



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



Strasbourg, 25 June 2010

CommDH/PositionPaper(2010)6

COMMISSIONER FOR HUMAN RIGHTS

**POSITIONS ON THE RIGHTS OF MINOR
MIGRANTS IN AN IRREGULAR SITUATION**

This is a collection of Positions on the rights of minor migrants in an irregular situation from the Council of Europe Commissioner for Human Rights. It is a short summary of the findings of the Commissioner based on his country-monitoring and thematic reports, issue papers, recommendations, opinions and viewpoints. By collating these findings drawn from the different components of his work, the Commissioner presents a summary of his conclusions and recommendations concerning the rights of minor migrants in an irregular situation. The Positions will be continuously updated in the further light of the Commissioner's ongoing work.

Migrant children are one of the most vulnerable groups in Europe today. Some have fled persecution or war, and others have run away from poverty, violence or destitution. There are also those who become victims of trafficking. Those who are separated from their families are at particular risk. Despite their vulnerability, little is known about the situation of migrant children.

What we do know indicates that the situation is dramatic. Many live on the streets, disappear from the centres where they are accommodated, are kidnapped and exploited, fall into the hands of traffickers and are denied basic health care and education.

A human rights approach

Migrant children are first and foremost children and they have the same rights as others to enjoy all the rights of the child. The principle of the best interest of the child means that each child must be seen as an individual and special consideration must be given to his or her particular circumstances. Migrant children should have the possibility to express their own views, and be able to influence their situation. Children coming with parents are not just belongings, and could have their own reasons for migrating.

States should have an individualised and rights-based approach. In addition to special protection as children, migrant children also fall under the protection of human rights applying to migrants. In order to develop an adequate response to the situation of migrant children, states need to start by collecting data in order to repair the unacceptable information deficit about the situation of these vulnerable children. Who are they? How do they arrive in Europe? Where and how do they live? Do they attend school? Are they cared for? How many are exploited for labour?

Enjoyment of basic rights

It is crucial that states take proactive steps to guarantee migrant children enjoyment of their human rights. It is especially important to ensure that they have access to compulsory and quality education – irrespective of their own or their parents' legal status. It should also be ensured that parents with irregular status can send their children to school without fear. Children's attendance in schools should in no way be used to identify, detain or deport irregular migrants. Furthermore, necessary pedagogical support should be provided, such as extra teaching of the majority language. This should be combined with an intercultural approach to education.

In addition, special attention should be paid to the right to health for migrant children, many of whom have a background of very difficult experiences which may require psychological support. This is an area where schools have a key role to play, not least for the detection of problems and follow-up with supportive treatment.

Minimising the detention of minors

The use of detention for minors should be kept to the absolute minimum in accordance with the provisions of the UN Convention on the Rights of the Child. The Convention states, in article 37, that children should be deprived of their liberty only as a last resort and for the shortest appropriate period of time. While the detention of children for a matter of hours or days prior to a certain expulsion might exceptionally fall within the permissible scope of these provisions, anything much longer would be of serious concern.

It should be stressed that detention cannot be justified solely on the basis of the child's or parents' irregular status under national migration law. As a principle, migrant children should not be subjected to detention. Any detention of children must be closely monitored and authorities need to ensure the utmost transparency with respect to such detention, keeping statistics that provide a detailed picture of the extent of their detention.

In accordance with the principle of the best interest of the child, special arrangements must be made for living quarters that are suitable for children and which separate them from adults, unless it is considered in the child's best interest not to do so; the underlying approach to such a programme should be 'care' and not 'detention'.

It is imperative that any decision to detain children be taken by a judicial authority, capable of independently weighing all the relevant considerations. Children should have access to legal aid, the opportunity to receive visits from friends, relatives, religious, social and legal counsel and their guardians. They should be provided with all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period of detention, children have the right to recreation and play.

Separated and unaccompanied minors

Age determination is a complex process involving physical, social and cultural factors, and is particularly difficult in the case of older children. Incorrect age assessments may result in the wrongful detention of a separated or unaccompanied child. Multidisciplinary procedures should be established and age assessment should not only depend on one medical examination such as bone X-rays. Minors must be given the benefit of the doubt where there is uncertainty as to their age.

Separated and unaccompanied minors should be provided with care, as well as safe and suitable accommodation and appointed competent guardians as expeditiously as possible. It is important that such children are met with respect and by personnel who have the necessary training and capacity to understand them and their situation.

Guardians should have sufficient powers to perform their functions and act in the best interest of the child, while taking the views of the child into account. States need to take effective steps to act against disappearances of children from custodial institutions.

While it is desirable to create an environment where the children can lead as normal lives as possible, the fact remains that separated minors lack the protection normally provided by families and are consequently particularly vulnerable. In such circumstances the duty of parental care falls entirely upon the state.

A number of measures could be taken to strengthen their protection, without resorting to the deprivation of liberty, simply by ensuring a sufficiently strict control by custodial institutions of the movement of the minors in their care. Moreover, children living in these institutions should be adequately informed about the serious risks of being lured into prostitution or other abuse by trafficking networks. Where there are instances of disappearances of separated children, these should be immediately reported to the police so that they may take appropriate action.

States are advised to establish and implement 'life projects' for all unaccompanied migrant minors, in accordance with the pertinent Committee of Ministers' Recommendation CM/Rec(2007)9¹. Such projects should aim to develop the capacities of minors allowing them to acquire and strengthen the skills necessary to become independent, responsible and active in society.

Family reunification is an urgent need for some migrant children. The Council of Europe Parliamentary Assembly has recommended that states "facilitate the family reunification of separated children with their parents in other member states even when parents do not have permanent residence status or are asylum seekers, in compliance with the principle of the best interest of the child"². This is a controversial position but fully in line with the agreed standards on children's rights.

¹ Available at <http://www.coe.int/t/cm>.

² PACE Recommendation 1596(2003) on the "Situation of young migrants in Europe."

Children have the right to live with their relatives. The right to family reunification applies to all children. Those governments which have limited this right to only younger children – for instance, only to those below 14 years of age – should remember their obligations regarding children's rights.

KEY RECOMMENDATIONS

States must collect data to repair the lack of information about the situation of migrant children.

The principle of the best interest of the child fully applies to migrant children, as do all other fundamental children's rights. Migrant children should be treated on an individual basis, with consideration for their circumstances, and should be able to influence their situation by expressing their own views.

Separated and unaccompanied minors should be appointed competent guardians as expeditiously as possible.

States must in particular ensure that the right to a quality education is guaranteed irrespective of the parents' legal status and that the necessary support measures are put in place. School attendance should never be used as a tool to identify and arrest irregular migrants.

Special attention should be paid to the right to health of migrant children.

Children should only be detained in exceptional circumstances as a last resort and for the shortest appropriate period of time. As a principle, migrant children should not be subjected to detention. Moreover all detentions of children must be strictly and closely monitored. Special arrangements must be made for suitable living quarters for children that are separate from adults, unless it is in their best interest not to do so. A judicial authority must be involved in any decision entailing the detention of children. Children must have access to legal advice and be able to receive visits. All basic necessities, including recreational activities, must be provided to them.

Age determination should involve multidisciplinary procedures. Minors should be given the benefit of the doubt where there is uncertainty as to their age.

States are advised to establish and implement 'life projects' for all unaccompanied migrant minors, in accordance with the pertinent Committee of Ministers' Recommendation CM/Rec(2007)9³. Such projects should aim to develop the capacities of minors allowing them to acquire and strengthen the skills necessary to become independent, responsible and active in society.

Separated and unaccompanied minors should not be detained. States should provide them with care, accommodation and competent custodians with powers to act in their best interest. States must recognise the vulnerability of separated children and take measures to strengthen their protection. Family reunification should be facilitated rather than hindered through requirements such as very low age limits.

³ Available at <http://www.coe.int/t/cm>.