "none of them want to go home"), and some communities are openly in favour of misleading the child in order to expedite the return.
- Contact between the child and his family is not facilitated prior to return. There were reports of children requesting and being denied phone calls for that very purpose<sup>184</sup>.
- There is no legal support for proper accompaniment during the child's return, though there has been verbal police recognition that a child could be accompanied during return by a trusted adult, if he so desired<sup>185</sup>. In the past, Spanish police officers have turned separated children over to Moroccan police officers.
- There is no call for monitoring the well-being of the child post-return.
- Prioritising the return of separated children over other solutions (e.g., permanence in a host country) or categorically equating any one solution with a child's best interests in all cases goes directly against the Statement of Good Practice's "First Principles", especially the respect for the child's best interests.
- The opaqueness surrounding authorship of and reasoning behind repatriation decision-making is counter to the Statement's "First Principles", especially the child's right to information.
- The insufficiency of the processes and criteria explicitly established by the law for determining whether a repatriation can proceed go against the Statement's "First Principles", as they can result in a decision that does not serve a child's best interests.

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<sup>184</sup> See Madrid cases.

<sup>185</sup> See Observatorio Booklet.

**u) Are any changes needed in relation to any first principles ?**

- Input from the child's care givers should be included in the assessment process of whether repatriation is in a child's best interests.
- The child's legal guardian, Child Protective Services, should always submit a report to the national administration assessing whether repatriation is in a child's best interests. No entity should blindly support or carry out the repatriation of all separated children.
- The family or child welfare authorities in the country of origin must be carefully assessed for their ability to provide appropriate care. The situation of a child's family (or the child welfare authorities) in his country of origin, their ability to assume care for the child, and the conditions in which the child would live if he were repatriated are crucial components of a thorough evaluation of which durable solution is ideal for him.
- The investigation of the child's family or child welfare authorities must be carried out by an independent entity, specialised in children's issues. The office of International Social Services does not currently have sufficient resources to take on this increased workload and should be duly capacitated. It is not appropriate for the country of origin's security forces to carry out the investigation.
- The opinion and participation of the child's family or child welfare authorities should be sought and taken into consideration.
- The government has the responsibility to maintain the child informed of the progress of the decision on his repatriation. His opinion and participation should be sought and taken into consideration in the decision-making process.
- Contact must be facilitated between the child and his family (or in their absence, with the child welfare authorities) prior to the child's return.
- In carrying out a repatriation, the journey home should be as non-threatening and free from abuse as possible. If the police must be present during the repatriation, the child should be allowed to select a trusted adult to accompany him, as could be his educator.
- Once in his country of origin, the child should not be turned over to security forces, but directly to his family or to child welfare authorities.
- The well-being of the child should be monitored after his return. In countries where the child protection infrastructure is not sufficient to monitor cases, the Spanish government should cooperate, to the extent it is able, in the country of origin.
- Government entities and officials at the regional and national level should publicly reaffirm their respect for the child's best interests principle and apply it to all decisions taken on the situation of the child.
- Transparency is integral to ensuring that decisions are taken properly on a child's situation. To that end, the entity taking the decision on a child's case should clarify how it determines whether it is in a child's best interests to be returned to his family or, in the impossibility of returning a child to his family, whether his placement with child welfare authorities in his country of origin is in his best interests. These guidelines should include instruction on how the principle of family reunification, the opinion of the child and his family, and the conditions in the child's country of origin are to be weighed against one another.

- The decision on a child's return should be taken by an independent body with expertise in children's issues.
- All children must have access to independent legal assistance during the repatriation process, in order to protect their best interests, their right to participation, their right to information, and the timeliness of the decision taken on their case.
- Any individual (e.g., a child, his family or a care professional) who strongly disagrees with the Government Delegation's decision to repatriate should be able to request a timely review of that decision by an independent body.

### **12.2.3 Programmes and aid to facilitate reintegration**<sup>186</sup>

#### **v) Please describe relevant law, policy and practice in your country**

While there is no legal requisite that Spanish authorities assist a child who has reached legal adulthood to reintegrate into his community, there have been numerous effective by the autonomous communities and the national government to fund development projects in Morocco (the country of origin of most separated children in Spain), which have met with varied success.

The Spanish organisation PAIDEIA, which supervises several group homes for separated children in Madrid, is in the process of carrying out one such project. They are constructing a large community centre in Tangier, supported financially by both Spain and Morocco, which aims to prevent premature migration by improving the situation for potential children in their country of origin. There will be a residence for street children, labour insertion classes for 100 children, and a large day centre for neighbourhood children.

#### **w) To what extent does this conform to the statement ? Please outline in brief**

- There have been attempts by Spanish NGOs (financed by the Spanish government) to initiate reintegration programs for children in their countries of origin, there are no known programs specifically created to assist young people over the age of 18.

#### **x) Are any changes needed in relation to any first principles ?**

- The Spanish authorities should, to the extent they are able, cooperate with countries of origin to facilitate the re-integration of young people over the age of 18.

### **12.2.4 Settlement in a third country**<sup>187</sup>

#### **y) Please describe relevant law, policy and practice in your country**

Spanish legislation allows for refugees to be settled in third countries, but in practice there are no known cases involving separated children in Spain.

#### **z) To what extent does this conform to the statement ? Please outline in brief**

- N/A

<sup>186</sup> See Aldanas, Giménez Romero and Pozo, section 12.2.2.

<sup>187</sup> See Aldanas, Giménez Romero and Pozo, section 12.3.

**zz) Are any changes needed in relation to any first principles?**

- N/A

**13. COLLECTION OF DATA**

The register of separated children described in the Registration and Documentation section is gradually being implemented on a national level, which will help lend order to what has been a chaotic, autonomous community-specific system of collecting information on these children.

**a) Who should be responsible for collecting data on separated children ? Please consider both government departments and NGOs.**

The Foreigners Section of the National Police is responsible for collecting data on and overseeing the management of the national database of separated children. Ideally, the database would be managed by the Public Prosecutor for Children, as it is a truly independent entity, which specialises in work with children. Nonetheless, interviews with the police representatives revealed a protection-centric approach to their data collection responsibilities.

Child Protective Services in each autonomous community collects information on the separated children under its guardianship, which is appropriate.

Considering the very limited involvement of the Public Prosecutor for Children in the protection [as opposed to criminal] system, organisations that care for the children and children's rights advocates should have access to the national database to allow for independent monitoring of the treatment of separated children.

**b) What sort of data is required ? From government ? From NGOs ?**

The basic data required for the national database is described in the Registration and Documentation section.

Child Protective Services collects information of a more detailed nature (e.g., psychological development, family background, etc.), but research into the child's background is often limited by what he is able or chooses to share, as sufficient mechanisms in the country of origin to carry out thorough reports on the family or a background check on the child (e.g., his educational or medical history) do not usually exist.

In addition to the data that is already collected, information on when decisions were taken on a durable solution for a child (i.e., refugee or humanitarian status, regularisation or repatriation) would be extremely useful (but only if it could be accessed by the Public Prosecutor for Children. For instance, the date of a child's entrance in the Spanish system of protection could be used to monitor the timeliness of his official regularisation process and speak out against any mistreatment.

**c) Please provide any current data on separated children which is available (from both government and NGOs).**

The Government Delegation for Foreigners and Immigration (Ministry of the Interior) has gathered quantitative data from the different autonomous communities and combined it to publish an estimate of the number of separated children in Spain, as well

as their nationalities and distribution throughout the autonomous communities. According to this study, in 2002, there were 6,350 *entrances* of separated children in reception centres in Spain<sup>188</sup>.

In contrast, a report published in Catalonia in April 2003 provided the number of separated children –*individuals*, not entrances– in the Catalonian system of protection over the last four-and-a-half years, based on their photographs and fingerprints<sup>189</sup>. Its finding was that between 1 January 1998 and 31 May 2002, a total of 1,659 separated children passed through the Catalonian system of protection. It is worth highlighting that the Government Delegation’s report counted 1,341 *entrances* in the Catalonian system of protection in 2002 alone, nearly 80% of the total number of *individuals* cared for in four and a half years. The most revealing figure, though, is the snapshot that the study gives of the number of separated children in the system of protection on 31 May 2002: 262<sup>190</sup>.

The sharp discrepancy between the number of separated children in an autonomous community at any one time and the number who pass through that community (potentially multiples times, with multiple names) in one year reveals how misleading figures on entrances can be if interpreted as the size on the community of separated children in Spain. It is hoped that the implementation of the national register will improve the accuracy of numeric data on separated children<sup>191</sup>.

As for the number of separated children seeking asylum in Spain, the Office of Asylum and Refugees provides the following data: 163 applications between 1995 and 1996, 60 in 1997, 34 in 1998, 47 in 1999, 4 in 2000 and 2 in 2001<sup>192</sup>.

#### **14. INTERNATIONAL INSTRUMENTS**

**Please indicate whether your country has signed or fully ratified the following international and regional conventions and covenants. As well, please indicate whether rules and guidelines are being implemented.**

Article 3 of the LO 1/1996 confirms that minors will enjoy the rights guaranteed to them by the Convention on the Rights of the Child and international treaties and conventions that secure their rights without any discrimination, reflecting its adherence to the prior mandate established in article 39.4 of the Spanish Constitution. Further, it states that the Spanish Minors Law will be interpreted in conformity with these international laws and treaties, especially the CRC.

##### **14.1 Refugee Instruments and UNHCR Executive Committee Conclusions**

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<sup>188</sup> Government Delegation for Foreigners and Immigration, “Separated children cared for in Spain in 2002,” February 2003. In 2002, Catalonia: 1341, Andalusia: 1251, Valencia: 1070, the Basque Country: 773, the Canary Islands: 646, Ceuta: 235, Melilla: 173.

<sup>189</sup> M. Capdevila and M. Ferrer, “*Els menors estrangers indocumentats no acompanyats*”, Jurisdata (Centre for Judicial Studies and Specialized Training), N. 35, April 2003.

<sup>190</sup> Of the 262 separated children under the care of the Catalonian child welfare agency, 138 were being cared for in the normalized, stable sector of the system, while 124 remained in the “emergency” circuit, without access to the normalized protection system.

<sup>191</sup> While at the community level, the majority of accounting systems are based on the number of *entrances* of children in reception centers, the new national database will be based on photographs and fingerprints.

<sup>192</sup> OAR Annual Report, 2001, p. 84. Also see Observatorio Booklet.

1951 UN Convention relating to the Status of Refugees.

*Signature: 22 July 1978*

*Ratification: 14 August 1978*

1967 Protocol relating to the status of refugees

*Signature: 22 July 1978*

*Ratification: 14 August 1978*

1954 Convention relating to the Status of Stateless Persons

*Signature: 24 June 1997*

1961 Convention for the Reduction of Statelessness

*Not signed by Spain*

## **14.2 General International Human Rights and Humanitarian Law Instruments**

UN Declaration on Human Rights, 1948.

International Covenant on Civil and Political Rights, 1966 (and Optional Protocol)

*Signature: 28 September 1976*

*Ratification: 27 April 1977*

*Entered into force: 27 November 1990*

International Covenant on Economic, Social and Cultural Rights, 1966

*Signature: 28 September 1976*

*Ratification: 27 April 1977*

International Convention against Torture, 1984

*Signature: 4 February 1985*

*Ratification: 21 October 1987*

*Entered into force: 20 November 1987*

International Convention for the Elimination of all Forms of Racial Discrimination (1965)

*Ratification: 13 September 1968*

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, Arts. 77 and 78.

*Ratification: 21 April 1989 (with effect from 21 October 1989)*

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol 11), 8 June 1977, Art. 4

*Ratification: 21 April 1989 (with effect from 21 October 1989)*

## **14.3 Children - International and Regional Instruments**

UN Convention on the Rights of the Child, 1989

*Signature: 26 January 1990*

*Ratification: 30 November 1990*

Optional Protocol on the Involvement of Children in Armed Conflict, 2000

*Signed: 6 September 2000*

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000

*Signed: 6 September 2000*

UN Rules for the Protection of Juveniles Deprived of Their Liberty, 1990

UN Standard Minimum Rules for the Administration of Juvenile Justice (*the Beijing Rules*), 1985

Hague Conference on Private International Law:

Convention for the Protection of Minors, 1961

*Signature: 22 May 1987<sup>193</sup>*

Convention on the Civil Aspects of International Child Abduction, 1980

*Signature: 16 June 1987<sup>194</sup>*

Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 1993 and the associated "Recommendation on the Application of the Convention to Refugee Children"

*Signature: 27 March 1995*

*Ratification: 11 July 1995 (with effect on 1 November 1995)*

Convention on Jurisdiction, Applicable Law, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, 1996 (not in force yet)

*Not in force yet<sup>195</sup>.*

European Convention on the Repatriation of Minors, 1970

European Convention on the Exercise of Children's Rights, 1996

#### **14.4 Europe**

European Convention for the Protection of Human Rights and Fundamental Freedoms (and Protocols), 1950.

*Signature: 4 October 1979<sup>196</sup>*

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<sup>193</sup> See Aldanas, Giménez Romeo and Pozo.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.*

The Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community (Dublin Convention), 1990.

*Ratification: 1 August 1997*

European Convention on the Gradual Abolition of Controls at the Common Frontiers (*Schengen Agreement*), 1990

*Ratification: 25 June 1991*

Schengen Implementation Convention, 1990

### **Resolutions and Recommendations:**

Joint Position on the harmonised application of the definition of the term "refugee" in Article 1 of the 1951 Geneva Convention relating to the status of refugees, Council of the EU, March 1996

Resolution on Minimum Guarantees for Asylum Procedures, June 1995

Resolution on the harmonisation of national policies on family reunification, June 1993

Resolution on manifestly unfounded applications for asylum, 1992

Resolution on a harmonised approach to questions concerning host third countries, 1992

Conclusions on countries in which there is generally no serious risk of persecution, 1992

Recommendations 564 (1969) and 984 (1984)

Joint Action to Combat Trafficking in Human Beings and Sexual Exploitation of Children, Feb. 1997 (97/1 54/JHA)

Resolution on unaccompanied minors who are nationals of third countries, June 1997 (97/C 221/03)

### **Council of Europe**

European Social Charter, 1961

### **14.5 UNHCR Guidelines**

*Because the UNHCR guidelines are considered not legally binding, in practice, they have not, per se, been implemented in Spain.*

The Handbook on Procedures and Criteria for Determining Refugee Status (Handbook)

Refugee Children: Guidelines on Protection and Care, 1994

Working with Unaccompanied Children: A Community-based Approach, 1996

Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, 1997

UNHCR Executive Committee Conclusion No. 47 (1987) on “Refugee Children”

UNHCR Executive Committee Conclusion No. 59 (1989) on “Refugee Children”

UNHCR Executive Committee Conclusion No. 84 (1997) on “Refugee Children and adolescents”

UNHCR Executive Committee Conclusion No. 88 (1999) on “Protection of the Refugee’s Family”

### **15. CONSULTATIONS WITH SEPARATED CHILDREN**

While the uniqueness of each separated child’s case cannot be overemphasised, there were several patterns and common characteristics that began to appear through direct interviews with these children. As mentioned in the beginning of the report, children’s decision to come to Spain often formed part of a personal or even family project to improve their living conditions. For that reason, none of the interviewees wanted to be returned immediately to their country of origin, though some did express a desire to return in the future, once they had established a viable option for themselves in Europe.

Most children admitted that the portrayal of Spain in their country of origin had been inaccurately positive, though they displayed a remarkable resilience and capacity to adapt and integrate to the situation in which they found themselves once in Spanish territory.

Beyond a general understanding of the basic resources of the Spanish system of protection (i.e., care centres, training facilities), interviewees did not appear to grasp the more esoteric legal concepts affecting their situation (e.g., their right to participation, the principle of the child’s best interests).

Very few interviewees had been granted a residence or work permit. All were noticeably affected by the uncertainty and slowness surrounding their regularisation.

#### Case One

*S. was interviewed by Save the Children on a research trip to Melilla in April 2003. He had just turned 18 and was living in a Red Cross hostel without a residence or work permit. It was, he estimated, his tenth year in Melilla, although he added that government authorities only recognised his stay to be around four years in length.*

*S.’s mother died when he was very young, and his father remarried shortly thereafter, leaving him and his siblings in the care of their aunt. Shortly after moving in with his extended family, S.’s uncle died, leaving his aunt to care for thirteen family members. In consequence, S. and his older brother headed to Melilla with the hope of relieving their aunt of the work of looking after them and sending money back to help the family.*

*After spending several years on the streets of Melilla, S. entered the Melillan protection system. He spent time in a hotel in the beginning –child welfare authorities*

were, in those years, unclear on how to deal with separated children– and was finally placed in a residential centre circa 1997-1998.

In 2000, S. was picked up by Melillan police, taken to the Moroccan border and handed over to his country of origin's security forces. He returned to Melilla within days, and re-entered the system of protection.

A year later, in November 2001, Child Protective Services requested and the Government Delegation ordered S.'s "family reunification" (with his father). S. explained to the authorities that he had barely had contact with his father since his mother's death and that his father would not accept him back at home. The authorities, who had telephoned the father, insisted that he had agreed to accept S. (S. explained in the interview that because his father had a temporary work permit from Spain, he was afraid to anger any Spanish authority, lest he lose permission to work in Melilla.) S. returned home, and his father immediately told him that he was responsible for taking care of himself and should make his way back to Melilla. S. was about 16.5 years old at the time. He returned to Melilla within days.

In January 2002, Child Protective Services re-requested and the Government Delegation re-ordered S.'s "family reunification" (again, with his father). S. continued to insist that his father would not care for him. He was turned over to the Moroccan police, as he had been the last time, and made his way home on his own. Upon his arrival, his father repeated that S. was responsible for taking care of himself and should make his way back to Melilla. He returned to Melilla within days. S. was almost 17 years old by the second repatriation.

From January 2002, when S. returned from his second and final "family reunification", until March 2003, he was under the uninterrupted care of Child Protective Services in Melilla. Because S. lacked documentation and had been repatriated several times, he had trouble completing the training courses (e.g., painting, computers) in which he was enrolled. Nonetheless, S. managed to get a job offer to support his solicitation of a work permit and was awaiting the concession of his residence permit when he reached legal adulthood.

The Government Delegation in Melilla explained that the annulment of the legal guardianship of Child Protective Services –which occurs automatically when a child turns 18– prevents the concession of a residence permit based on legal guardianship, regardless of how many years a child has spent in Melilla. S.'s solicitation of legal residency as a separated child, finally submitted after years in Spanish territory, was thus denied. S. left the system of protection at age 18, after at least four years of official legal guardianship, without documentation of any kind.

S. confirmed that he had once been offered documentation by security forces, when he was encouraged to file a complaint against the president of [Melillan children's rights organisation] PRODEÍN, an active critic of the administration's treatment of separated children in Melilla. S. refused.

S. confirmed feeling confused and frustrated with regard to his unresolved legal situation. He also felt very much alone, explaining that he had long ago lost contact with his aunt (as it embarrassed him not to be able to offer the family financial help) and was no longer integrated in the system of protection. Additionally, S. feared that his frequent criticism of abuses committed against children in the care facilities had a negative effect on the resolution of his legal status in Spain.

When Save the Children met with S., he had, with the help of PRODEÍN, re-solicited a residence and work permit (including the job offer that he had been extended by a business in Melilla), this time as an irregular adult immigrant. S. tentatively

*maintained hope that this request would be resolved positively, given his long residency in the city and many years under the guardianship of the public administration.*

*After our visit to Melilla, Save the Children wrote to the Child Protective Services representatives out of concern for several issues, S.'s case being one of them. CPS was generally responsive –as it had been during our visit– but was unwilling to give details on S.'s case, explaining that it would constitute a violation of his right to privacy.*

*In July 2003, Save the Children was informed by PRODEÍN that S.'s request for a residence and work permit (as an adult) had been denied. The president of the organisation was working to involve the Public Prosecutor for Children and the Ombudsman in S.'s case in order to reverse the negative decision.*

## Case Two

*A. was interviewed by Save the Children on a research trip to Tangier in March 2003. He was 17 years old. Having spent a year in Barcelona, A. had come home for a few weeks to visit his mother, father and siblings, with whom his relationships appeared to be strong and stable. He would return to Barcelona later that week.*

*In Barcelona, A. had managed to do well for himself. He spoke Spanish fluently and had been officially regularised and granted a work permit, giving him a potential future option to reside and work legally in the city. His job was at a restaurant, which he liked, though it was located far outside of the city. Each day he spent almost four hours on public transportation travelling back and forth from work. Despite the gruelling commute, A. seemed relatively pleased with his situation.*

*The principal difficulty he admitted to having encountered was with his care facility. Because Child Protective Services had assessed that A. had a high level of maturity and independence, he was placed in a hostel setting where residents were allowed to eat dinner, sleep and eat breakfast, but had to leave the premises by 10:00. Because A. worked an afternoon/evening shift at the restaurant, which was nearly a two-hour commute from his hostel, he did not arrive home to go to sleep until four or five in the morning. This restrictive schedule only allowed A. an average of five hours rest each night. Because he was incapable of functioning on so little sleep, A. would try sleep in the Barcelona metro for a few hours during the day. On the day of our meeting in Tangier, A.'s mother expressed her serious concern for his health and safety, in response to which Save the Children agreed to get in touch with members of the Platform of Citizens in Defence of Minor Immigrants in a Situation of Disprotection, who had been working to help A. move to a care facility that would allow him to get sufficient sleep each night.*

*In April 2003, Save the Children got in touch with a member of the Citizen's Platform who had attempted to assist A. in changing his residential placement. Through a personal contact, this individual had had A.'s case brought up in the Urgencies section of the Child Protective Services office (which deals solely with separated children). Allegedly, the representatives of the Urgencies section responded that they would give A. no help because of his bad attitude and because, according to these individuals, he had stolen from the cash register restaurant where he worked. When the Platform member telephoned A.'s boss to inquire as to whether there had been any such problem at the restaurant, the boss replied that A. had no such problem, and that his colleagues and supervisors trusted him completely<sup>197</sup>.*

*Several weeks later, the Citizen's Platform informed us that A. had been ultimately unable to change his centre placement. Upon his return to Barcelona, he stopped going*

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<sup>197</sup> Email from Plataforma Ciudadana, 22 April 2003.

*to work and was later involved in an altercation with police on the metro, for which he was taken to spend the night in a juvenile detention centre. His employer, concerned, waited two weeks for A. to return before cancelling his contract.*

## **16. POLITICAL LEVEL – SUPPORT FOR CHANGE**

**Please where possible provide the following information :**

**\* describe the level of contact NGOs working with separated children have with: central government departments, local and regional governments**

At the national level, only a small number of NGOs are included in the working group on separated children at the Observatorio de la Infancia (Ministry of Labour and Social Affairs). At a group meeting in April 2003, there were approximately thirty attendees, four of whom were representatives of NGOs in the autonomous community of Madrid.

A national platform of NGOs and individuals concerned about the situation of separated children in Spain was created in 2002, though its contact with functionaries, politicians, or lawmakers at national, regional and local levels is limited. Certain members of the Platform have more frequent contact with government actors due to the nature of their jobs *outside* their involvement with this national network.

On a regional level, there are two organisations of NGOs and individuals worth highlighting, both of which helped organise the national platform. In Catalonia, the Platform of Citizens in Defence of Minor Immigrants in a Situation of Disprotection has been instrumental in advocating for separated children's rights since 1998. They are composed of an amalgam of care professionals, activists, attorneys and other individuals concerned for separated children and have been one of the strongest voices of protest against violations of the rights of these children in Catalonia and throughout Spain. They are seldom in direct contact with Catalonian government entities<sup>198</sup>.

In Madrid, there is a working group comprised of both NGOs that provide care and labour training classes for separated children, as well as those that are more involved in the sphere of rights defence. The group, which meets monthly, has focused on working in collaboration with the government and has frequent, official contact with all the public entities involved in the attention to separated children in Madrid (e.g., Child Protective Services, Government Delegation, Public Prosecutor for Children, Ombudsman for Children, National Office of Foreigners)<sup>199</sup>.

**• describe any contacts with European institutions e.g.: members of European Parliament, European Commission, or European Council. (give names if possible)**

Unknown.

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<sup>198</sup> As a side note, among the organizations and individuals in Catalonia that provide services to separated children (e.g., care, training, leisure activities), there is a sense that the relationship between contracted service providers [working with separated children] and the Child Protective Services office in Catalonia has undergone a transformation in the last few years. Whereas CPS representatives used to meet with all the service-providing entities together, direct relationships have now been established separately with each entity, and the forum-style relation has been lost.

<sup>199</sup> See Arranz.

- **can you identify at the different political levels, any sources of support for improving the situation of separated children?**

There are numerous individuals within the government who support improving the situation of separated children, to which the creation of the national working group on separated children at the Observatorio de la Infancia is a testament. The challenge is that these individuals are often spread out between organisations and have limited contact with one another.

The figures of the Public Prosecutor for Children (independent, part of the judicial system), the Ombudsman (political appointee) and judges (independent, part of the judicial system) can be strong voices of advocacy on behalf of separated children. In practice, their positive influence is stronger in some communities than others.

- **can you identify, at the different political levels, the main obstacles to change?**

Among the primary political obstacles to change are:

- the lack, in some cases, of will to critically examine and work to improve the treatment separated children, including reticence from Child Protective Services and Government Delegation bodies as well as some Public Prosecutor Offices and judges<sup>200</sup>. The hesitance to work with organisations and individuals who really press for change is symptomatic of this attitude and has revealed itself in isolated attempts to sideline the intervention of organisations like MSF in Ceuta or Red Cross in the Canary Islands, or open threats against smaller organisations like PRODEÍN or the Citizens' Platform in Barcelona;
- the strong focus of legislation and policy on immigration control, which influences the way in which both national and regional administrations view and address the arrival of separated children;
- the reticence by the Spanish public to accept immigration and, by association, separated children;
- the criminalisation of separated children in the media;
- the lack of coordination between autonomous communities, which results in inconsistent policies and practices of intervention with separated children.
- the lack, in some cases, of cooperation between autonomous communities and the national government. Some entities adopt a defensive attitude with regard to their responsibilities to separated children. Many regional government representatives expressed a feeling of [financial] abandonment by the national government;

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<sup>200</sup> For instance, the Andalusian Pro-Human Rights Association, along with other organizations, brought a court case in Cadiz (DP-1754/98) against the Government Delegate and a top regional government official in Ceuta for the mistreatment and expulsion of separated children in 1998. Since then, both the judge and the public prosecutor on the case demonstrated a startling unwillingness to investigate the organizations' allegations, attempting on multiple occasions to "archive" their complaint and refusing to take statements from the defendants so as to handicap the accusation process. On 28 February 2002, a higher court judge reversed the lower court's third attempt to "archive" the case, and the defendants were finally scheduled to make a statement on 13 May 2003.

- the strained diplomatic relations between Spain and Morocco, which prevent meaningful cooperation in benefit of the separated children caught between the two countries.

The fact that the great majority of problems highlighted in this assessment were already identified by Child Protective Services and national government representatives over three years ago<sup>201</sup> reveals the obstacles to change to be reasonably formidable.

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<sup>201</sup> See Observatorio Booklet. See also Amaya Iribar, “Trabajo se compromete a entregar una tarjeta sanitaria a cada niño ‘sin papeles’”, *El País*, 3 February 1999, which cites the Public Prosecutor for Children and Ministry of Labour and Social Affairs recognizing the difficulty that undocumented children face in gaining full access to health care, and the Ministry of Labour and Social Affairs claims that it will give a health card to every undocumented child in order to ensure the recognition of their right to health care. As mentioned in Health section, a Médicos sin Fronteras study in Ceuta in 2002 found that separated children not integrated into the system of protection had no health care cards and thus suffered privation from full access to health care.