

ASPECTS OF THE PROTECTION OF MIGRANT CHILDREN'S RIGHTS IN THE EUROPEAN UNION LAW

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ABSTRACT

The present study is based on the implementation of the UN Convention on the Rights of the Child in terms of immigration in recent years in Europe. There are analyzed some aspects of migration regulations and their implementation in cases of underage migrants in the European Union.

Key-words: International law, European Union law, human rights, child protection, asylum-seekers, Fundamental Rights Agency.

1. International standards for the protection of children

The issue of children's rights was in the attention of states and of international organizations over time. An important moment was the movement initiated by Eglantyne in 1924 in the United Kingdom. She managed to impose the adoption by the League of Nations of the first Declaration of the rights of the child. It was a five-point declaration marking the consecration of the rights of the child, drawing attention to the need for a political approach to the problem.

The Universal Declaration of Human Rights adopted in 1948 makes only some brief references to the child's situation. In 1959 the Declaration of the rights of the child was adopted, a document that recognizes that children's rights are qualitatively different from those of adults. The Declaration gives these rights a specificity, which turns them into a field of study in itself, a support for a legal discipline insufficiently studied as such, so far.

The UN General Assembly resolution 1386 (XIV) proclaimed the Declaration of the Rights of the Child "for him to have a happy childhood and to benefit in his interest as well as in the interest of society of all the rights and freedoms therein declared." The Declaration contains a number of principles capable to ensure all children without exception and without distinction based on race, color, sex, language, religion, national or social origin, property or other status, the protection of their rights, a normal development physically, intellectually, morally, spiritually and socially, in conditions of freedom and dignity.

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Among the principles proclaimed in the Declaration, which will be taken up 30 years later in the Convention on the Rights of the Child, are the following:

- the child should receive special protection; the child must be given opportunities and facilities by law and by other means to be able to develop healthy and normal, physically and intellectually, morally, spiritually and socially; the interest of the child is decisive;
- the child from birth, has the right to a name and nationality;
- the physically, mentally or socially disadvantaged child should receive treatment, education and special care required by his or her situation;
- to develop a harmonious personality, the child needs love and understanding; if possible, the responsibility of parents should increase, in an atmosphere of affection, of moral and material security;
- the child has the right to free and compulsory education, at least at elementary level;
- the child in any circumstance will be among the first to receive protection and assistance;
- the child must be protected from all forms of neglect, cruelty or exploitation;
- the child must be protected against practices that could lead to racial, religious or any other form of discrimination.

It was only on 20 November 1989, that the UN General Assembly adopted the Convention for the Rights of the Child through the Resolution No. 44/25.¹ This entered into force in 1990 and was considered by the international community and in the UN circles as a historic event. There were three reasons that led to the elaboration of the Convention: 1) the desire to cover all areas where the society intervention was necessary, in order to safeguard the new generation; 2) the need to focus in a single unitary document all international regulations on children; 3) the requirement of revising the rules concerning situations where the interests of the child's legal guardians differ from those of the child.

The fundamental principle of the Convention is thus the major interest of the child; all the rules concerning the condition of the child should be interpreted in his or her interest. This involves two premises: firstly the vulnerability of the child, caused by physical and mental immaturity and secondly the child's full rights, any infringement of these rights being excluded.

The adoption of the Convention was followed by several optional protocols relating to the restriction of children's involvement in armed conflicts, to the sale of children, child prostitution and child pornography and to the communication of any complaints concerning breach of international norms mentioned above.²

¹ See Irina Moroianu Zlatescu, Emil Marinache, Rodica Șerbănescu coord, *Drepturile copilului și tânărului*, Ed. IRDO, 1998, p. 9 et seq.

² See Irina Moroianu Zlatescu, *Human Rights, A dynamic and evolving process*, Pro Universitaria, 2015, p. 88, 89.

2. Children and Migration in the European Union Law

In the course of history it has been observed that migration in general had been one of the most dramatic events. If in 1965 there were 75 million migrants, in 2014 their number reached around 200 million worldwide³.

In the present age when Europe is confronted with unprecedented massive immigration numerous problems occur related to the rights of children who arrive on our continent, specifically in the Member States of the European Union, accompanied by their parents or by other persons, or unaccompanied, requesting international protection under the Geneva Convention on refugees of 1951⁴ or in accordance with the regulations of the Council of Europe or of the European Union.⁵

In accordance with Article 3 of the UN Convention on the Rights of the Child, Article 24 of the Charter of Fundamental Rights of the European Union, the public and private authorities must show particular interest to children and take into account their vulnerability when seeking asylum or are in a situation of irregularity, whether or not accompanied by their parents.

We remind that generally speaking, *migrants* are people who move from the country where they live or whose nationals they are to another country. The motivation for such radical decision may be economic, educational, political, etc. They could leave their country to escape persecutions, abuses against their fundamental rights or as a result of threatening against their lives or physical integrity generated by a conflict/war situation. Some of them would seek asylum. Terminologically, the word *asylum*, is Latin coming from the Greek word *asilon* derived from a form of the adjective *asylos* (inviolable). *Asylos*, in its turn, comes from two words: *a* (no) and *syle* (to catch/to arrest). This induces the idea that "asylum" means "not to be caught" or "not to be arrested", which involves "protection against prosecution", "escape place", „shelter", "refugee". According to the doctrine, the notion of "asylum" would rather include certain places, areas or territories, where a person cannot be arrested as a result of the fact that the respective area is protected by a national force. The Geneva Convention of 1951 defines in its article 1 paragraph 2 the term of refugee as follows: *As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality*

³ See Jean-Yves Carlier, Marie-Claire Foblets, *Migration and Law, General report to IACL Congress, Vienna, 2014*, p. 8.

⁴ See Henry Oberdorff, *Droits de l'homme et libertés fondamentaux*, L.G.D.J., Paris, 2010, p. 361-362; F. Newman, D. Weissbrodt, *Selected International Human Rights Instruments*, Anderson Publishing Co/Concinati, p. 48.

⁵ See Irina Moroianu Zlatescu, *Human Rights...*, *cit. supra*, p.145-172.

*and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it*⁶.

Asylum is guaranteed for the first time in the European Union by Article 18 of the Charter of Fundamental Rights which actually defines this right.

The member states of the Union are compelled, according to Article 3 (1) of the EU regulation in this field ⁷ to examine any international request submitted by a citizen of a third country or by a stateless person, following to be examined by a single member state.

To this purpose, the member states of the Union have the possibility to compare the data regarding the asylum seekers requests. An important instrument is available for them in this sense – the EURODAC.⁸ Created in 2000, EURODAC is operational since 2003. The initial regulation did not provide the possibility of data comparison by the law enforcement authorities. Currently, after the amendment of the Regulation in 2013⁹ and its application in 2015, the EURODAC became to be considered by the European Commission as a very useful instrument for the comparison of fingerprints, which is used as such by the EU member state responsible and by the Europol¹⁰ for examining a request for international protection submitted by a national of a third state or by a stateless person.

There are various proposals to improve European legislation on asylum that do not always take into consideration the situation of children who are a vulnerable category of people.

In the case of minors, for example, although there are express provisions for vulnerable people in European Union law that evidently concerns children and we cite as an example Directive 2013/33 / EU on reception conditions and Directive 2008/115/EC on return situations faced by countries when receiving these people, there are situations which are not always the same, since every case raises specific issues. Let us not forget the International Convention on the Elimination of All Forms of Racial Discrimination of 1965¹¹ and the mechanism of monitoring compliance with the Convention. The UN Committee on the Elimination of Racial

⁶ See also Irina Moroianu Zlătescu, *Migration and Law*, IRDO Publishing, Bucharest, 2014, p. 9 and seq.

⁷ The EU Dublin III Regulation No, 604/2013, See also Catrinel Brumar, *Determinarea statului membru responsabil pentru examinarea unei cereri de protecție internațională*, in *Drepturile Omului*, nr. 1/2015, p. 16-21. The author makes reference to the Dublin mechanism and to Eurodac, which are useful for better understanding this study.

⁸ Created by Regulation EC No. 2725/2000 concerning the establishment of "EURODAC" for the comparison of fingerprints for the effective application of the Dublin Convention.

⁹ By EU Regulation No. 603/2013 of the European Parliament and of the Council for the creation of the EURODAC system this was adapted to the current EU practices and to the evolution of the EU legislation.

¹⁰ European Union's Law Enforcement Agency.

¹¹ See Irina Moroianu Zlătescu, *Human Rights A Dynamic and Evolving Process*, Pro Universitaria, 2015.

Discrimination, which required the application of the Convention to refugees, asylum seekers and migrants who are in regular and irregular situations, obviously by correlation with international and regional regulations aforementioned, it results that migrant children whether in regular or irregular situations, should receive the same rights as children belonging to the Member state on whose territory they are.

3. Migrant children's rights – a priority for FRA

Moreover, the Fundamental Rights Agency of the European Union (FRA), an independent EU body with legal personality constituted on the basis of the Council Regulation (EC) No. 168/2007¹², which will soon celebrate its 10th anniversary, analyzes the situation of migrant children, in the context of migration and asylum as a priority issue. According to the multi-annual Framework 2007-2012 of the Agency, one of the main areas of the Agency's work, entered under letter (e), is asylum, immigration and integration of migrants". The multi-annual Framework 2013-2017, adopted on the 11th of March 2013, also includes "immigration and integration of migrants, visa and border control and asylum" as a main area for the Agency's work, together with the rights of the child etc. The issue of migration remains a priority also for the future multi-annual plan of the Agency.

For example, the Agency for Fundamental Rights of the European Union (FRA) analyzing the impact on children of existing regulations notes that although Article 3 of the UN Convention on the Rights of the Child and Article 24 of the Charter of Fundamental Rights have in view the prevailing interests of minors, the institution involved in data processing, EURODAC intends to reduce the age of children entering third countries in the European area, from 14 to 6 years.¹³ This might have multiple implications, for example in the case of unaccompanied children etc. The same age reduction for registered persons could have unforeseen negative consequences on children, without bringing a major contribution to the fight against illegal migration. At the same time, FRA proposes the replacement of the term "illegal migration" with that of "irregular migration" in the EURODAC regulation.¹⁴

The Agency warns that these changes would come into conflict with the Charter of Fundamental Rights of the European Union on the right to human

¹² The EU Fundamental Rights Agency according to Article 2 of the above mentioned Regulation No. 168/2007 aims to provide assistance and expertise related to fundamental rights for the member states and for the institutions, bodies, and agencies competent in the application of EU law, in order to assist them in fully respecting these rights when they take measures or actions in their fields of competence.

¹³ See the impact of the proposal for a revised EURODAC Regulation on Fundamental Rights, Opinion of the European Union Agency for Fundamental Rights, FRA opinion 6/2016 (EURODAC), Vienna, 2016.

¹⁴ *Ibidem*.

dignity, the integrity of the person, prohibition of torture and inhuman or degrading treatment, respect for privacy and family life, protection of personal data, the right to asylum, protection in case of removal, expulsion or extradition, protection of children's rights, the right to an effective remedy and a fair trial.¹⁵

From the point of view of the Fundamental Rights Agency, the proposed changes to European legislation to which we referred specifically concern the fundamental human rights and primarily those of the child. It is about comparing the fingerprints of illegal migrants and keeping for a period of five years the data of those people who do not apply for international protection and the processing of biometric data from children starting from the age of 6, but also the processing of two types of biometric data (fingerprints and facial identification). Discussions refer to the data stored in the central system too, since they must include the name, nationality, date and place of birth and details of travel documents.

The Fundamental Rights Agency considers that registration of persons is an important component of the international protection of refugees. All activities related to registration must be made in accordance with the principle of human dignity taking into account the child's age and maturity, respecting Article 1 of the Charter of Fundamental Rights.

The Agency warns that, according to article 37 of the Convention on the Rights of the Child, the child may be deprived of liberty only as a last resort and for a very short period of time. The Article mentioned above, related to Article 5 of the European Convention on Human Rights and the interpretation given by the European Court of Human Rights, state that reference is made to children accompanied or not by their parents and come to agree that it is necessary to put in the forefront the specific needs of the child. As highlighted by the Agency for Fundamental Rights of the European Union, in light of the development of human rights law with particular reference to the detention of migrant children, it is very difficult to justify the deprivation of liberty of the child for the purpose of taking fingerprints or facial images.

Also, FRA believes that minors, suspects to be victims of torture, sexual abuse and gender-based violence, or victims of other serious crimes, as well as those children who were traumatized, should not be constrained to undergo the procedure of fingerprinting, and likewise it should not be proceeded with any person considered to be vulnerable.

Of course, these are just some of the issues that could be raised in relation to migrant minors and procedures to be undertaken so that their rights are respected in all circumstances. Other issues such as health and education of migrant children remain to be further analyzed since they are essential to achieve the objectives for which the Heads of State and Governments have pledged under Agenda 2030.¹⁶

¹⁵ *Ibidem*.

¹⁶ See Nel Noddings, *Education and democracy in the 21st Century*, New York, Teachers College Press, 2013, p.192, Irina Moroianu Zlatescu, *The United Nations Organization and the Institutionalization of Human Rights*, in *Drepturile Omului* nr. 1/2015, p.7 et seq., I.Voicu, Florina

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