

# Better support, better protection

Steps lawyers and guardians can take to better identify and protect trafficked children





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Steps lawyers and guardians can take to better identify and protect trafficked children

A ReACT Project (Reinforcing Assistance to Child Victims of Trafficking) report based on research in Belgium, France, Germany, the Netherlands and the United Kingdom

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## ACRONYMS AND ABBREVIATIONS

**ADCS**

Association of Directors of Children's Services

**FRA**

European Union Agency for Fundamental Rights

**FRA Handbook**

*Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*

**KOK**

German NGO Network against trafficking in human beings

**RACE**

RACE in Europe Project against Criminal Exploitation

**SUMMIT**

Safeguarding Unaccompanied Migrant Minors from going Missing by Identifying Best Practices & Training Actors on Interagency Cooperation

**UKVI**

United Kingdom Visas and Immigration department

**UNHCR**

The Office of the United Nations High Commissioner for Refugees

**UNICEF**

The United Nations Children's Fund

## GLOSSARY

### ANTI-TRAFFICKING CONVENTION

Council of Europe Convention on Action against Trafficking in Human Beings

### CANNABIS FARMS

Buildings which have been converted to grow cannabis in moist and hot conditions, and where children are exploited to tend the plants

### CHILDREN WHO MAY HAVE BEEN TRAFFICKED

Children who have not yet been identified as trafficked children but where there are indicators that they may have been trafficked

### CONNECT PROJECT

EU Commission-funded project on Identifying good practices in, and improving, the connections between actors involved in reception, protection and integration of unaccompanied children in Europe

### CULTURAL MEDIATOR

A person who not only acts as an interpreter, but who also seeks to resolve any cultural misunderstanding between a migrant and those in authority

### DANCING BOYS

The translation of *bacha bazi*, the term used in Afghanistan for boys who are forced to dress up as young girls before being sexually assaulted by adult males

### DEBT BONDAGE

A pledge by an individual to provide labour or services as security for the repayment of a loan

### DUBS AMENDMENT

The amendment moved by Lord Dubs in the UK House of Lords which led to Section 67 of the Immigration Act 2016 providing for the entry of some unaccompanied migrant children to the UK

### DUTY SOLICITORS

Scheme in England and Wales whereby a criminal suspect is provided with legal advice in a police station

### EU ANTI-TRAFFICKING DIRECTIVE

EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims

### HELP CONFERENCES

*Hilfepfankonferenz* (German) are led and undertaken by the Youth Welfare Agency after a child has been taken into care and has recovered

### JUJU

A spiritual belief system deriving from West Africa incorporating objects and spells, which can be used to ensure compliance

### LOVER BOYS

Young men who pose as boyfriends in order to sexually exploit girls

### MYRIA

Formerly known as the Federal Migration Centre, this NGO in Belgium defends the rights of foreigners and combats human smuggling and trafficking; it also performs the role of the Belgian National Rapporteur on Human Trafficking

### NIDOS

An NGO in the Netherlands funded by the Ministry of Security and Justice, which is responsible for providing guardianship to unaccompanied migrant children

### TREATY RIGHTS

Rights under the Treaty on the European Union and the Treaty on the Functioning of the European Union





## Contents

I. INTRODUCTION

II. EXECUTIVE SUMMARY

III. IDENTIFICATION

IV. OBSTACLES TO IDENTIFICATION

a. LACK OF INTERPRETERS

b. CHILDREN GOING MISSING

c. AGE DISPUTES

V. THE PROVISION OF GUARDIANS

VI. ACCESS TO SUITABLY TRAINED EXPERIENCED LAWYERS

VII. CRIMINAL EXPLOITATION

VIII. NON PROSECUTION

IX. SPECIAL MEASURES IN LEGAL AND JUDICIAL PROCEDURES

X. OBTAINING IMMIGRATION STATUS AS A TRAFFICKED CHILD

XI. FINDING DURABLE SOLUTIONS FOR TRAFFICKED CHILDREN

APPENDIX A: METHODOLOGY

APPENDIX B: CORE STANDARDS FOR GUARDIANS OF SEPARATED  
CHILDREN IN EUROPE

## I. INTRODUCTION

This report provides a snapshot of the manner in which children who may have been trafficked into and within five EU states were or were not identified and protected in and up to 2016. It should be read in the context of other key research<sup>1</sup> in this area, which has identified many of the same issues and shortcomings. For the purposes of this report, a trafficked child may be a foreign national, a national of an EEA state or a national of Belgium, France, Germany, the Netherlands or the United Kingdom. This last group of trafficked children share many characteristics of the first two groups, but, as they do not require immigration status, they are unlikely to have their age disputed and may gain access to suitable care and accommodation more easily.

The recommendations are principally based on provisions contained in the EU Anti-Trafficking Directive, the Council of Europe Convention on

Action against Trafficking in Human Beings, the UN Convention on the Rights of the Child, the EU Charter of Fundamental Rights and the content of relevant publications by FRA<sup>2</sup>, UNHCR and UNICEF. Reference has been made to other directives<sup>3</sup> and publications<sup>4</sup>, where appropriate. Professionals who wish to find references to a wider range of sources and, in particular, resources that are state specific should refer to the five country reports, which can be accessed on the relevant ECPAT group websites.

In keeping with the response recommended by UNICEF<sup>5</sup>, the report has adopted a child-rights based approach to trafficking, which acknowledges that children are actors with a right to participate. It is in this context that the current practice of guardians and lawyers has been analysed. The report also recognises that child trafficking is not merely a subset of human trafficking as there are

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<sup>1</sup> See, for example, *Child Trafficking in Europe: A broad vision to put children first*, UNICEF Office of Research-Innocenti, 2007; *Child Trafficking in the Nordic Countries: Rethinking strategies and national responses*, UNICEF Office of Research-Innocenti, 2011; *Report from the Commission to the European Parliament and The Council assessing the extent to which Member States have taken the necessary measures in order to comply with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims in accordance with Article 23*, European Parliament, 2016

<sup>2</sup> *Child Trafficking in the EU: Challenges, perspectives and good practices*, FRA, 2009; *Guardianship for children deprived of parental care: A hand book to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, FRA, 2014

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<sup>3</sup> See, for example, Directive 2011/93/EU on combatting the sexual abuse and exploitation of children and child pornography; Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,

<sup>4</sup> *Communication from the Commission to the European Parliament and Council: Action Plan on Unaccompanied Minors (2010 – 2014)*, COM (2010) 213 Final, European Parliament, 2010; *Identification of victims of trafficking in human beings in international protection and forced return procedures*, European Migration Network (EMN), 2014

<sup>5</sup> *Child trafficking in Europe: A broad vision to put children first*, UNICEF, 2008



forms of exploitation which are child specific, and the drivers and consequences of exploitation may also be child specific. This is an important perspective as in some states practice relating to trafficking, in so far as it existed, was dominated by responses to the trafficking of adult women for sexual exploitation and to a lesser extent the trafficking of adult men for labour exploitation.

In the recent past, civil war, insurgency and economic challenges in Syria, Iraq, Afghanistan, Eritrea and other parts of the Middle East and Africa has led an unprecedented number of children to seek safety and support in Europe. One immediate consequence of this migration flow is that the structures in place in European countries to assist children on the move struggle to cope with the sheer enormity of the tasks facing them. In Belgium, Germany and the Netherlands, this has led to well-established guardianship services not always managing to provide guardians in the timescale necessary to offer adequate protection to children who may have been trafficked. In Belgium and the Netherlands, steps have subsequently been taken to increase the number of guardians needed to support unaccompanied migrant children. In France, this has led to children's services leaving many children without accommodation or adequate support for prolonged periods of time and compromising their chances of a durable solution. In the United Kingdom, which did not bear the brunt of the huge increase in child migration, local authority children's services close to ports of entry became overwhelmed and a new dispersal process had to be put in place<sup>6</sup>.

It is not merely that the sheer number of migrants puts a strain on existing services. It also feeds into a growing anti-immigrant populism, which demonises both migrant adults and children as potential terrorists, criminals and delinquents. This has particularly adverse consequences for children who may have been trafficked and who are still in

the migration flow as they can no longer rely on random acts of kindness by strangers willing to investigate whether they should be on the street alone at night or working in unsuitable premises, for example. It also impacts on EEA national children such as children of Roma descent, who are often viewed and treated as outsiders.

It is widely accepted that this anti-immigration populism is one of the factors that led to the decision by the United Kingdom on 23 June 2016 to leave the European Union. It is a decision that may have adverse consequences for trafficked children in the future, but EU law will continue to apply until the United Kingdom actually leaves the Union. Furthermore, the United Kingdom has already incorporated many of the provisions in the EU Anti-Trafficking Directive and the Anti-Trafficking Convention into statute and policy, and its guardianship services contain many of the features recommended in the FRA Handbook. The good practice developed in the United Kingdom can act as an example to other EU states, but the fact that it is leaving the Union may make its example less powerful. It will certainly remove the influence that many members of civil society in the United Kingdom are able to bring to EU Commission-funded projects and platforms.

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<sup>6</sup> *Interim National Transfer Protocol for Unaccompanied Asylum Seeking Children 2016-2017*, Department for Education, Home Office & Department for Communities and Local Government, 2016

## II. EXECUTIVE SUMMARY

### The research identified the following general findings:

- 1 Many guardians and lawyers working with children do not have the experience and training to identify when these children may have been trafficked or are at risk of trafficking.
- 2 Some trafficked children have no control over their movement to Europe. Others will have no control over being trafficked once they reach Europe. In either case, children cannot consent to their exploitation.
- 3 Only two of the five states collect the necessary data to begin to analyse and understand child trafficking in their country.
- 4 Multi-agency national referral systems assist in providing such data on child trafficking and also help to identify more trafficked children.
- 5 Children who may have been trafficked are best identified and protected within an integrated children protection system, involving children's or youth welfare services, the police, the prosecution service, health and education services, independent guardians and NGOs.
- 6 Many guardians require enhanced training about different types of child trafficking and working with victims in order to play an essential coordinating role within such a system.
- 7 Guardians are best able to play such a role if they are part of an independent guardianship service, within which they are supported and supervised. This service should be an important part of the wider child protection system.
- 8 Their ability to protect and support a child who may have been trafficked is enhanced if lawyers and other professionals share essential information with them and give due weight to their opinions.

- 9 There are a number of obstacles that may prevent a trafficked child being identified and protected. These include a failure to provide suitable interpreters; a propensity by those in authority to challenge the ages of unaccompanied migrant children – often without due cause – and the speed at which a child may go missing if not provided with appropriate accommodation, services and a durable solution.
  - 10 The majority of the states are not implementing the protective presumption arising from the Anti-Trafficking Directive and Convention, which deems that a child is a child until it has been proven otherwise.
  - 11 Guardians and lawyers need to recognise that there is an increasing trend for children to be trafficked for the purpose of criminal exploitation, and that these children should not be treated as offenders.
  - 12 States need to ensure that children trafficked for the purpose of criminal exploitation are not arrested and prosecuted for offences they have committed as a result of being exploited. In particular, States need to implement the non-prosecution provisions contained in Article 8 of the EU Anti-Trafficking Directive and Article 26 of the Anti-Trafficking Convention.
  - 13 Due to the fact that a trafficked child is likely to have to engage with a range of complex legal and judicial processes, he or she needs to be represented by suitably trained and experienced lawyers.
  - 14 In many cases, a trafficked child may be appearing in a number of different courts and, where this is the case, his or her lawyers will need to liaise with each other and have at least a basic knowledge of the law being implemented in other court proceedings.
  - 15 A child's chance of obtaining justice is enhanced by the provision of publicly funded legal aid.
  - 16 A child's chance of obtaining justice is also enhanced by the provision of special protective measures in courts and tribunals.
  - 17 Trafficked children's long-term prospects are better protected if states put in place a formal multi-agency best interests determination process which is capable of identifying an individual durable solution for each child as required by Article 16.2 of the EU Anti-Trafficking Directive.
  - 18 A grant of refugee status is not a durable solution if it does not lead to the child's physical and psycho-social recovery.
  - 19 Returning an EEA trafficked child to his or her country of origin without due diligence between Member State authorities may impact on his or her physical and psycho-social recovery and could put the child at risk of being re-trafficked to another Member State.
  - 20 Permitting any trafficked child to simply remain in a state, with or without a residence permit, until he or she reaches the age of 18 does not equate to a durable solution and is unlikely to lead to his or her physical and psycho-social recovery, as required by Article 14.1 of the EU Anti-Trafficking Directive.
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### III. IDENTIFICATION

Article 11.4 of the EU Anti-Trafficking Directive places an obligation on Member States to take the necessary measures to establish mechanisms to identify those who have been trafficked as early as possible. This obligation is interpreted in very different ways by the five states, but consistent and accurate identification of trafficked children remains a challenge in all of them. It is also the case that mechanisms that are multi-agency in nature are likely to be able to identify a wider range of types of child trafficking<sup>7</sup>. Relying on the police or prosecution service<sup>8</sup> is an incomplete response as traffickers are rarely arrested and prosecuted, and children are trafficked for a wide range of reasons and not just criminal or sexual exploitation. Similarly, incorporating identification into asylum processes is likely to be beneficial to unaccompanied children who are channelled into this system, but it does not address the fact that many trafficked children will remain on the streets or hidden in communities, and that others will not qualify for refugee status.

Children are being trafficked for a range of different types of exploitation in the five states, but guardians and lawyers in many states do not have the information or training to recognise that this is the case. Traffickers may also change their methodologies in response to what they perceive to be new opportunities to exploit children and to avoid detection by the authorities. Children are generally unaware that they have been trafficked, either because they do not recognise the concept or understand their rights, or because they are being exploited by family members or those they perceive to be their protectors. There are also a number of barriers to disclosure, which include fear of retribution, debt bondage, a belief that they will be arrested as illegal entrants or an overwhelming feeling of shame<sup>9</sup>. It is in the areas of identification and challenges to obstacles to identification that both guardians and lawyers can play key roles – roles which will be more effective if located within a multi-agency child protection system. Guardians may also benefit from adopting the International Multi-Agency Assessment Framework (IMAF)<sup>10</sup> pioneered by the NSPCC in the United Kingdom. The IMAF has been developed

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<sup>7</sup> As is the case in The Netherlands and the United Kingdom

<sup>8</sup> The fact that data was only collected by the Federal Criminal Police was thought to be a particular problem in Germany; an overview of cases received by International Social Services between 2007 and 2015 involving Bulgarian and Romanian children indicated that about one third of the cases showed indicators of child trafficking

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<sup>9</sup> This was reported to be a particular feature when boys had been trafficked for sexual exploitation, for example, as ‘dancing boys’

<sup>10</sup> *Free to Move, Invisible to Care: Coordination and Accountability towards Romanian Unaccompanied Minors’ Safety*, ICARUS Project, NSPCC, 2015

as a tool for professionals to consider and guide their assessments for a child who has been or is being moved across geographical borders, looking at side issues that may impact on a child. It does not replace or come before protection responses required to ensure a child is safe from harm. It is a prompt to extend assessments and to remind professionals of the wider issues to consider, such as things a child might be fleeing and seeking. It also encourages professionals to focus more on accompanying adults, who they are and whether they have responsibility for the child<sup>11</sup>.

The research also indicates that effective identification is the necessary precursor to the provision of appropriate services and protection. Both the Council of Europe<sup>12</sup> and the OSCE<sup>13</sup> have recommended that states establish formal multi-agency national referral mechanisms to identify those who have been trafficked. These do exist in some states, but, even where they exist, they need further refinement. For example, in Belgium only four unaccompanied migrant children were referred for protection as children who have been trafficked, and only five were granted residence permits on this basis in 2014. Yet interviews with guardians, lawyers and other professionals confirmed that several of the unaccompanied migrant children identified in Belgium could be or are trafficked. The United Kingdom has a multi-agency national referral mechanism, which is in the process of reform, but its ability to identify trafficked children has been questioned by civil society<sup>14</sup> on the basis that it is not embedded in the wider child protection system.

Although even a multi-agency national referral mechanism may not identify all children who may have been trafficked<sup>15</sup>, the data does provide the information to formulate the strategies necessary to combat child trafficking as a crime and a human rights abuse. It is also a means of keeping track of the ever-evolving forms of child trafficking, which mutate as traffickers find new ways to exploit children and evade detection by authorities<sup>16</sup>. Such data is also essential when arguing for appropriate services to be established in a time when financial resources are said to be limited. A formal identification as a trafficked child provides guardians and lawyers with the basis on which to ensure that these children are provided with safe accommodation, psycho-social support, appropriate residence permits and that they are not wrongly convicted in criminal courts.

## RECOMMENDATIONS

1. States should establish multi-agency national identification mechanisms<sup>17</sup>.
2. States should devise a formal system for collecting, recording and sharing data on the age, gender and nationality of trafficked children, and the type of exploitation they were subjected to<sup>18</sup>.
3. This data should not be limited to unaccompanied migrant children who agree to cooperate with a criminal investigation or prosecution.

<sup>11</sup> Ibid

<sup>12</sup> Article 10.1 of the Convention requires Member States to provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings

<sup>13</sup> *National Referral Mechanisms: Joining Efforts to Protect Rights of Trafficked Persons: A Practical Handbook*, OSCE/ODIHR, 2004

<sup>14</sup> *Proposal for a Revised National Referral Mechanism (NRM) for Children*, The Anti Trafficking Monitoring Group, 2014

<sup>15</sup> For example, in 2014, 2,340 individuals were referred into the NRM, but the Independent Anti-Slavery Commissioner believed that there were up to between 10,000 and 13,000 trafficked people in the United Kingdom in that year; *Independent Anti-Slavery Commissioner's Strategic Plan 2015 – 2017*, Independent Anti-Slavery Commissioner, 2015

<sup>16</sup> *NCA Strategic Assessment: The Nature and Scale of Human Trafficking in 2014*, National Crime Agency, 2015

<sup>17</sup> Article 10.1 of the Council of Europe Anti-Trafficking Convention; *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, European Commission, 2012

<sup>18</sup> *The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, European Commission, 2012

## IV. OBSTACLES TO IDENTIFICATION

The research identified a number of obstacles to the successful identification of children who may have been trafficked. Sometimes the reason is simply that the systems previously established to cater for unaccompanied migrant children are not able to cope with the far higher number of these children arriving in a state, and, therefore, children end up in inappropriate accommodation or on the streets. In France, there have been particular concerns about the number of children who may have been trafficked who were living in the ‘jungle’ in Calais and in other temporary settlements<sup>19</sup> and the barriers which exist to them accessing French child protection services<sup>20</sup>.

### a. LACK OF INTERPRETERS

In some states<sup>21</sup> a lack of effective interpretation services is a barrier to identification. For example, in Germany, guardians and social workers reported that linguistic and cultural factors mean that children who may have been trafficked cannot communicate with staff in youth welfare services. This is despite the fact that guidelines<sup>22</sup> produced by the Working Group of Land Youth Welfare Services states that youth welfare services should immediately inform a child about next steps in the presence of an interpreter and possibly a guardian. In other states, the police and reception centres are not providing the interpreters needed to ensure that children who may have been trafficked could seek the assistance of a guardian or lawyer.

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<sup>19</sup> Grande-Synthe, Angres, Norrent Fontes, Steenvoorde, Tatinghem and Cherbourg (there are also similar camps in Belgium)

<sup>20</sup> It is hoped that the situation will improve when the provisions in the first French National Action Plan against Trafficking in Human Beings are in place; but progress in relation to children who may have been trafficked has been slow

<sup>21</sup> No particular problems were reported in the Netherlands or the United Kingdom

<sup>22</sup> Which are non-binding; see, for example, *Handlungsempfehlungen zum Umgang mit unbegleiteten minderjährigen Flüchtlingen*, 2014

In Belgium, lawyers and guardians reported that children who may have been trafficked are likely to require services of an interpreter and bemoan a shortage of interpreters for certain languages, which impacts on a child's right to be heard and to express his or her views. The research in France also identified that ad hoc administrators experience a range of difficulties in relation to interpreters. In particular, it is a challenge to access them and their quality varies. Moreover, there is sometimes concern about their neutrality. In addition, in many cases, professionals have to rely on other children or volunteers to interpret for them. Interpreters may be provided in the immediate context of a police hearing or court proceedings but not necessarily for a consultation with a lawyer outside court premises.

In contrast, in the United Kingdom, interpreters are recognised to be an essential component of any engagement with a child who may have been trafficked<sup>23</sup>. Where it is not possible to provide an interpreter at a particular location in a reasonable timescale, a child will be provided with an interpreter over the telephone. Statutory guidance<sup>24</sup> states that:

“No assumptions should be made about the child's language skills. Where interpreters are required, they should be appropriately trained to understand the particular issues the child may face. In particular, 'trafficking' as a concept may not translate literally or easily, and may need to be expressed in a different way to ensure the child fully comprehends their situation. Care should be taken and appropriate checks made to ensure that the interpreter is not linked in any way with those who may have been involved in their trafficking or exploitation.

Practice Guidance<sup>25</sup> also states that “interpreters should be used where English is not the child's preferred language. Under no circumstances should the interpreter be the sponsor or another adult purporting to be a parent, guardian or relative”.

## RECOMMENDATIONS

- 1 Member States should provide guardianship services or services that act as guardians and lawyers representing children who may have been trafficked with sufficient funding to ensure that they are provided with a qualified interpreter<sup>26</sup> who is proficient in the child's first language throughout any legal or judicial proceedings.
- 2 Lawyers should apply for any available public funding which may be available to pay for such an interpreter.

<sup>23</sup> *Standards to ensure that unaccompanied migrant children are able to fully participate: A tool to assist actors in legal and judicial proceedings*, CONNECT Project, 2014

<sup>24</sup> *Care of unaccompanied and trafficked children: Statutory Guidance for local authorities on the care of unaccompanied asylum seeking and trafficked children*, Department for Education, 2014

<sup>25</sup> *Safeguarding children who may have been trafficked*, Home Office and Department for Education, 2011

<sup>26</sup> In its Handbook, FRA states at page 99 that a guardian must facilitate communication between the child and legal representatives, when necessary, including by taking steps to organise the presence of a qualified interpreter; *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, FRA, 2014



## b. CHILDREN GOING MISSING

Both Europol<sup>27</sup> and the European Network of Ombudspersons for Children<sup>28</sup> have remarked that the criminal infrastructures which have been constructed within the recent migration flow into Europe place unaccompanied children at great risk of being trafficked. Once these children have entered a destination state, it is to the benefit of traffickers that they go missing so that the authorities cannot protect them. In other cases, the inability on the part of most states in continental Europe to provide adequate accommodation and support for the recent increase in migrants into Europe has meant that some children are trafficked after their arrival in Europe<sup>29</sup>.

The current research identified particular risk factors. Children went missing in Belgium very soon after their arrival at an observation and orientation centre before having been allocated a guardian or placed in specialist accommodation. Trafficked children went missing in the United Kingdom if they were not placed in safe and appropriate accommodation<sup>30</sup>. There was no specific data on trafficked children who went missing in Germany because they were rarely identified, but the fact that unaccompanied children were being placed in emergency shelters run by private firms without the supervision of a social worker or guardian was seen as a risk factor. The situation of unaccompanied children living rough in France in Calais and other camps along the coast was even more extreme. UNICEF<sup>31</sup> identified several situations of exploitation involving human trafficking which fell within the French definition of human trafficking. It was also a concern that the Vietnamese children living in Angres and Grande-Synthe were being trafficked for exploitation in cannabis farms. No guardians were provided for these children, and they were not placed in care until the camp at Calais was destroyed in November 2016. The Refugee Youth Service tracked 179 of the children being dispersed around France. It found that a third of these children are now missing and expressed concern that they are at risk of being trafficked<sup>32</sup>.

In the Netherlands, Nidos guardians are allocated to unaccompanied children shortly after their arrival at the Ter Apel Reception Centre, and these guardians use known indicators of child trafficking to identify children who should be transferred to a protected reception facility for trafficked children. Few of these children went missing at this stage. However, children do go missing at later stages in the process in the Netherlands.<sup>33</sup>

<sup>27</sup> *The Guardian* published an article in England on 30 January 2016 reporting on a statement made by Brian Donald, EUROPOL's Chief of Staff; this was said to be an underestimate by Michael O'Flaherty, the Director of FRA at the 10th European Forum on the rights of the child: The protection of children in migration in 2016

<sup>28</sup> *Safety and Fundamental Rights at Stake for Children on the Move*, ENOC, 2016

<sup>29</sup> For example, GRETA has noted that due to a lack of space in reception centres, unaccompanied children may end up in inappropriate accommodation or on the streets, where they run the risk of falling into the hands of traffickers; *GRETA's Fifth General Report: Urgent need to protect children from human trafficking and exploitation*, Council of Europe, 2016

<sup>30</sup> *Heading back to harm: A study on trafficked and unaccompanied children going missing from care in the UK*, ECPAT UK and Missing People, 2016

<sup>31</sup> *Neither Safe Nor Sound: Unaccompanied children on the coastline of the English Channel and the North Sea*, UNICEF France, 2016

<sup>32</sup> Almost one in three Calais child refugees missing since Jungle camp demolition, *The Independent*, 23 November 2016

<sup>33</sup> *Jaarbericht Kinderrechten 2016*, UNICEF Nederland en Defence for Children, 2015; in 2015, 160 children went missing, including 20 from the protected shelter for minor victims of trafficking



There is also a pilot project in the Ile de France region that is aimed at securing places in institutions for a limited number of child victims of trafficking, guaranteeing them support by trained professionals (the project already exists for adults through the Ac-Sé network). It is anticipated this pilot will improve protection for children likely to remain under hold of their exploiters via a safe placement, based on the necessity of geographical relocation, alongside support by trained staff. Once a trafficked child is in a specialist reception centre, the majority do not go missing, but this depends on the centres adopting suitable strategies to keep them safe, such as supervising them during the crucial first 48-hour period and building good relationships of trust with them<sup>34</sup>. However, when safety measures are imposed on a child, they can feel punished and imprisoned, especially if they do not see themselves as having been exploited or at risk. Some professionals have observed that carers who are overly anxious about a child's safety and keen to use highly restrictive safety measures can come across to the young person as being punitive<sup>35</sup>.

Guardians and lawyers in the Netherlands and the United Kingdom mentioned the need for short-term secure accommodation for trafficked children at high risk of going missing or being abducted. There is an ongoing discussion on the legality of detaining children in secure accommodation without judicial consent. The alternative, which is to place them with judicial authorisation in accommodation usually used for children who have committed crimes is also highly contested.<sup>36</sup> In its guardianship handbook, FRA advises that if a child is placed in a safe house where restrictions of movement are applied, decisions should be reviewed by judicial authorities every month to ensure that the placement is absolutely necessary for the safety of the child and is limited to the minimum time necessary<sup>37</sup>.

Research<sup>38</sup> in the United Kingdom also identified other factors that may lead to trafficked children going missing. These include the failure to build a relationship of trust with a trafficked child, social isolation, debt bondage and the fear of being re-trafficked. Debt bondage is likely to be a significant factor where a Vietnamese child has been trafficked for the purposes of criminal exploitation, and these children have regularly gone missing in both the Netherlands and the United Kingdom. This trend may be reversed if guardians and lawyers are trained to identify the particular characteristics of child trafficking for the purpose of criminal exploitation. Research in the United Kingdom has also found that trafficked children feel

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<sup>34</sup> These strategies have worked in the specialist accommodation for trafficked children run by Minor Ndako, Juna and Esperanto in Belgium; this is also the case in Northern Ireland where all unaccompanied migrant children are accommodated in a specialist children's home where staff are able to build relationships with them

<sup>35</sup> *On the Safe Side: Principles for the safe accommodation of child victims of trafficking*, ECPAT UK, 2011

<sup>36</sup> *De kwaliteit van de beschermde opvang voor alleenstaande minderjarige vreemdelingen*, Inspectie Jeugdzorg en Inspectie Veiligheid en Justitie, 2015

<sup>37</sup> See, for example, Article 37b of the UN Convention on the Rights of the Child; Article 5 of the ECHR

<sup>38</sup> *Heading Back To Harm: A study on trafficked and unaccompanied children going missing from care in the UK*, ECPAT UK, 2016

more secure when placed in a specialist foster placement<sup>39</sup>. In 2016, the Department for Education granted ECPAT UK and the Refugee Council a contract to run 60 four-hour training courses throughout England for foster parents and support workers on the care of unaccompanied asylum seeking and trafficked children.

The situation is different where a child is from the Roma community, and they may go missing from care on a regular basis<sup>40</sup>. This may be attributed in part to their loyalty to family and community, even if they have been trafficked and exploited by them. It may also arise from the fact that many of these children have been brought up to see their criminality as a necessary part of their lives. Roma children and other EEA national children are at additional risk when they go missing as they may be moved to another part of Europe because there will be no border controls to prevent this happening.

The research also indicated that states which have developed better data<sup>41</sup> on the number of trafficked children going missing and their specific characteristics, such as age, gender and nationality, have a greater understanding of the reasons why these children go missing. Such data was not available in the majority of states in this project. However, data collected by ECPAT UK through Freedom of Information requests to local authorities in the United Kingdom revealed that from September 2014 to September 2015 of the 590 children thought to have been trafficked, 167 children had gone missing at least once. It also confirmed that children of some nationalities were more likely to go missing<sup>42</sup>.

<sup>39</sup> *Evaluation of Barnardo's Safe Accommodation Project for Sexually Exploited and Trafficked Young People*, University of Bedfordshire, 2013

<sup>40</sup> *Free to Move, Invisible to Care: Coordination and Accountability towards Romanian Unaccompanied Minors' Safety*, Icarus Project, NSPCC, 2015; *Trafficking for Forced Criminality Activities and Begging in Europe: Exploratory Study & Good Practice Examples*, Anti-Slavery International, 2014

<sup>41</sup> For example, in the United Kingdom, the National Crime Agency publishes regular statistics; in addition, the NSPCC's Child Trafficking Advice Centre has been providing advice to professionals working with trafficked children since September 2007, and the keeping of detailed data has been a crucial part of its ability to identify trends and characteristics of different forms of child trafficking and devise strategies to protect these children

<sup>42</sup> Ten local authorities provided the nationalities of these children, and Vietnamese and British children were the most likely to go missing

<sup>43</sup> Article 14.2 of the EU Anti-Trafficking Directive

<sup>44</sup> Article 11.5 of the EU Anti-Trafficking Directive

<sup>45</sup> Article 14.1 of the EU Anti-Trafficking Directive; *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, FRA, 2014

## RECOMMENDATIONS

- 1 Children who may have been trafficked have to be provided with a guardian and specialist safe accommodation from the moment he or she is identified<sup>43</sup> and must not be placed in an emergency or general reception centre<sup>44</sup>.
- 2 The guardian must liaise with other professionals, such as the police, lawyers, public prosecutors and NGOs, to assess the risk of the child going missing and ensure that any other necessary steps are taken to protect the child from being re-trafficked or exploited<sup>45</sup>.
- 3 Guardians and lawyers have to be trained about child trafficking in general so that they can understand the particular risks which arise when a trafficked child is subjected to debt bondage, 'juju' or family and community pressures.

## c. AGE DISPUTES

Although data was not available for trafficked children, the ReACT Project country research suggests that the ages of unaccompanied migrant children who may also have been trafficked are being routinely challenged. For example, in 2015, 5,076 unaccompanied migrant children arrived in Belgium, and between January 2015 and March 2016, 2,099 had their ages challenged. Similarly, in 2015 in the United Kingdom, 3,043 unaccompanied children applied for asylum and 766 had their ages challenged<sup>46</sup>. In France, there is no data on age disputes, but several interviewees said that the ages of unaccompanied migrant children are systematically disputed. An interviewee in Belgium also believed that age disputes are being used as a migration management tool.

If a trafficked child is mistakenly believed to be an adult, he or she may be detained or placed in an adult reception centre with no access to child protection services or child specific procedures in any legal or judicial proceedings. In addition, not all states<sup>47</sup> provide children with guardians if their age is disputed, and, therefore, they will not have any adult to assist them to challenge any age assessment. The experience of having his or her age wrongly challenged is also likely to further traumatise a trafficked child and reduces the likelihood of full disclosure and engagement with the authorities.

Age disputes may also arise in criminal proceedings. States reported different ways to challenge age disputes in court proceedings. Statute and case law in the United Kingdom requires criminal judges to make 'due inquiries'<sup>48</sup>, and to take into account any relevant evidence at the hearing<sup>49</sup>. The Court of Appeal also found that, if at the end of the 'due inquiries' there remains a doubt, he or she should be treated as a child.

In most of the states, guardians and lawyers reported that immigration departments, and even at times guardianship services, are suspicious of identity documents provided by unaccompanied children, especially from countries such as Afghanistan. Traffickers may provide children with false documents so that their involvement will not be discovered<sup>50</sup>. Therefore, unaccompanied children are x-rayed<sup>51</sup> to ascertain their age in most states. This was despite widespread concern by clinicians<sup>52</sup>, guardians and lawyers that this methodology is inaccurate and unethical<sup>53</sup> because it exposes children to radiation

<sup>46</sup> *Immigration Statistics October-December 2015*, National Statistics Office, Home Office, 2016

<sup>47</sup> Temporary guardians are provided in Belgium if an age assessment is being challenged, and where guardians do exist in the United Kingdom and the child challenges an age assessment in the High Court or Upper Tribunal (Immigration and Asylum Chamber), children's services are routinely ordered to continue to accommodate them, pending a decision on their age by the court

<sup>48</sup> Children and Young Persons Act 1933, section 99(1)

<sup>49</sup> *L, HVN, THN, and T v R* [2013] EWCA Crim 991

<sup>50</sup> *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, FRA, 2014

<sup>51</sup> X-rays and dental examinations are not permitted in the United Kingdom; instead, age assessments are undertaken by local authority social workers, and any assessment can be challenged by the child by way of judicial review in the Upper Tribunal (Immigration and Asylum Chamber); *Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England*, Association of Directors of Children's Services, 2015

<sup>52</sup> See, for example, *The Health of Refugee Children – Guidelines for Paediatricians*, The Royal College of Paediatrics and Child Health, 1999; *Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control*, British Medical Bulletin, 2012; *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011; *Position Paper on Age Assessment in the Context of Separated Children in Europe*, SCEP, 2012

<sup>53</sup> In Germany paediatricians and radiologists disagree about this; a just published statement (30.09.2016) by the central ethic commission (Zentrale Kommission zur Wahrung ethischer Grundsätze in der Medizin und ihren Grenzgebieten (Zentrale Ethikkommission) on medical age assessment clearly asks to exclude x-ray and genital examination for the purpose of age assessment; see <http://www.zentrale-ethikkommission.de/page.asp?his=0.1.66>

for no therapeutic reason. The genitals of children are also examined in some states. In France, for example, since 2016, new legislation has stated that genital examinations are forbidden<sup>54</sup>.

The majority of states do not apply Article 13.2 of the EU Anti-Trafficking Directive and Article 10.3 of the Council of Europe Convention, and do not apply a presumption of childhood. The Directive states that where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection. The condition that there must be reasons to believe that the person is a child should be construed in the context of recital (8) to the Directive which states that, when applying the Directive, a child's best interests must be a primary consideration.

In England and Wales, Section 51(2) of the Modern Slavery Act 2015 obliges public authorities, but not courts, to apply the presumption where there are reasonable grounds to believe that a child has been trafficked until his or her age has been determined. Section 25(3) of the Human Trafficking and Exploitation (Criminal Justice & Support for Victims) Act (Northern Ireland) 2015 goes further and obliges all professionals working with a trafficked child in any setting to apply the presumption. This includes the police, the prosecution service and the judiciary, as well as those with welfare duties. The need to apply the presumption is also stressed in statutory guidance for local authority social workers<sup>55</sup> and was acknowledged in the Court of Appeal (Criminal Division)<sup>56</sup> in a case involving Vietnamese children trafficked for the purposes of criminal exploitation<sup>57</sup>.

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<sup>54</sup> Law n°2016-297, March 14th 2016 related to the child protection, article 43

<sup>55</sup> *Care of unaccompanied and trafficked children: Statutory guidance for local authorities on the care of unaccompanied asylum seeking and trafficked children*, Department of Education, 2014

<sup>56</sup> An association for directors working in local authorities in England

<sup>57</sup> *L, HVN, THN and T v R* [2013] EWCA Crim 991



## RECOMMENDATIONS

- 1 All states should, with due diligence, apply the presumption of age contained in the EU Anti-Trafficking Directive and the Council of Europe Convention on Action against Trafficking in Human Beings.
- 2 Guardians should apply this presumption, ensure that other professionals involved in the case of a child who may have been trafficked also apply it and, if necessary, instruct lawyers on behalf of the trafficked child if they do not<sup>58</sup>.
- 3 Until a final decision is taken in relation to the trafficked child's age, he or she should remain in appropriate safe accommodation and have a guardian to represent his or her best interests in relation to all relevant issues<sup>59</sup>.
- 4 States and guardians should take into account the research which indicates that the use of x-rays is an unreliable indicator of a person's chronological age, and that other medical tests estimate maturity as opposed to chronological age.

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<sup>58</sup> *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, FRA, 2014

<sup>59</sup> *Position Paper on Age Assessment in the Context of Separated Children in Europe*, Separated Children in Europe Programme, 2012; *The Fact of Age; Review of case law and local authority practice since the Supreme Court judgment in R(A) v Croydon London Borough Council [2009]*, Children's Commissioner for England, 2012; *R (PM) v Hertfordshire County Council [2010] EWHC 2056 (Admin)*

## V. THE PROVISION OF GUARDIANS

Article 16.3 of the EU Anti-Trafficking Directive states that Member States shall take the necessary steps to ensure that, where appropriate, a guardian is appointed to unaccompanied child victims of trafficking. There have been a number of projects<sup>60</sup> that have looked at the optimum standards to be adopted by guardians representing unaccompanied migrant children, and this report does not seek to repeat these. The 10 core standards for guardians can be found at Appendix B in this report. FRA has also published a report<sup>61</sup> and a handbook that looks at guardianship systems for trafficked children. It is its view that in order to cater for the needs of the most vulnerable groups of children, such as children who may have been trafficked, guardianship systems in EU Member States need to be strengthened and harmonised.

The systems in place in the five states involved in the ReACT Project vary considerably. In Belgium<sup>62</sup>, the Netherlands<sup>63</sup>, Northern Ireland<sup>64</sup> and Scotland<sup>65</sup>, there are guardianship services for all

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<sup>60</sup> *Towards a European Network of Guardianship Institutions*, Nidos Foundation, 2010; *Core standards for guardians of separated children in Europe: Goals for guardians and authorities*, Defense for Children, ECPAT the Netherlands, 2011 (endorsed by the Council of Europe – see <http://www.corestandardsforguardians.com/p/1/391/council-of-europe-refers-to-core-standards-for-guardians-as-a-good-example->)

<sup>61</sup> *Guardianship systems for children deprived of parental care in the European Union: With a particular focus on their role in responding to child trafficking*, European Union Agency for Fundamental Rights, 2015

<sup>62</sup> In Belgium, a guardian will also be provided for EU national children if they are in a position of vulnerability, and trafficked children are seen to be vulnerable

<sup>63</sup> Nidos provides guardians for unaccompanied non-EEA children, while The Youth Care Agency provides guardians for Dutch and EU children, where necessary, and in particular, for the purposes of this report, for children within the “lover boy” syndrome; the Salvation Army provides guardians for EEA children from the Roma community

<sup>64</sup> Human Trafficking and Exploitation (Criminal Justice & Support for Victims) Act (Northern Ireland) 2015, section 21

<sup>65</sup> This is the current non-statutory Scottish Guardianship Service; it is not clear whether it will be incorporated into the new statutory service provided for under section 11 of the Human Trafficking and Exploitation (Scotland) Act 2015, which should be operational in 2017



unaccompanied migrant children<sup>66</sup>. These services employ professional<sup>67</sup> guardians and provide their guardians with training, supervision and support. In France<sup>68</sup> and Germany<sup>69</sup>, there are some individual guardians, but most unaccompanied migrant children will be appointed a ‘public guardian’. This will be a local youth welfare office or an approved association. This does not conflict with the EU Anti-Trafficking Directive, which indicates that a guardian can be a legal person, an institution or an authority, but such arrangements do not appear to offer trafficked children the personal support and protection which they require, with a guardian focused on their best interests and free from potential interference from institutional policies. Additionally, there is often a delay or failure to appoint effective ‘public guardians’.

One feature of even the most developed of guardianship services was the inability of individual services to absorb the rapid increase in numbers of unaccompanied migrant children within the migration flow into Europe in the recent past<sup>70</sup>. One consequence of this is that children who may have been trafficked and who have not been allocated a guardian do not have an adult with the legal capacity to make necessary applications on their behalf<sup>71</sup>. The research also indicates that even professional guardians with training and experience of child protection issues struggle to identify children who may have been trafficked. This highlights the need for all guardians to be

provided with specialist training about child trafficking. For example, in the Netherlands, Nidos guardians who work with the protected reception centres for trafficked children are provided with extensive training about child trafficking, and Nidos guardians working at the Ter Apel Central Reception Centre are also trained to recognise child trafficking indicators, as are guardians working for The Salvation Army with Roma children who may have been trafficked. However, there are concerns that other guardians in the Netherlands are not receiving the necessary training to identify and protect children who may have been trafficked that they may encounter in other reception facilities. Pending the acquisition of further expertise, guardians in Belgium thought that it may be useful to establish pools of guardians with special expertise in relation to child trafficking or provide coaches within its guardianship service.

Guardians in Belgium also stressed the importance of the service being independent from the immigration and asylum service. This accords with the advice provided in the FRA Handbook, which states<sup>72</sup> that agencies or individuals whose interests could potentially be in conflict with the interests of the child should not be eligible for guardianship. Guardians should be in a position to make independent and impartial decisions, assessments and representations that are in the best interests of the child concerned, and that

<sup>66</sup> In contrast, in England and Wales, the UK Government has published a contract for a service providing independent child trafficking advocates to trafficked children in Hampshire, Wales and Greater Manchester

<sup>67</sup> In Belgium, some guardians are volunteers, as opposed to employees

<sup>68</sup> In France, unaccompanied migrant children identified at ports or in transit zones and who apply for asylum and children whose traffickers are subject to criminal proceedings are provided with a temporary ad hoc administrator (if no guardian is yet in place); however, there is no requirement to appoint an ad hoc administrator where a child is a defendant, even if he or she has been trafficked, or when an unaccompanied child has not yet applied for asylum and has not been assessed by local child protection services – there is a *tutelle* system where a child has been placed in the care of child protection services, but not all unaccompanied children who may have been trafficked are able to access such representation in practice

<sup>69</sup> There is no reliable data on how many professional guardians are working in Germany; the Association for Unaccompanied Minors’ estimate is around 30 professional guardians, and many of these professional guardians have been appointed in the region of Nuremberg and Fürth; as professional guardians are self-employed, they decide on how many wards they take on

<sup>70</sup> For example, in February 2016, there were 280 active guardians in Belgium who were responsible for 2,500 unaccompanied children (1,500 of these guardianships had been set up in 2015), and there were also 650 children who were waiting for a guardian to be assigned, a number which had decreased to 175 children by August 2016 as a result of a decision by the Ministry of Justice to double the number of guardians; research for this report also indicated that guardianship services in Germany and the Netherlands were also failing to be able to provide all unaccompanied children with a guardian in a timely manner; since then, Nidos has employed and trained a number of extra guardians so that they are able to effectively represent the children assigned to them.

<sup>71</sup> For example, they may not be able to apply for asylum without a legal guardian and may not be able to challenge a decision about their age or accommodation without an adult with legal capacity doing so on their behalf

<sup>72</sup> *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to care for the specific needs of child victims of trafficking*, FRA, 2014

promote and safeguard the child’s well-being. This approach has been adopted in the three pieces of trafficking legislation recently in force in the United Kingdom<sup>73</sup>.

The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 also addresses the issue of the provision of guardians to children who are British nationals or whose parents are also in the United Kingdom. It states in Section 21(4)(d) that an independent guardian can be appointed as long as the person holding parental responsibility for the child is not in regular contact with him or her if suspected of a trafficking offence in relation to him or her or for other reasons has interests which conflict with those of the child. The reference to a person in this section is not a reference to an institution acquiring temporary parental responsibility for a child as Northern Ireland is the only part of the United Kingdom where unaccompanied or trafficked children are regularly taken into the care, as opposed to merely being accommodated by children’s services.

The FRA Handbook states<sup>74</sup> that the guardian should hold public authorities accountable for any decisions affecting the child and ensure respect for the principle of the best interests as a primary consideration as required by Article 3 of the CRC throughout the decision making processes<sup>75</sup>. In order to enable guardians or advocates to undertake these tasks, the relevant sections of the three pieces of trafficking legislation<sup>76</sup> in the United Kingdom require other professionals to give ‘due regard’ to the independent guardian or advocate’s functions and to provide him or her with access to the information needed to carry out these functions. Guardians in Belgium also said that it was necessary for professionals to share information about a child, in keeping with any data protection laws.

The FRA Handbook notes<sup>77</sup> that an integrated child protection system places the child at the centre. It ensures that all essential actors and systems – education, health, welfare, justice, civil society, community, family and more – work in concert. It goes on to note that national guardianship systems are an integral part of child protection systems. Guardians in Belgium confirmed that they were assisted when they were able to work with the multi-agency teams which existed for children in the specialist reception centres for trafficked children. They also referred to themselves as playing a case management role and said that it was necessary for professionals to share information. Section 21 of the Human Trafficking and

<sup>73</sup> See, for example, Section 48 (2) of the Modern Slavery Act 2015; Section 11 of the Human Trafficking and Exploitation (Scotland) Act 2015 and Section 21 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

<sup>74</sup> *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to care for the specific needs of child victims of trafficking*, FRA, 2014

<sup>75</sup> See also Core Standard no.1.

<sup>76</sup> 48 (2) of the Modern Slavery Act 2015; Section 11 of the Human Trafficking and Exploitation (Scotland) Act 2015 and Section 21 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

<sup>77</sup> *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to care for the specific needs of child victims of trafficking*, FRA, 2014



Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 also explicitly states that one of the core functions of the independent guardian is to provide a link between the child, services and other professionals.

If there is an adult with parental responsibility for a child who may have been trafficked in the same Member State, the child will also need an independent guardian if there is a potential conflict of interest with that adult<sup>78</sup>.

## RECOMMENDATIONS

- 1 Each separated child or young person whose age is disputed and any child suspected of having been trafficked or at risk of trafficking, must be provided with a guardian immediately. In the case where there is a potential conflict of interest with any person who may have parental responsibility for the child, a specifically trained guardian must be provided.
- 2 All guardians should be provided with comprehensive training<sup>79</sup> about child trafficking before starting to work with unaccompanied migrant children.
- 3 Guardianship services should be independent of child protection and immigration services that will be responsible for making important decisions in relation to the individual trafficked child, in order to ensure that no conflict of interests arise. However, the Guardianship service must be located within an integrated child protection system.
- 4 Guardianship services should establish systems to supervise and support individual guardians and to ensure that they are accountable for their decisions.
- 5 Other professionals should give due weight to a guardian's opinions and decisions and share relevant information with them.

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<sup>78</sup> See, for example, Article 14.2 of the EU Anti-Trafficking Directive

<sup>79</sup> See the training programme developed within the ReACT Project and launched at a training for trainers event in January 2017

## VI. ACCESS TO SUITABLY TRAINED EXPERIENCED LAWYERS

The report has taken into account the content and recommendations of previous EU reports<sup>80</sup> and, in particular, the principles developed by ECRE in 2014.<sup>81</sup> The current research identifies difficulties in relation to compliance with these principles. Firstly, trafficked children do not always have prompt and effective access to quality legal assistance. For example, in Belgium, the Guardianship Law stipulates that the guardian should immediately appoint a lawyer for an unaccompanied child, but the research revealed that there are very few lawyers with sufficient understanding of child trafficking for a guardian to appoint. In contrast, when a child is placed in one of the specialist reception centres for trafficked children, the reception centre will often instruct its own lawyer. He or she will be someone who knows about child trafficking.

In contrast, in all the four constituent parts of the United Kingdom, there are private lawyers who specialise in representing trafficked children, and there are a number of specialist services<sup>82</sup>. This is partly as a result of asylum, immigration and civil law lawyers and their associations having identified the phenomena of child trafficking as far back as 1998<sup>83</sup>. However, within the criminal courts, duty solicitors at the Magistrates Court level have little knowledge or experience of child trafficking and the principle of non prosecution<sup>84</sup>. It is left to a handful of specialist lawyers at the appellate level to seek to overturn consequent wrongful convictions in the Crown Court or Court of Appeal.

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<sup>80</sup> See, for example, *Right to Justice: Quality Legal Assistance for Unaccompanied Children*, European Council for Refugees and Exiles (ECRE), 2014

<sup>81</sup> See also Core Standard for guardians nr. 5.

<sup>82</sup> Anti Trafficking & Labour Exploitation Unit in London and Anti-Trafficking Young People Project in Belfast

<sup>83</sup> In 1998, the Sussex Police began to identify young girls being trafficked into the United Kingdom for the purposes of sexual exploitation and asked local immigration lawyers to represent them

<sup>84</sup> See discussion in chapter VII below

In the Netherlands there is a list<sup>85</sup> of lawyers specialising in cases of children who may have been trafficked, and there are also specialist lawyers attached to Nidos. However, interviewees also said that they were concerned that lawyers who were appointed to represent children in the Ter Apel Reception Centre did not always have sufficient knowledge to identify when a child may have been trafficked.

It is also the case that trafficked children are not always able to access publicly funded legal aid in order to pay for a lawyer. For example, in France, legal aid is generally only available once an application has been refused and court proceedings have to be commenced, but bar associations have set up schemes to provide direct access to a lawyer. In practice, very few lawyers have yet encountered cases of child trafficking, but in several cities there are lawyers' groups which meet regularly and work with NGOs and experts to develop their knowledge on unaccompanied foreign children and issues they may face, including trafficking.

Very few children are recognised as having been trafficked in Germany, but it was reported that in asylum proceedings lawyers are often acting on a *pro bono* basis or are employed by a welfare or civil society organisation. The civil society organisation KOK (German NGO network against trafficking in human beings) also stated that, although the merit for legal aid is whether there is at least some prospect of success, in practice the threshold is much higher. In addition, trafficked children can be refused legal aid if they do not have the necessary documents to show that they do not have the financial means to pay for

a lawyer themselves. In contrast, in Belgium and the United Kingdom, an unaccompanied migrant child who applies for asylum or protection as a trafficked child will be entitled to free legal aid. He or she will also be entitled to legal aid if he or she seeks to challenge any decision related to an age assessment or the accommodation or services provided to him or her.

There is also doubt about whether lawyers have sufficient knowledge of the effects of child trafficking in order to take effective instructions. UNICEF guidance<sup>86</sup> states that it is important that lawyers working with children who may have been trafficked are listening to these children and giving sufficient weight to their experiences, taking into account their evolving capacities. This issue was picked up by lawyers in the Netherlands, who said that they needed further training in effective communication with children and had not been trained to hear what children were trying to say to them. They also mentioned that a cultural mediator<sup>87</sup> may also assist in communication.

## RECOMMENDATIONS

- 1 Law societies, bar associations and/or the Ministry of Justice should arrange comprehensive training for all lawyers who will potentially advise and represent children who may have been trafficked in asylum and immigration, child protection or criminal proceedings<sup>88</sup>.
- 2 All lawyers should be aware of the need to advocate for special measures in court to protect trafficked children against re-traumatisation and duress.

<sup>85</sup> Nidos guardians criticised this list on the basis that it included lawyers who rarely represented these children and, therefore, had not had the necessary experience to build up real expertise; they also stated that there was sometimes a delay before a lawyer could visit trafficked children placed in the remote protected reception centres

<sup>86</sup> *Child trafficking in Europe: A broad vision to put children first*, UNICEF, 2008

<sup>87</sup> For more details about cultural mediation, see, for example, *Safeguard: Safer with the Guardian: Transnational Report Europe*, Defence for Children Italy, August 2016

<sup>88</sup> The training needs of lawyers are further considered as part of the ReACT training for trainers event in January 2017

## VII. CRIMINAL EXPLOITATION

Article 2 of the EU Anti-Trafficking Directive includes criminal exploitation within the wider definition of exploitation. Recital (11) also explains that the expression ‘exploitation of criminal activities’ should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shoplifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain. Previous reports<sup>89</sup> have considered this particular manifestation of child trafficking but did not directly address the role of guardians and lawyers in identifying and representing these children.

The research indicates that the ability on the part of guardians and lawyer to identify situations of criminal exploitation may be very limited. It was reported that in a number of states children involved in street crime may be viewed as criminals and/or delinquents, and guardians and lawyers do not consider whether the pattern of crimes suggested that they have been trafficked. This is not a blanket response. The fact that Vietnamese children are exploited in cannabis farms and Roma children are obliged to undertake street crime is widely acknowledged in the United Kingdom<sup>90</sup>. In France, there is also a growing concern about children being trafficked for the purposes of criminal exploitation in large cities, such as Lyon, Lille, Marseilles and Paris, and about the limited response from social and judicial institutions. Some lawyers in France also reported prevailing bias against Roma children, that there was

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<sup>89</sup> *Child trafficking for exploitation in forced criminal activities and forced begging*, Intelligence Notification 16/2014, Europol, 2014; *Trafficking for Forced Criminality Activities and Begging in Europe: Exploratory Study & Good Practice Examples*, Anti-Slavery International, 2014; *Freedom to Move, Invisible to Care: Coordination and Accountability towards Romanian Unaccompanied Minors’ Safety*, Icarus Project, NSPCC, 2015

<sup>90</sup> *Modern Slavery Strategy*, HM Government, 2014



often no commitment to engaging with their community and that lawyers, judges and social workers did not necessarily have the skills, resources or time to gain their trust.

One obstacle to identification is that, although all five states recognise this form of exploitation, some included it under the heading of 'labour exploitation'. This tends to obscure the fact these children are also at risk of being arrested, prosecuted and detained. Furthermore, if they are treated as criminals, this may delay the appointment of a guardian, and it is unlikely that they will have sufficient trust in any lawyers they come into contact with to disclose full details of their exploitation. This will obviously impact on their ability to challenge the charges being made against them. If they require immigration status, it will also act as a barrier to them establishing a right to international protection.

It is also the case that many professionals seem to believe that child trafficking is exclusively linked to sexual exploitation<sup>91</sup>. Certainly, responses may be swifter when children have been trafficked internally for the purposes of child sexual exploitation. In the Netherlands, for example<sup>92</sup>, the indicators for child trafficking are largely those used to identify whether girls are being exploited by their 'lover boys'. A special task force has also developed a referral process for them<sup>93</sup>.

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<sup>91</sup> This attitude appeared to be very prevalent in Germany, but in October 2016 Germany incorporated the EU Anti-Trafficking Directive into national law and included a reference to criminal exploitation

<sup>92</sup> Similarly, in the United Kingdom, Local Safeguarding Children Boards tend to prioritise developing policies and processes to combat child sexual exploitation of national children who have been trafficked internally and to pay less attention to children trafficked for other purposes

<sup>93</sup> It is only more recently that it has been realised that these 'lover boys' are also targeting girls accommodated in general reception facilities

## VIII. NON PROSECUTION

The European Union<sup>94</sup>, the Council of Europe<sup>95</sup> and UNICEF<sup>96</sup> have all recognised that states need to take measures to ensure that children trafficked for criminal exploitation are not prosecuted for offences committed as a result of their exploitation, as well as those prosecuted for immigration offences as a direct consequence of their trafficking. However, the most common response<sup>97</sup> in the five states is to rely on the existence of discretion on the part of prosecution services or judiciary not to prosecute in certain circumstances. However, this discretion tends to be based on an understanding that a person should not necessarily be convicted for an offence he or she had committed under physical or mental duress, and it is not always obvious that a trafficked child has acted under such duress, particularly where states do not understand or apply the trafficking definition for children, which states that children cannot consent to their own exploitation. It may be that he or she had been trafficked and criminally exploited by a family member or had been subject to debt bondage and does not appear to disassociate him or herself from the trafficking gang.

Discretion may also not be exercised if a trafficked child's lawyer and guardian does not recognise that he or she has been criminally exploited. Children appear to be better protected if statutory guidance is issued to give force to the non-prosecution principle. This has happened in Scotland where the Lord Advocate has issued *Instructions to Prosecutors when considering the Prosecution of Victims of Human Trafficking and Prosecution*<sup>98</sup>, which includes the

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<sup>94</sup> Article 8 of the Anti-Trafficking Directive

<sup>95</sup> Article 26 of the Convention on Action against Trafficking in Human Beings

<sup>96</sup> *Guidelines on the Protection of Child Victims of Trafficking*, UNICEF, 2006

<sup>97</sup> This is the response in France, Germany and the Netherlands; prosecutors can decide not to prosecute if there is inadequate evidence or the individual has been coerced or subjected to blackmail or duress

<sup>98</sup> Issued under section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015

factors and steps to be taken into account when deciding when to prosecute where the actions of a child appear to have been done as a consequence of the child being trafficked. Lawyers in France also indicated that they would welcome similar guidance for magistrates in criminal courts and also provisions that could help prevent or suspend prosecution, sentencing and imprisonment.

In England and Wales, in 2013, the Lord Chief Justice heard a case<sup>99</sup> concerning a number of children who had been trafficked for the purposes of criminal exploitation in cannabis factories. He recognised that, under the United Kingdom's unwritten constitution, parliament and the government could not instruct the Crown Prosecution Service not to prosecute a class of defendants. However, he found that a decision taken by the prosecution which breaches Article 8 of the EU Anti-Trafficking Directive is likely to be an abuse of process, and that the judiciary can overturn convictions on this basis. The Lord Chief Justice also found that the correct test to be applied when a child had been trafficked and then criminally exploited was whether the offence committed by the child is consequent upon or integral to the exploitation for which he or she was trafficked<sup>100</sup>. Unfortunately, it remains the case that many duty criminal solicitors in England and Wales do not appear to have read this case or the guidance provided by the Law Society<sup>101</sup> – or be aware of the guidance provided by the Crown Prosecution Service for England and Wales<sup>102</sup>, which refers to the guidance in *R v L & Others* – despite ECPAT UK and others offering training on

this specific issue. Furthermore, it remains the case that, if a decision is made not to prosecute a trafficked child, the child may refuse child protection services and go missing<sup>103</sup>. Guardians and lawyers in the United Kingdom agree that action needs to be taken to strengthen child protection measures in these cases and to provide better and safer accommodation.

## RECOMMENDATIONS

- 1 States must provide statutory guidance to guardians, lawyers<sup>104</sup> and professionals within the criminal justice system about the non-prosecution principle contained in the Anti-Trafficking Directive and Convention.
- 2 Guardians, lawyers and child protection/criminal justice actors should be trained to identify whether a child defendant may have been trafficked and exploited for a criminal purpose<sup>105</sup> so that they can ensure that the police and prosecution services implement the Anti-Trafficking Directive and Convention.
- 3 If there is a doubt whether a child has been trafficked, the proceedings should be stayed and further investigations must be carried out without delay<sup>106</sup>.

<sup>99</sup> *L, HVN, THN & T v R* [2013] EWCA Crim 992

<sup>100</sup> This was a formulation which was found to be more appropriate for children as although Article 8 of the Anti-Trafficking Directive referred to 'compulsion', this was not compatible with the fact that the Directive did not require a child to prove the means by which they had been trafficked

<sup>101</sup> *Criminal Prosecutions of Victims of Trafficking*, The Law Society of England and Wales, 2016

<sup>102</sup> *Guidance on suspects in a criminal case who might be victims of trafficking or slavery*, Crown Prosecution Service, 2016; this guidance also advises prosecutors to ensure that victims are referred into the NRM, and that due enquiries are made about their age if they may be children

<sup>103</sup> This has been reported by the Salvation Army in the Netherlands, and lawyers and police officers in England

<sup>104</sup> If permissible in national law

<sup>105</sup> See, for example, indicators contained in *Trafficking for Forced Criminal Activities and Begging in Europe: Explanatory Study and Good Practice Examples*, RACE in Europe Project, 2014

<sup>106</sup> *L, HVN, THN & T v R* [2013] EWCA Crim 992

## IX. SPECIAL MEASURES IN LEGAL AND JUDICIAL PROCEDURES

Previous reports<sup>107</sup> have considered the need for measures to ensure that court proceedings in general are ‘child-friendly’, and that children are put at ease and that steps are taken to ensure that they understand the objectives and practicalities of the process in which they are involved. Unfortunately, the current research indicates that guardians and lawyers are rarely aware of the guidelines on child-friendly justice. The guidelines also refer to the need to protect the privacy and personal data of children, but often in cases of criminal exploitation, the name and addresses of children who have been trafficked are disclosed on public documents. This does not encourage children to come forward to give evidence against their traffickers. In addition, when trafficked children are in legal and judicial proceedings, professionals need to understand the likely effect of being trafficked on the ability of a child to give cogent evidence<sup>108</sup>.

Article 12.4 of the EU Anti-Trafficking Directive also requires Member States to take measures to prevent secondary victimisation by avoiding unnecessary repetition of interviews, visual contact between victims and defendant, and the giving of evidence in open court<sup>109</sup>. Some states are complying with this article, at least in part. For example, in the Netherlands, children who have been trafficked and are appearing as witnesses or defendants have their interviews recorded audio-visually. In Belgium, as a witness in a trafficking

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<sup>107</sup> *Child-friendly justice: Perspectives and experiences of professionals on children’s participation in civil and criminal judicial proceedings in 10 EU Member States*, FRA, 2015; *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, Council of Europe, 2011

<sup>108</sup> In the United Kingdom, ECPAT UK, Anti-Slavery International and other NGOs are at times called upon to provide expert reports to courts and tribunals to explain why this is the case

<sup>109</sup> See, for example, paragraph 34 of the UN Committee on the Rights of the Child’s General Comment No. 12 on the right of the child to be heard and Standard Fourteen of *Standards to ensure that unaccompanied migrant children are able to fully participate: A tool to assist actors in legal and judicial proceedings*, CONNECT Project, 2014



case, a child has the right to be accompanied by an adult of his or her choice, and, where sexual offences are involved, the child's testimony will be recorded before the trial<sup>110</sup>. In France, a child's evidence is also recorded when he or she has been trafficked<sup>111</sup>.

In the United Kingdom, children who are witnesses in criminal courts in trafficking cases are able to give their evidence from behind a screen or by video link. Special provisions are also available for trafficked children in the United Kingdom in the Immigration and Asylum Tribunal<sup>112</sup>. This includes special provision for gathering expert and other evidence before the hearing, the re-arrangement of the court room and the presence of responsible adults in court with a child.

## RECOMMENDATIONS

- 1 In order to avoid re-victimisation and secondary trauma, specific arrangements must be made in order to protect trafficked children (their identity, private life, etc.) who are witnesses in a criminal trial. For example, trafficked children should be able to give their evidence in chief on DVD or by video link, or they should be permitted to give their oral evidence from behind a screen.
- 2 These provisions should also be applied where the non-prosecution principle has not been fully applied and a child may be appearing as a defendant.

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<sup>110</sup> As required by the EU Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography

<sup>111</sup> Article 706-52 of the French Code of Criminal Procedure

<sup>112</sup> *Joint Presidential Guidance No. 2 of 2010: Child, vulnerable adult and sensitive appellant guidance*, Tribunals Judiciary, 2010

## X. OBTAINING IMMIGRATION STATUS AS A TRAFFICKED CHILD

The majority but not all children<sup>113</sup> who have been trafficked will require a residence permit if they are to reside in a country of destination lawfully. If they do, they will have to engage with immigration departments and courts. When they do so, their options are somewhat limited and presently do not provide them with the holistic protection they need as trafficked children. Some<sup>114</sup> trafficked children are granted refugee status on the basis that if they are returned to a country of origin, they will be re-trafficked and exploited or subjected to retribution or because they are from states<sup>115</sup> which are generally thought to be unsafe. It is often difficult to prove that a child faces a risk of re-trafficking or persecution in the future, and that the authorities in his or her country of origin will not be willing or able to protect him or her from any reprisals from trafficking gangs. This has presented problems in the United Kingdom, which has had a significant number of such cases where a child will not be returned until he or she is 18<sup>116</sup>. Lawyers in Belgium and the Netherlands pointed out if a child is recognised as a refugee, he or she may not be offered the additional protection and accommodation required by a trafficked child.

In theory, trafficked children may also qualify for subsidiary protection under Article 15 of the recast<sup>117</sup> Qualification Directive. However, the threshold for the grant of such leave is very high and few trafficked children are able to establish that they are at serious risk of inhuman or degrading treatment or punishment in their

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<sup>113</sup> National children and EEA children who can establish that they have a Treaty right will not need such a permit, but EEA children are likely to only be entitled to reside for an initial three-month period

<sup>114</sup> There was no data on the number of children granted asylum on this basis

<sup>115</sup> This varies from EU state to EU state but is likely to include countries such as Syria, Sudan and Eritrea

<sup>116</sup> *HD (Trafficked women)* CG [2016] UKUT 454

<sup>117</sup> The United Kingdom has not opted into the Recast Directive but can grant subsidiary protection under the previous Directive



country of origin, or, in the alternative, that there is an individual threat to their lives due to indiscriminate violence arising from international or internal armed conflict. Some states also offer children residence permits based on their status as unaccompanied migrant children, but this status comes to an end at the age of 18.

There are additional provisions for a residence permit to be granted on the basis that a child has been trafficked, but in practice very few children receive such permits. There are a number of reasons for this. Some states are choosing to rely on the EU Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings, or who have been the subject of an action to facilitate illegal immigration who cooperate with the competent authorities,<sup>118</sup> as opposed to the newer EU Anti-Trafficking Directive.

The research indicates that guardians and lawyers are not relying on either Directive. For example, in Germany, although trafficked children are theoretically entitled to a residence permit if they participate in a criminal trial against their traffickers, the youth welfare service is usually not aware of this provision. In France, if a child who is over 16 declares that he or she would like to undertake vocational training has broken off links with his or her traffickers and co-operates with the authorities, he or she is entitled<sup>119</sup> to a

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<sup>118</sup> 2004/81/EC (The UK had not opted into this Directive)

<sup>119</sup> Article R316-3 CESEDA

residence permit. In theory, such a permit can also be issued to a child as they become 18, if they have cooperated with the authorities in the past<sup>120</sup>. However, these options are not well known to relevant practitioners. There is also guidance recommending that Prefectures take into account that vulnerable individuals may not be able to cooperate and consider whether to grant them a permit on an exceptional humanitarian grounds.

Even where guardians and lawyers are aware of the earlier Directive, they may not advise the child to apply for a residence permit. In Belgium, for instance, the child has to accept support from a specialist reception centre and break all links with his or her traffickers. He or she is also required to cooperate<sup>121</sup> in the prosecution of his or her trafficker. The Immigration Office will grant a trafficked child a temporary residence permit if the child's presence is notified to the Office by the reception shelter. An indefinite residence permit will only be granted if his or her testimony results in a conviction or if the Public Prosecutor has initiated proceedings on the basis of the trafficking in human beings' offence. Many children are too afraid to name their traffickers in criminal proceedings or may not have enough evidence to provide. They may also not wish to give evidence against a family member, or their exploitation may have taken place outside Belgium. As a consequence, guardians often conclude that it would be in the child's best interests to apply for asylum or a residence permit as an unaccompanied child.

Linking the provision of a residence permit directly to the prosecution of a trafficker also means that a trafficked child may be penalised for a failure by the authorities to build strong cases against traffickers, which should not be solely dependent upon the child's own testimony. It also means that it may be the police, and not other professionals with primary child protection duties, who decide whether a trafficked child needs the protection of a residence permit. The contradictions this can lead to are exemplified by the situation in the Netherlands. The police are responsible for deciding whether a trafficked child is entitled to remain in the country for a three-month reflection period, and the child will have to file a complaint against his or her trafficker and cooperate in any subsequent criminal proceedings if he or she wishes to be granted a temporary residence permit<sup>122</sup>. In 2015, only 10 children were granted a temporary residence permit even though there were a hundred children who had been identified by Nidos as trafficked children and placed in a protected reception centre for trafficked children.

<sup>120</sup> *Instruction 19/05/2015: Conditions d'accès au séjour des ressortissants étrangers victimes de la traite des êtres humains et de proxénétisme*, Ministère de l'Intérieur, 2015

<sup>121</sup> Cooperation may, however, mean no more than making a statement, and not a complaint, to the police

<sup>122</sup> This is not required if the child can establish he or she has been subjected to a serious threat; is suffering from medical or psychological problems; if the police issue a declaration stating that there are indicators of trafficking which are sufficient to justify a prosecution or if the authorities have continued to try and trace a trafficker for three years without success



Furthermore, it is only the United Kingdom that is applying Article 14.1 of the Anti-Trafficking Convention, which also provides for a residence permit to be provided to a trafficked person where a competent authority considers that their stay is necessary owing to their personal situation. This has led to trafficked adults being granted permits in order to obtain medical or psychiatric treatment, complete a pregnancy or finish an educational course. Unfortunately, the provision is rarely applied to trafficked children. This is because a renewable residence permit under this provision is granted for a year and a day, and case workers at the Home Office believe that it is better to provide children with a residence permit as an unaccompanied child as this is likely to provide them with a residence permit until the age of 17.5 years<sup>123</sup>.

It is also the case that many EU children recognised as being trafficked are simply returned to their country of origin after a very limited best interests assessment. As many of these children may have been trafficked by or with the consent of their parents, this may lead to them being re-trafficked<sup>124</sup>.

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<sup>123</sup> Paragraph 352ZE of the Immigration Rules

<sup>124</sup> *Free to Move, Invisible to Care: Coordination and Accountability towards Romanian Unaccompanied Minors' Safety*, Icarus Project, NSPCC, 2015

## XI. FINDING DURABLE SOLUTIONS FOR TRAFFICKED CHILDREN

All five states have clear obligations to trafficked children under the EU Anti-Trafficking Directive, and Article 16.2 of this Directive obliges them to put in place the necessary measures to ensure that there is an individual assessment of the best interests of each trafficked child with a view to finding an appropriate durable solution for him or her. A durable solution can be defined as a sustainable solution that ensures that any child on the move is able to develop into adulthood in a safe and secure environment which will meet his or her needs and assert his or her rights as defined by the CRC, and will not put the child at risk of persecution or serious harm. Because the durable solution will have fundamental long-term consequences for children on the move, it must consider the child's views and wishes, and any decisions must be in their best interests. A durable solution also ultimately allows the child to acquire, or to re-acquire, the full protection of a state<sup>125</sup>.

This obligation was not being complied with in any of the five states. This was partly because there is no holistic best interests determination process in place. For example, in Belgium, Article 2 of the Guardianship Act states that the best interests of a child shall be the primary concern for guardians, but there is no practical guidance or methodology for how this principle should be applied. Similarly, in the United Kingdom, the Modern Slavery Act 2015, the Human Trafficking and Exploitation (Scotland) Act 2015 and the Human Trafficking and Exploitation (Criminal Justice and Support

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<sup>125</sup> *Durable Solutions for Separated Children in Europe*, SCEP, 2015

for Victims) Act (Northern Ireland) 2015 all state that guardians or advocates must at all times act in a trafficked child's best interests. However, no guidance is provided as to what is meant by the term 'best interests' and, if guardians or other professionals devise their own methodology, they will be acting in isolation as there is no multi-agency best interests assessment process in place<sup>126</sup>. This is despite there being multiple references to best interests in policies developed by UK Visas and Immigration and other parts of the Home Office<sup>127</sup>. Similarly, in the Netherlands, the Immigration and Naturalisation Service argues that it does take a child's best interests into account, but there is no formal process in place, and it does not include a transparent and individual best interest assessment in its decisions.

In France, there are general references to the interests of the child and the participation of the child in various legal provisions concerning the child protection systems and judicial decision-making, and Article 3.1 of the Convention on the Child can be directly invoked before courts. In practice, however, there is no practical guidance or methodology for assessing the best interest of a trafficked child or finding a durable solution. Instead, tensions between central and regional authorities (départements) and gaps in protection have left unaccompanied and trafficked children with very little, and sometimes no support from the French<sup>128</sup> authorities. This has notably been the case in Calais<sup>129</sup>.

In both France and Germany, there is also a fundamental failure to identify all but a few trafficked children, and, therefore, no best interests determination is possible even if a process is in place. For example, in Germany, as a matter of standard procedure, if an unaccompanied child is referred to the youth welfare service<sup>130</sup>, a best interest determination should take place within seven days (*Clearingverfahren*). However, due to the service being overwhelmed by the present number of unaccompanied migrant children, children are remaining in general reception centres, being dispersed between lander and are not being referred into the service. It is only when a child is in the care of the youth welfare service that multi-agency 'help conferences' (*Hilfeplankonferenz*) should take place every six months.

The failure to operationalise best interests procedures for trafficked children is at odds with recital (8) to the EU Anti-Trafficking Directive, which recognises that children are more vulnerable than adults and, therefore, at greater risk of being trafficked. It then goes on to remind states that a trafficked child's best interests must be a primary consideration in accordance with the Charter of Fundamental Rights of the European Union and the 1989 United Nations Convention on the Rights of the Child.

<sup>126</sup> *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/5, 2015

<sup>127</sup> See, in particular, *Guidance: Implementation of section 67 of the Immigration Act 2016 in France*, Home Office, 2016, which discusses 'best interests' determinations and states that, although social workers will carry out the determination, the final decision will be made by UKVI staff

<sup>128</sup> The authorities in the United Kingdom could also have processed the children that they were responsible for under Dublin III and the Dubs Amendment more efficiently and quickly

<sup>129</sup> *Neither Safe Nor Sound: Unaccompanied children on the coastline of the English Channel and the North Sea*, UNICEF France, June 2016

<sup>130</sup> Which is responsible for taking unaccompanied children into care and determining their 'best interests'

The UN Committee on the Rights of the Child has provided detailed guidance<sup>131</sup> as to the meaning of the ‘best interests’ assessment. The UNHCR and UNICEF have also issued practical guidance as to how such assessments should be undertaken where a child is unaccompanied or separated<sup>132</sup>. Within Europe, FRA has also provided detailed guidance in relation to the best interests of trafficked children in its Handbook<sup>133</sup>, but this has had little impact on state practice. At best, in the United Kingdom, UNICEF and UNHCR have held a number of meetings with government departments to urge them to adopt the recommendations in *Safe & Sound*. UNICEF has also published a new report<sup>134</sup> recommending that a multi-agency best interests determination process is established in order to find a durable solution for each individual trafficked child that it is embedded in existing child protection processes, such as Multi-Agency Safeguarding Hubs<sup>135</sup>.

Belgium is the only state to address the need for a durable solution in legislation, and guardians are responsible<sup>136</sup> for finding durable solutions for non-asylum seeking unaccompanied children, including trafficked children. Guardians also agree that, when determining a durable solution, they must take into account all the elements that affect the child, and that the definition of the durable solution should be seen as a broad and dynamic concept. However, the provision only applies to children in the unaccompanied child procedure and guardians have been provided with no agreed definition of a durable solution.

The research also indicated that there was a reluctance on the part of state authorities to establish a stand-alone best interests determination process leading to a durable solution, because this may threaten the integrity of immigration control systems. In particular, research in the United Kingdom indicated that the Home Office would not support an assessment which was not part of its own asylum and immigration determination process. This position was recently confirmed in its *Guidance: Implementation of section 67 of the Immigration Act 2016* in France.

This issue was raised within the EU Commission-funded project on *Durable Solutions for Separated Children in Europe*<sup>137</sup>. In the United Kingdom, The Children’s Society was a partner in this project and recommended in its country report that an alternative child protection status should be explored for separated children who do not qualify for asylum<sup>138</sup>. UNICEF UK made a similar recommendation in relation to trafficked children in its report<sup>139</sup>. This was also raised by Defence for Children, ECPAT and others in the Netherlands and Belgium.

<sup>131</sup> *General Comment No. 14 on the right of the child to have his or her ‘best interests’ taken as a primary consideration*, 29 May 2013, CRC/C/GC/14

<sup>132</sup> *Safe & Sound: What states can do to ensure respect for the ‘best interests’ of unaccompanied and separated children in Europe*, UN High Commissioner for Refugees (UNHCR), 2014

<sup>133</sup> *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to care for the specific needs of child victims of trafficking*, FRA, 2014; *Achieving a durable solution for trafficked children*, UNICEF, 2015

<sup>134</sup> Article 11.1 of the Guardianship Law

<sup>135</sup> The co-location of representatives of authorities with child protection duties, such as children’s services, the police, health and education authorities and youth offending teams, where they share information on the child and decide on safeguarding priorities

<sup>136</sup> Article 11.1 of the Guardianship Law

<sup>137</sup> *Durable Solutions for Separated Children in Europe*, Irish Refugee Council, 2015

<sup>138</sup> *Not just a temporary fix: The search for durable solutions for separated migrant children*, The Children’s Society, 2015

<sup>139</sup> *Achieving a durable solution for trafficked children*, UNICEF, 2015





## RECOMMENDATIONS

- 1 Each state should establish a best interests determination process to determine the durable solution most appropriate for each individual trafficked child.
- 2 Guardians should actively contribute to the determination process, making sure the views of the child are adequately heard<sup>140</sup>.
- 3 Lawyers should be trained to be alert to the legal obligation to make a best interests determination to ascertain the appropriate durable solution.

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<sup>140</sup> *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, FRA, 2014

## APPENDIX A: METHODOLOGY

The objective of the ReACT Project is to contribute to ensuring effective access to justice for children who may have been trafficked into and within EU Member States. It builds upon existing and proposed EU instruments and the tools developed in previous EU-funded projects, such as the RACE, CONNECT and SUMMIT projects. In order to deliver this objective, it was recognised that it may be necessary to augment the current skills of those representing these children, namely guardians and lawyers.

The starting point for the project was detailed practical research in five Member States: Belgium, France, Germany, the Netherlands and the United Kingdom. The first phase involved desk research, which focused on the ability of these states to identify children who may have been trafficked, as well as the role which guardians and lawyers played in identifying and protecting these children and guiding them through any legal and judicial processes. It identified a significant failure in most of the five states to collect and record the data necessary to construct a protective environment for children who may have been trafficked, and a lack of understanding by and training for many guardians and lawyers. After a briefing meeting in Paris on 12 February 2016, the country researchers undertook a period of field research, which focused on interviews with guardians and lawyers in each state. Other professionals involved in national child protection and criminal justice systems, including social workers, staff in reception centres, police officers, judges and NGO staff, were also interviewed when this was necessary in order to obtain a comprehensive view of what was happening in a particular state.

Five country reports were completed over the summer and early autumn of 2016. They indicate that there is a significant variation in legislative provision, policy and practice relating to children who may have been trafficked between the five states. In some states, there was a significant lack of engagement by guardians and lawyers with these children. As a consequence, examples of good practice tended to be found in some states as opposed to others. However, there were certain common concerns and responses.

The third stage of the project involves the development of multi-disciplinary training tools, based on the needs identified in the earlier stages of the project. These will be used at a training for trainers event in the Netherlands in 2017 and then adapted for use in the five Member States later in the year.

## APPENDIX B: CORE STANDARDS FOR GUARDIANS OF SEPARATED CHILDREN IN EUROPE

**STANDARD 1:** The guardian advocates for all decisions to be taken in the 'best interests' of the child, aimed at the protection and development of the child.

**STANDARD 2:** The guardian ensures the child's participation in every decision which affects the child.

**STANDARD 3:** The guardian protects the safety of the child.

**STANDARD 4:** The guardian acts as an advocate for the rights of the child.

**STANDARD 5:** The guardian is a bridge between and focal point for the child and other actors involved.

**STANDARD 6:** The guardian ensures the timely identification and implementation of a durable solution.

**STANDARD 7:** The guardian treats the child with respect and dignity.

**STANDARD 8:** The guardian forms a relationship with the child built on mutual trust, openness & confidentiality.

**STANDARD 9:** The guardian is accessible.

**STANDARD 10:** The guardian is equipped with relevant professional knowledge and competences

