



EU Returns Directive Contact Committee February 11 2010
Implementation of Article 10 (2): Points for Reflection

Article 10

1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

2. Before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

In anticipation of the contact committee discussions on February 11, 2010 in relation to Article 10(2) of the EU Returns Directive, we set out some reflection points concerning its interpretation and implementation. We also include below some of the reflections from the previous contact committee discussions on November 20, 2009 concerning the interpretation and implementation of Article 10 (1).

I. Overall Framework

1. What are the key steps in issuing a return decision and what part does Article 10(2) play in that regard?

As recognized in the last workshop, “*return is only one option for a durable solution for UAMs and that any action must take into account as a key consideration the ‘best interest of the child’*”. Part of the assessment concerning the return option is whether and how “*he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.*”

Consequently Article 10 (2) should not be read in isolation but should be read together with Article 10(1) and Article 5. It is not sufficient to identify that a member of the family, a nominated guarantee or adequate reception facility exists in order to take a return decision. A decision on return to one of the situations identified in Article 10 (2) must in any event be informed by the best interests’ assessment.

However, Article 10(2) stands as a safeguard that a child cannot be removed from a Member State to a country of return in the absence of a family member, a nominated guardian or adequate reception facilities there.

II. Procedures

1. What “*authorities*” of a Member State shall be satisfied?
2. In the context of what action – “*before removing*”? Will this be part of a decision to return?

3. On what do the authorities of a Member State need to be “*satisfied*” under Article 10(2)?
4. What tools exist to make the relevant assessment and produce evidence to ensure satisfaction?
5. Where does the burden of proof lie?
6. How will the views of the child be taken into account?

III. Return to a family member

1. How to define *family member*?
2. How does Article 10(2) link to procedures to *trace family* under other EU instruments (e.g. under Dublin II) and general international law? What are the circumstances in general in which family tracing should be initiated, the actors which should be involved and the general objectives of the process (family reunification or aiming simply, or initially, to restore family contacts). What are the considerations to be made to remain in conformity with all the applicable data protection principles?
3. How are family links confirmed?
4. How does this fit with determining whether it is appropriate, taking the best interests of the child as a primary consideration, to return to a family member? What if the family member does not wish to be contacted by/to receive the child or has not the means to receive the child?
5. How to assess the situation of the family? What actors are involved? What body bears the obligation to do this?
6. What preparatory steps should be taken before returning a child to a family member?

IV. Return to a nominated guardian

1. How to define a *guardian*? What is the role and the characteristics/qualifications of a guardian?
2. Who is *responsible* for nominating a guardian?
3. What is the process for *nominating* a guardian?
4. In what circumstances might a *return to a guardian* be considered?

V. Return to adequate reception facilities

1. How to define *adequate reception facilities*? What elements are essential to ensuring adequate reception? What actors are necessary to ensuring adequate reception?
2. In what circumstance might a return to such facilities be considered? For what *purpose and time period* are the reception facilities to be used?
3. Who is responsible for *assessing the adequacy* of the reception facilities? What safeguards exist to ensure that no child protection concerns exist in relation to such facilities?

VI. State of Return

1. What is the “*state of return*” in each of these three scenarios? When must it be a state of origin, rather than any other third country, including states of transit.

VI. Process of Return

1. In what way if any does Article 10 (2) inform the actual process of returning children?

VII. Reintegration obligations

1. What obligation exists under the Returns Directive or international law for Member States to ensure reintegration under each of the three scenarios?
2. What obligation exists to follow up and monitor the situation?

VIII. Anticipated EU Action Plan on Unaccompanied Minors

1. To discuss in what way the anticipated EU action plan may be relevant to the implementation of the Return Directive.

EU Returns Directive Contact Committee November 20
Implementation of Article 10(1): Points for Reflection

1. What kind of children will fall under Article 10(1)?

Failed asylum seekers, children who have not had access to asylum processes, children with other protection needs, trafficked children, children who are in search of opportunities or family reunification, children who seek economic opportunities, children who come to Europe for a combination of the above reasons

2. How do Member States currently address their situation?

There are considerable divergences in how Member States currently address the situation of these children:

- Sometimes child protection systems are the starting point (and sometimes the “mainstream” protection services apply, i.e. the same as for national children; whereas in other cases there is a parallel system for “third-country” children).
- Sometimes children fall under migration control systems primarily;
- Sometimes return may be the default solution;
- In other countries, other options are actively explored and children may be entitled to a residence permit until 18;
- In some countries, children are channelled into asylum procedures and asylum reception for lack of other options.

3. What does the Returns Directive require in relation to unaccompanied children?

- *Article 6(1)* requires Member States to take a return decision with respect to illegally staying third country nationals; there is no exception in relation to children;
- *Article 6(4)* allows Member States to decide to offer a right to stay for compassionate, humanitarian or other reasons;
- *Article 5* states that due account must be taken of best interests of the child when implementing the Directive; the recitals say best interests must be a primary consideration of Member States when implementing the Directive;
- *Article 10(1)* states that before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

- *Article 10(2)* states that before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.
- Other provisions concern access to education and health once a return decision is taken; there are also specific provisions relating to unaccompanied minors in detention;
- Most of the general provisions also apply to unaccompanied minors, for example, Article 13 on legal assistance.

4. What are the key questions today when we talk about assistance before a returns decision is taken under Article 10(1)?

- (a) What is the purpose of the assistance required by the Directive?
- (b) What is the type of assistance required by the Directive?
- (c) What is the source of the assistance required by the Directive?
- (d) When does this assistance start and when does it end?

Since Article 10(1) refers to assistance before the returns decision is taken, does it concern either:

- (i) specific assistance in relation to participation in the procedures relating to the decision or as regards the substantive assessment which will inform the decision, or
- (ii) the broader assistance to be provided to an unaccompanied minor as an unaccompanied minor?

If it concerns (i) only, proper implementation will in any event require this assistance to be embedded in a more general system of assistance required under international law. In other words, you cannot provide “assistance” unless you first properly identify an unaccompanied child, provide interim care and protection, access to education and health services pending any decision, provide a guardian for all issues etc.

5. The general context under international law

The UN Convention on the Rights of the Child: Article 3 all children falling within the jurisdiction of a country should benefit from their rights without discrimination. It notes the applicability to these children of the general provisions of best interests, non discrimination, survival and development and child participation. Article 20 requires Member States to provide special protection and **assistance** to children who are separated from their parents

General Comment Number 6 of the Committee on the Rights of the Child addressing the treatment of unaccompanied and separated children outside their country of origin spells out what this special protection and assistance should entail. It also notes that the overall obligation in relation to such children, namely, finding a durable solution that is in their best interests, including potentially return and reintegration.

CoE Forced Return Guidelines contain provisions which inspired the Directive’s provisions

6. **Other sources of inspiration for what Article 10 (1) might require exist under EU law:**

- The EU asylum instruments in their current form and drawing from proposals concerning their revision; they contain specific provisions relating to unaccompanied minors as regards:

Age assessment
Guardians
Legal Representation
Information
Family Tracing
Access to education and health services
Accommodation
Freedom from detention
Specialised interviewing
Training of officials
Assessment of special needs

If the interpretation in (ii) above applies (i.e. broader assistance), how does this assistance relate to provisions in the asylum acquis?

The proposed revision of the Asylum Procedures Directive includes an express reference to Article 10 (1) which also would inform the type of assistance to be provided under Article 10 (1). It notes that “*Member States shall ensure that the appropriate bodies referred to in Article 10 of Directive 2008/115/EC of the European Parliament and of the Council 17 have the right to lodge an application for international protection on behalf of an unaccompanied minor if, on the basis of an individual assessment of his/her personal situation, these bodies are of the opinion that the minor may have protection needs pursuant to Directive [...]/EC [the Qualification Directive].*”

- The proposed revision of the EU trafficking framework decision contains specific provisions on unaccompanied minors
- The adoption of an EU action plan on unaccompanied minors

The Stockholm Programme adopted in December 2009 anticipates that the European Council will adopt an action plan on unaccompanied minors in June 2010 which will address prevention of unsafe migration, assistance of unaccompanied minors within the EU and return and reintegration where this is in their best interests. It will identify EU actions in relation to these issues, including further exchange of good practice and other mechanisms to address issues of common interest (including family tracing, age assessment).

In relation to each of the above we refer you to Save the Children comments on the proposed revision of the asylum and trafficking measures and the returns directive to be found on http://www.savethechildren.net/alliance/europegroup/europegrp_pubs.html

7. How the national presentations today have helped us explore the nature and scope of “assistance”.

There has been a common focus in many of the presentations on existing national practices on certain core elements in the process of assistance, including:

- The appointment of guardians with clearly defined role, responsibility and qualifications;
- The provision of legal assistance;
- The provision of information to the child and the need to take proper account of the views of the child;
- The importance of family tracing;
- The need for country of origin information and assessment of conditions there;
- The need for clear procedures to assess the best interests of the child in each case;
- The value of independent assessments

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http://www.savethechildren.net/alliance/europegroup/europegrp_pubs.html