

Unaccompanied and separated children in the asylum system in Ireland

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1. Introduction

The movement of unaccompanied and separated children across international borders creates very real challenges for governments, NGOs, and most importantly, children themselves.

The many challenges involved in providing protection to these children are compounded by the fact that identifying unaccompanied minors as minors is not always a straightforward process. Some of the children I have worked with come from societies where the date of birth is not systematically recorded. There may not even be a central authority to record births on a national basis in the country they are from and, in the circumstances the child simply cannot provide satisfactory 'official' proof of age.

2. Definitions of 'unaccompanied' children and/or 'separated' children

The terms 'unaccompanied' and 'separated' children are often used interchangeably and a number of countries around the world have developed different definitions for these same terms as they apply within the context of their immigration, asylum, child protection and criminal justice systems.

The **UN Convention on the Rights of the Child (CRC)** provides definitions for child, unaccompanied children and separated children:

A child is every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

Unaccompanied children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.

Separated children are children who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

In the United States, an 'unaccompanied alien child' is a child who:

- (a) has no lawful immigration status in the United States;
- (b) has not attained 18 years of age; and
- (c) with respect to whom—
 - (i) there is no parent or legal guardian in the United States; or
 - (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

The word 'unaccompanied' therefore covers both children regarded as 'separated' **and** children regarded 'unaccompanied' under the CRC.

The (UNHCR/UNICEF/Save the Children) SCEP Statement of Good Practice for Separated Children in Europe goes the opposite way with the term 'separated' children preferred over 'unaccompanied' to apply to both CRC categories. The word 'separated' is considered to better define the essential problem that such children face being without the care and protection of their parents or legal guardian and as a consequence suffer socially and psychologically from this separation:

Separated children are under 18 years of age, outside their country of origin and separated from both parents, or their previous legal, or customary primary caregiver. Some children are totally alone while others, who are also the concern of the SCEP, may be living with extended family members who are not necessarily their customary or primary caregivers. All such children are separated children and entitled to international protection under a broad range of international and regional instruments

Section 8(5) of the Irish Refugee Act 1996 (as amended), provides that an 'unaccompanied minor'

is a child under age 18 who has arrived at the frontiers of the State or entered the State and who is not in anyone's custody.

The section, which is quite vague because of the reference to 'custody', can therefore apply to both CRC categories as long as 'custody' refers to the custody of parents or official guardians only (custody can have a far wider meaning).

Section 8(5)(a) provides that if an immigration officer or authorised officer

believes that a person under 18 years of age who is not in the custody of another person has arrived at the frontiers or in the State, she or he should inform the relevant health board (now the HSE) as soon as possible. The minor will then be looked after according to the provisions set out in the 1991 Child Care Act.

3. Family reunification

If the child, having arrived alone, is then re-united with his or her parents or with an adult who was already his or her guardian in the country of origin then they are no longer an unaccompanied or separated child although it is very important to record them as a child that **was** unaccompanied when he or she came to the State for the purposes of an application for protection (refugee and/or subsidiary), particularly if the claim made is based upon a separate and distinct risk of persecution or serious harm and/or events that may have occurred after the parent/guardian left the country of origin.

After re-unification, the decision on whether or not to apply for protection falls to the parent/guardian and the applications usually proceed in the same way as they would for any child that has been with the parent(s)/guardian all of the time.

4. The numbers of ‘un-accompanied and/or separated children applying for asylum in Ireland

The number of unaccompanied and/or separated children (the terms are used interchangeably in ORAC statistics) applying for asylum has fallen in line with the number of refugee applications in general over the past few years, remaining at roughly 2% of all asylum applications since 2009. In absolute terms, this is 20 – 40 children a year. In 2001, when we had over 10325 new applications it was 600+.

5. The rights of unaccompanied and separated children seeking asylum

The legal framework for working with unaccompanied and separated children applying for protection is best articulated in the CRC, which was ratified by Ireland in 1992. The focus of the Convention is first upon the child, rather than the nationality or legal status of the child. The four core principles of the Convention are: the right to life, survival and development; the right to non-discrimination; the right to participation; and, of course, the best interest of the child.

In relation to asylum, Article 22(1) of the Convention provides:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other human rights or humanitarian instruments to which the said States are Parties.

Article 22(2) provides that

in cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason.

6. Children’s asylum claims – UNHCR Guidelines 2009

The UNHCR has released guidelines on international protection specific to children’s asylum claims that references the core principles of the CRC and provides both procedural and substantive guidance about how asylum claims made by children should be dealt with (Guidelines on International Protection: Child Asylum Claims under Articles 1(A)(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees HCR/GIP/09/08, 22 December 2009).

UNHCR Executive Committee Conclusion No. 38 “Refugee Children” (1987) also stresses that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child. The UNHCR Guidelines on Best Interest Determination is the most comprehensive outline and implementation of this key principle. The Guidelines on International Protection Child Asylum Claims (see above) similarly cite the principle of the best interests of the child.

7. Unaccompanied/separated children's claims – UNHCR Guidelines 1997

While the guideline referred to above apply to all child asylum claims, there are specific UNHCR Guidelines on Principles and Procedures in dealing with Unaccompanied Children Seeking Asylum (UNHCR's Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, 1997) which recommend that when a protection decision maker is making a decision about a separated child's refugee claim he or she should have particular regard to:

the age and maturity of the child and their stage of development

the possibility that children may manifest their fears differently from adults

the likelihood will have limited knowledge of conditions in their country of origin

the need for a liberal application of the benefit of the doubt.

8. SCEP Guidelines

The Separated Children in Europe Programme (SCEP) *Statement of Good Practice*, March 2010, 4th Revised Edition, which was developed by the UNHCR, UNICEF and Save the Children, and a similar status to UNHCR guidelines, provides

Some separated children travel to, or within Europe because they are fleeing persecution, forced conscription, conflict and upheaval. Such children, regardless of their age, country of origin, method and route of travel or whether they entered or moved within Europe legally or illegally must never be denied access to procedures which grant international protection, including, where relevant consideration of whether or not their circumstances meet the criteria set out in the 1951 Refugee Convention.

Decision makers need to be aware that some forms of persecution are specific to children and that some human rights violations impact upon children more severely. Separated children must never be removed from the country without a thorough determination of their asylum application and their best interests, ensuring fundamental procedural safeguards, and the identification of a durable solution.

...Separated children must not be fitted into procedures designed for adults and decision making bodies should design procedures that are appropriate to the needs of children and their levels of understanding.

...Authorities should specifically consider the:

Age and maturity of the child and their stage of development

Possibility that the child may manifest their fears and experiences differently from adults

Possibility that the child will have limited knowledge of conditions in their country of origin

Existence of child-specific forms of human rights violations, such as, but not limited to, recruitment of children into armies, trafficking for sexual exploitation, female genital mutilation and forced labour

Situation of the child's family in their country of origin and, where known

the wishes of parents or primary caregivers who may have sent the child out of the country in order to protect them

Harmful actions which might be considered as harassment or discrimination when applied to an adult, may constitute persecution when applied to a child

*Therefore, in the examination of the protection needs of a separated child it may be necessary to have greater regard to certain objective factors, and to take those into account when making determinations about whether a child may be at risk of harm or presumed to have a well-founded fear of persecution based upon these. **A liberal application of the benefit of doubt should be applied when making determinations on the international protection needs of separated children.***

(These provisions reflect CRC Arts. 3, 12, 22, 32, 34, 35, 36 & 37 and the UNHCR Guidelines, paragraphs 8.6 - 8.10, 9.7 & 10.4)

9. E.U.

In a similar and perhaps more concise manner, EU Council Resolution of 26th June 1997 on Unaccompanied Minors who are Nationals of Third Countries (97/C 221/03) states:

6. When an application for asylum from an unaccompanied minor is examined, allowance should be made, in addition to objective facts and circumstances, for a minor's age, maturity and mental development, and for the fact that he may have limited knowledge of conditions in the country of origin.

Regulation 5 (1) (c) of the European Communities (Eligibility for Protection) Regulations, 2006 provides that the protection decision maker must consider individual position and circumstances of the applicant including gender and age.

10. Practical application of the guidelines in asylum claims

a) Trying to establish 'a well-founded fear'

It must be recognised that children may not be able to articulate their 'subjective' fear with any great precision (or at all). Decision makers may therefore need to rely more heavily on objective evidence. The application of this balance will depend upon the child's maturity, capacity, understanding and developmental stage.

b) Credibility

Generally, the standard for credibility is that the evidence provided the applicant is coherent and plausible. However, the UNHCR guidelines call for a 'liberal' application of benefit of the doubt when dealing with children. It is also well known that children may express experiences of abuse and exploitation in ways that are non-verbal. Children may have 'proof' of abuse in the form of physical and psychological impact, but may not be able to provide other types of evidence (even oral evidence) of what happened to them. This should not detract from their case. Practitioners and decision makers need to be alive to these issues and look out for signs of trauma.

c) Persecution

The decision maker should consider persecution from the child's point of view. Really taking into consideration the child's point of view can mean that the harm a child suffers or fears may be less 'serious' than an adult but still qualify as persecution for a child. The specific developmental and psychological stage of the child can impact this analysis.

Under the CRC, children are entitled to a range of rights that recognize their young age and dependency and are fundamental to their development and survival. A violation of any one of these rights could constitute persecution or if there are serious systematic or multiple violations of rights, these taken together can constitute persecution. A straightforward example is a child being denied access to primary education because they belong to a certain ethnic group.

The 2009 UNHCR Guidelines on Children's Asylum Claims reference child-specific forms of persecution such as under-age recruitment, domestic violence, female genital mutilation, child trafficking and labor, and violations of social, economic and cultural rights.

d) The persecutors/source of persecution

In adult cases, the agents of persecution (the persecutors) tend to be State agents or actors - government, army, police, quasi-official government groups. In cases involving children, it is more common that **non-state** actors have inflicted persecution. This can often occur, for instance, in intra-family abuse, blood feuds, and gang-based violence. The 2009 UNHCR guidelines indicate that there should be a flexible framework in applied in examining government unwillingness or inability to control the alleged persecutors that can include the absence of child welfare services, failure of states to intervene to protect children, failure to effectively implement a protective law, and objective evidence of high rates of harms to children or patterns of persecution.

e) Convention grounds

While children asylum seekers must establish persecution on one of the 5 Refugee 'Convention grounds' – race, religion, nationality, social group or political opinion, a child may not always be able to establish direct or circumstantial evidence of motive, particularly for culturally accepted harmful-practices such as, for example, FGM. The 2009 UNHCR Guidelines on International Protection indicate that it is sufficient that one of five grounds be a factor relevant to persecution, but it is not necessary that it

is the sole or dominant cause. In relation to social group, it is noted in the guidelines that being a child can (in itself) be an immutable characteristic at any given time. The guidelines also describe possible social groups as including children, abandoned children, orphans, children born outside coercive family practices, street children, children with HIV/AIDS, and children singled out for recruitment or use by an armed force or group.

11. Application of these guidelines in Ireland – judicial reviews of asylum decisions

To gain an insight into how unaccompanied minors have been treated in the asylum process, I would like to look at 2 judicial review decisions relating to decisions of the RAT in 'unaccompanied minor' cases:

O. (a minor) v MJELR and RAT [2010] IEHC 151 Unreported High Court Edwards J 5 February 2010.

K.N.Q. v MJELR and RAT [2013] IEHC 117 Unreported High Court Clark J 14 March 2013

In the O. case the applicant was an unaccompanied minor from Afghanistan. He was 13 when he came to Ireland and 14 when the refugee appeal hearing took place. He claimed asylum on the basis of a fear of persecution both by the Taliban and the Afghan government (as a suspected child fighter). The Refugee Appeals Tribunal refused his refugee appeal on the grounds that 14 year old applicant was not credible and that his claim was not objectively well-founded. The age of the applicant is not mentioned at all in the decision nor was there any reference to the benefit of the doubt.

The High Court quashed the appeal decision on the grounds that the Tribunal Member had engaged in impermissible speculation and conjecture in relation to the applicant's prospect of State protection in Afghanistan, that the Tribunal Member had imputed expectations to the applicant without any consideration of his level of maturity at the time, and that the Tribunal Member had failed to consider whether the applicant's fears in relation to the Taliban were realistic having regard to his age, maturity and the particular circumstances in Northern Afghanistan.

The key finding of the TM was:

"The applicant has no interest in joining the Taliban and it is difficult to understand what use he would be to the Taliban if they had to force them to join their organisation. Further, it is difficult to understand that, knowing the applicant's opposition to join the Taliban, the Taliban would warn the applicant that on the next occasion they would take him by force -- thereby affording the applicant an opportunity to escape. When asked if he had complained to the Government forces about his harassment by the Taliban and if he told the Government that he had no interest in joining the Taliban the applicant said that he had not as the Government was also his enemy. One would expect that considering the applicant did not want to join the Taliban, and the Government's attitude towards the Taliban and the fact that they were warning the applicant not to join the Taliban, that the applicant would

have at least informed the Government of his difficulties with the Taliban, even if just to abate his difficulties with the Government. The applicant's account in this regard, again, would not appear to be credible or well founded."

Edwards J found:

It seems to the Court that the Tribunal member's decision with respect to the applicant's claimed fear of persecution by the Taliban is largely based on speculation and conjecture. ...No country of origin information is called in aid to support the decision with respect to the apprehended fear of the Taliban. In particular she does not engage with the applicant's expressed worry that he was at risk of being press-ganged as a child soldier or that he might even be forced to undertake a suicide bombing. To the extent that there is a consideration of the possibility that the applicant could have availed of state protection the approach is speculative and conjectural, particularly in circumstances where the available country of origin information, referred to in para 4.6.ii of the s. 13 report, was to the effect that the availability of state protection in Afghanistan is confined to certain parts of the country, such as Kabul.

In the absence of extrinsic evidence tending to show that the claimed fear was not well founded when considered objectively, the tribunal member should not have speculated or engaged in conjecture in the way that she did, but rather should have proceeded to consider the applicant's subjective credibility. Moreover, in doing so, she was required to liberally apply to him the benefit of the doubt having regard to his age and immaturity. During the course of the hearing Counsel for the applicant complained, in the Court's view fairly, that the Tribunal imputed expectations to the applicant without any consideration of his maturity or as to whether those expectations were realistic having regard to his maturity and particular circumstances. The Court considers that the applicant was not afforded a fair hearing in all the circumstances and that the Tribunal member's decision to affirm the recommendation of the Refugee Applications Commissioner to the effect that the applicant should not be declared to be a refugee was flawed, and ought to be quashed by Order of Certiorari.

In the Q. case, the applicant presented to the ORAC as a deaf 17-year old unaccompanied minor and he submitted an Iraqi national identity card in support of his age and identity (he was quite ill at the time and was receiving medical assistance) The Commissioner questioned the validity of his identity card and that document was therefore deemed insufficient evidence of his age. His claim was that his father was a high-ranking (Kurdish) member of the military in the Ba'ath party in Kirkuk. Following the fall of Saddam Hussein's regime in 2003 his father's position as a former Ba'athist was not secure and he came under threat. His application was refused by ORAC on credibility grounds and he was treated as an adult.

On appeal, the Tribunal member accepted that the applicant was in fact a minor when he was interviewed but, notwithstanding references to the treatment of children at interview, her analysis of the claim involved frequent comparisons between what the applicant said in his asylum questionnaire, what he said at his s. 11 interview (when he claimed to be a minor but was treated as an adult) and what he said at his

oral appeal hearing. The Tribunal Member made a number of credibility findings on this basis.

The Tribunal Member also questioned why the applicant, a Kurd, did not seek asylum in Turkey "where millions of Kurds live (and) where there is nothing to suggest that there is systematic persecution of Kurds". She rejected his explanation which was his belief that people cannot seek asylum in Turkey and that Kurds are persecuted there. She found it incredible that a person as sick and as young as the applicant claimed he was would have chosen to travel in a truck for thirteen or fourteen days rather than seek help as soon as practicable after leaving Iraq.

While the Tribunal Member did accept that the applicant had a serious ear injury, she said she found it difficult to believe that this injury arose in the manner asserted. The Tribunal Member attached little evidential value either to the medical reports regarding the applicant's ear injuries or to the further documentary evidence produced, namely a school report from Kirkuk, and his father's death certificate. These were described as documents which "could not be authenticated".

The High Court quashed the appeal decision on a variety of grounds including that the Tribunal Member had ignored the guidelines in the knowledge that the applicant was an unaccompanied minor whose interview was conducted without the usual safeguards for children and that while the Tribunal Member referred to the need for a liberal application of the benefit of the doubt to the claims of minors, there is no evidence of any such application in this case.

Clark J found:

24. It appears to the court that the applicant's identity, ethnicity and age were accepted by the Tribunal Member. It follows that the applicant was 17 years old when his initial s. 11 interview was conducted; 16 when his father was killed and approaching 13 when Saddam Hussein was overthrown and when he ceased going to school. In circumstances where the Tribunal Member quoted best practice attaching to the treatment of minors at interview, it is puzzling that she then ignored those guidelines in the knowledge that the applicant was an unaccompanied minor whose interview was conducted without the usual safeguards for children and made credibility findings based on a comparison between his evidence at interview and his evidence at appeal. While she referred to the need for a liberal application of the benefit of the doubt to the claims of minors, there is no evidence of any such application in this case.

...27. As previously mentioned, no material difference was identified between what the applicant said at each stage which could be said to be of such substance as would warrant the rejection of the core claim. According to his narrative the applicant was an Iraqi boy of barely seventeen years old from the troubled city of Kirkuk who was injured in the successful assassination of his father some seven or eight months before he arrived in Ireland. He produced documentary evidence of his connection to a man with the same address as the applicant and with a date of birth that had been provided by the applicant and who was indeed killed on the requisite day from gunshot wounds. In these circumstances it seems to the Court that the claim to be investigated was not whether his mother and sisters stayed in

the family home after the assassination, whether Al Qaeda were involved in the threats, whether he should have sought asylum in Turkey or whether he knew enough about his father's duties in the military. Instead the Tribunal Member ought to have considered whether he would be at risk of persecution because of his connections if returned to Iraq.

28. The failure of the Tribunal Member to actually deal with the claim rather than concentrating on perceived inconsistencies leading to negative credibility findings is best described as unsettling. No understanding of the war in Iraq is evident from the impugned decision. The Tribunal Member's findings on Kurds seeking asylum in Turkey ignored the explanations offered by the applicant for not applying for asylum there and no reasons were given for her decision to disregard his seemingly reasonable explanation. The Court is also disturbed by the treatment of medical documents furnished to the Tribunal which state beyond dispute that the applicant has hearing loss and vertigo arising from blast damage. In the circumstances, the Court has very strong reservations regarding the fairness of the appeal hearing. The applicant's hearing loss was dismissed with the following cursory sentence: "I have had regard to the medical documentation on file and the Applicant's account of how he received the injury. While the applicant has an ear injury, considering the credibility issues that arise with the Applicant's stated account, it is difficult to believe that the Applicant's injury arose in the manner stated in the Applicant's claim. " It must be recalled that the negative credibility findings related to (i) the identification of Al Qaeda as the terrorists who threatened his father so that he would fight against the Americans rather than so that they could seek revenge against former Ba'athists; (ii) his perceived lack of knowledge and lack of consistency with regard to his father's functions and duties; (iii) the fact that his mother and siblings stayed on in the family home after the assassinations and (iv) his failure to apply for asylum in Turkey.

29. The Tribunal Member also paid scant notice to the death certificate furnished by the applicant. When viewed in the context of the earlier negative credibility findings, the Court is bound to ask itself why such a potentially corroborative document was rejected and is further bound to review the reasonableness of the Tribunal Member's reasons for not seeking to authenticate the document. It cannot have been beyond the power of the Commissioner to investigate the provenance and authenticity of the document which is stamped in several places, contains the signature of the pathologist who certified the cause of death and left blank the entries for any previous treated illnesses, possibly because he had not previously been treated for existing medical conditions. The strong impression given by the dismissal of the document is of a mind closed to even the possibility that what the applicant was asserting might possibly be true. Even if the death certificate had been authenticated, there is the distinct suspicion that following the tone of the previous findings the Tribunal Member may have attached little weight to the certificate as it did not establish Ba'ath Party membership.

Conclusions

There number of unaccompanied and separated children making applying for asylum in Ireland is relatively small - 20-40 a year for the past few years. There is therefore a limited number of High Court Review decisions in relation to

determinations of the ORAC and RAT. However, reading these two very critical High Court review decisions, it is difficult to avoid the following conclusions in relation to asylum decision making:

- a) It appears that, although frequently cited in decisions, the UNHCR and SCEP guidelines are not being followed when it comes to decision-making.
- b) There is little or no regard for the age or level of maturity of child applicants and it seems to be particularly difficult for them to establish credibility. A liberal benefit of the doubt is not being applied.
- c) Child-specific forms of human rights violations, such as recruitment of children into armies, trafficking for sexual exploitation, female genital mutilation and forced labour are not being properly acknowledged (or understood)

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