

A photograph of a person's head and shoulders in profile, looking out a window. The person has dark, curly hair and is wearing a dark jacket. The window frame is visible, and the background shows a blurred cityscape with buildings and a red-tiled roof.

## Child-sensitive return

Upholding the best interests of refugee and migrant children in return and reintegration decisions and processes in Germany

November 2019

unicef 

## **A UNICEF Germany and UNICEF Division of Private Fundraising and Partnership (PFP) project**

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UNICEF Germany  
Berlin, November 2019

# FOREWORD

## A child is a child:

### The best interests of refugee and migrant children at the centre of return decisions

In 2019, we celebrate the 30th anniversary of the United Nations Convention on the Rights of the Child (UNCRC, or CRC). During the last 30 years, the Convention has become one of the most widely ratified treaties in the history of the UN and has helped to improve children's lives worldwide. However, by no means every child gets to enjoy what we would call a full childhood. Far too many girls and boys endure violations of their rights, in every region, every day.

Crises and conflict, violence, natural disasters, instability, and poverty deprive millions of children of their right to a childhood; of being supported, protected, and heard in the sense of the Convention. Across the world, nearly 50 million children have been internally displaced, or have fled or migrated across borders. The number of countries or regions being torn and shaken by conflict is as high as it has been since 1989. Throughout their often extensive, exhausting, and terrifying journeys, children are extremely vulnerable. They are at risk of violence and exploitation. Some are separated from their families; too many have to cope with the loss of family members, neighbours, or friends.

Driven by the hope of finding safety and security or new opportunities, many families and unaccompanied children have lately arrived in Europe. We can be glad and grateful that Germany has offered desperately needed refuge, and has – by way of thousands of volunteers, civil servants, mayors, entrepreneurs, and many others – given them a warm welcome. Many of these families and children have found – and taken – the opportunity to rebuild their lives and appreciate stability after years of being uprooted by war and other violence.

However, not every child has the opportunity to stay in Germany. Families and children must face the consequences of decisions that oblige them to return to their home country or a third country. What does this “return decision” mean for children who have recently come to Germany, and whose memories of war, insecurity, extreme poverty, and unsecure flight are still vivid? What does it imply for children born in Germany, or children who have been living in the country for many years? We can only guess what the arrival of this official decision really means for every family and especially for every single child concerned.

What we do know is that, for very good reasons, the principle of the best interests of the child was crafted 30 years ago as one of the overarching guiding principles of the CRC. Germany, as one of the signatories of the Convention, is bound to uphold this right for all children – no matter where they come from, no matter their migration status, or their language, or their origin country. For UNICEF, it is therefore of paramount importance that the principle of the best interests of the child be taken as the primary consideration in all decisions and actions concerning children in asylum, return, and reintegration processes.

The present study – “Child-sensitive return. Upholding the best interests of refugee and migrant children in return and reintegration decisions and processes in Germany” – outlines areas of progress in policy and practice for children made in recent years. However, it also clearly shows that more action is required to ensure that the principle of the best interests of the child guides all decisions in this area.

In order to assess what is in the best interests of children, it is critical to: a) listen to them individually; and b) to consider their views in all matters concerning them. It is their right to be heard. However, this should of course only be pursued if it is the child's will to speak. It is important that the specific situation of each and every child is acknowledged. A child's views, individual needs, and evolving capacities must be considered. Administration and all other staff concerned need to provide a child appropriate setting, while communication with children requires personnel well-qualified to make children feel safe and protected, and to allow them to speak. Further, it is our very duty to make sure that every child who arrives in Germany knows their rights and understands all processes applicable to them.

Refugee and migrant children are individuals, not a homogenous group. They each have a different story, background, and – often very arduous – experience. Even at their young age, they have already undergone significant trials. As children, they may judge and view circumstances differently than do adults. They have been and continue to be exposed to different levels of threats, dangers, and challenges than those faced by adults. We must make sure that all children are protected and have the best possible chance to develop, participate, and contribute in order to pursue flourishing lives. But the degree of this support cannot be dependent on the city or federal state at which they happen to arrive after their long journey to Germany.

The current UNICEF study aims to contribute a better insight into the very difficult and complex situation of children in the asylum, return, and reintegration process in Germany. The qualitative study is not representative, but it nonetheless provides important indicators of required actions. It demonstrates good practices and lays a foundation for further improvements.

Children have the most to gain and the most to lose when decisions are made regarding their migration status. Politicians, authorities, and courts are entrusted to bring children and their best interests to the forefront of all decisions that are made in asylum, return, and reintegration processes. Only if this principle is respected can refugee and migrant children have a true chance of securing a childhood worthy of the name; for a child is always and foremost a child, not a migrant or refugee.



A handwritten signature in blue ink that reads "Christian Schneider". The signature is written in a cursive, flowing style.

Christian Schneider  
Cologne, November 2019



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# LIST OF ACRONYMS

AsylG	Asylum Act (Asylgesetz)
AufenthG	Residence Act (Aufenthaltsgesetz)
BAMF	Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge)
BumF	Association for unaccompanied refugee minors (Bundesfachverband Unbegleitete Minderjährige Flüchtlinge e. V.)
BGB	Civil Code (German law) (Bürgerliches Gesetzbuch)
BIA	Best Interests Assessment
BID	Best Interests Determination
BIP	Best Interests Principle
BMI	Federal Ministry of the Interior, Building and Community (Bundesministerium des Innern, für Bau und Heimat)
BMZ	Federal Ministry for Economic Cooperation and Development (Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung)
CRC	UN Convention on the Rights of the Child
ERRIN	European Return and Reintegration Network
GC	General Comment (i.e. General Comment on the CRC)
GIZ	German Corporation for International Cooperation (Deutsche Gesellschaft für Internationale Zusammenarbeit)
GO	Governmental Organization
IOM	International Organization for Migration
REAG/GARP	Reintegration and Emigration Programme for Asylum-Seekers in Germany/ Government-Assisted Repatriation Program
SGB	Social Code Book (German law) (Sozialgesetzbuch)
UASC	Unaccompanied Asylum-Seeking Child
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
VG	Administrative Court (Verwaltungsgericht)
ZIRF	Information Centre for Voluntary Return (Zentralstelle für Informationsvermittlung zur Rückkehrförderung)
ZUR	Centre for the Support of Return (Zentrum zur Unterstützung der Rückkehr)

## DEFINITION OF KEY TERMS

**Children** are any persons under the age of 18, as specified in Article 1 of the UNCRC. Article 3 of the Return Directive identifies children as vulnerable persons to whom the best interests principle applies.

**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” (UNCRC, General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children Outside their

**Separated children** are “separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives or adults. The term may, therefore, include children accompanied by other adult family or non-family members” (CRC/GC/2005/6, para. 8).

**Accompanied children** are, for the purpose of this study, migrant and refugee children who are accompanied by one or both parents.





## Executive summary

In the first half of 2019, 72,953<sup>1</sup> people sought asylum in Germany, around half of whom were children. Many of these children moved together with their families. Many others came to Germany on their own. Children who have been uprooted face many challenges in transit and at their destination, often because they have limited options to move through safe pathways and with their families. On their journey, they frequently encounter violence, abuse, exploitation, or discrimination. They miss out on education and proper medical care. In Germany, they hope to rebuild their lives. However, some of them are not granted the right to remain in Germany and may have to return to their home country or a country of transit.

So far, more than one in three asylum seekers have received a negative decision this year in Germany.<sup>2</sup> But data and statistics on children in asylum and return processes in Germany are incomplete and fragmented, and may not portray a full picture. It is not clear how the best interests of the child are assessed and determined before the return decision, there is uncertainty about the conditions under which children are returned, and there is very little or no data on children during transit and after they have returned.

The present study was planned and commissioned by UNICEF Germany and conducted by SINUS-Institute as part of a four-country project (Germany, the Netherlands, Sweden, and the United Kingdom).<sup>3</sup> The study comprised a legal analysis, desk research phase, and empirical research period.

<sup>1</sup> Bundesamt für Migration und Flüchtlinge: Aktuelle Zahlen – Ausgabe Juli 2019, p. 3 (available in German online at [http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-juli-2019.pdf?\\_\\_blob=publicationFile](http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-juli-2019.pdf?__blob=publicationFile) [accessed 20 October 2019]).

<sup>2</sup> Ibid.

<sup>3</sup> Each country conducted a study in the same way. The principal findings of all four countries are collated in a joint report.

This study analyses existing processes involving children before the return decision and children facing return, reflects upon how their best interests are considered, and provides recommendations for upholding their rights and protecting them at all times. The results of the study show that action is required to ensure that the principle of the best interests of the child guides all decisions and processes involving children.

There remain no nationally binding and standardized formal procedures for assessing and determining the best interests of each child in the asylum, return and reintegration process. Children and families often find themselves in arbitrary situations due to opaque administrative and bureaucratic procedures. This is in part due to the diverse practices in each federal state in Germany, a lack of information and professional support for the children and families in the procedures, and deficient or missing structures, tools, training, and information for all stakeholders involved.

Nonetheless, progress has been made in some areas of policy and practice concerning children in asylum, return, and reintegration processes, progress which can be thought to manifest good practices and that accordingly may be of interest to other countries. Some of the good practices that have been identified by this study are described in the box below.

## Good practices

### Unaccompanied children:

- Unaccompanied minors are treated as other vulnerable children and adolescents in Germany. This means that they are accommodated and cared for under the primacy of Child and Youth Welfare Office immediately after arriving in Germany (§ 42a et seq., Social Code Book VIII).
- As a rule, unaccompanied children are assigned an individual guardian. Within a few days of the child's arrival, the Youth Welfare Office must inform the family court to appoint a legal guardian for the child (§ 42a and § 42, Social Code Book VIII). The family court must then initiate the necessary steps to appoint a guardian (§ 1774, German Civil Code).
- The Federal Ministry for Migration and Refugees (BAMF) has established nationwide guidelines for asylum procedures involving unaccompanied children.
  - Trained decision-makers should conduct personal interviews with unaccompanied children.
  - A concept for quality assurance was developed and is now implemented.

### Accompanied children:

- There are precedents in which courts have acknowledged that poor conditions in countries of return impede parents' capacity to protect the best interests of their children, and as a result have ruled against deportation (as for example in VG Stade, judgement 22.05.2018 of case 2 A 21/17; and VG Köln, judgement 16.02.2018 of case 2 K 6628/16.A).
- Voluntary return and departure are encouraged in Germany. Latterly, more focus has been given to children returning with their families. By way of example, for families that participate in voluntary return programmes such as REAG/GARP, child-specific needs can be taken into account when determining the level of financial support.

**All children:**

- In 2015, the BAMF published non-binding Guidelines for Nationwide Return Counselling, which are currently being revised. While not specifically targeting practitioners working with children, the Guidelines do specify that counselling should be sensitive to the needs of vulnerable groups.
- Pathways to residency other than asylum exist for young people, e.g. the Apprenticeship Deferment Law, which defers deportation for young people enrolled in an apprenticeship, and Section 25a of the Residence Act, which holds that “well-integrated” young people who have legally resided in Germany for four years may be granted a residence permit.
- There is a robust network of large and small NGOs and welfare organizations in Germany experienced in working with both migrants/refugees in general and children specifically. This network frequently holds conferences and other events, enabling the “bottom-up” exchange of best practices, legal frameworks, fundamental rights, and children’s rights.

A brief overview of some of the challenges recognized by the study findings is given in the following box.

## Challenges

**Unaccompanied children:**

- Some sources suggest that deportations of unaccompanied minors have in fact occurred recently (BumF, 2019).
- Not all guardians have enough relevant professional experience (on the asylum procedure, for example) or training, and thus require better support structures and improved training.
- It is still the norm to issue return decisions for young people shortly after their 18th birthday.

**Accompanied children:**

- Under the Social Code Book VIII, structures for social support of parents and families are generally available. Unfortunately, many migrant and refugee children and families do not benefit from these regulations and support because reception centres and collective accommodation are often isolated, and co-operation with the Child and Youth Welfare Office is rarely established.
- The right of a child to be heard is seldom respected in family asylum procedures, appeals, or return counselling.
- Respondents to this study report cases in which families are separated due to the detention or deportation of one parent.
- Accompanied children are deported alongside their parents. Children are sometimes removed directly from school, childcare, hospital, or even kindergarten.

**All children:**

- The principle of the best interests of the child is not legally binding and implemented in a systematic manner, i.e. through formal and multi-disciplinary best interests assessments and determinations. The child's individual circumstances and child-specific reasons for flight or migration are not properly considered before a return decision.
- Accelerated asylum procedures for children can result in time pressure for children and families, who must prepare for stressful, high-stakes personal interviews. These procedures can also lead to a rushed decision on whether to apply for asylum or explore alternate pathways to residence in Germany.
- Refugees and migrants have limited options for state funding of professional legal representation which often results in families and children having to pay the cost by themselves.
- All stages of the return process are structured primarily with adult returnees in mind. There are no formal procedures and guidelines throughout the process, neither are there guidelines and formal proceedings for the development of individual reintegration plans for children.
- There is no systematic nationwide and independent collection of quantitative or qualitative data on child immigration or returns (including forced returns) in Germany. There is, further, no (independent) complaint mechanism or Ombudsperson for children in place.
- Child-appropriate informational materials on asylum, return, detention, deportation, and reintegration are not widely available.
- There is no unconditional nationwide ban on the detention of minors.
- Deportations mostly take place early in the morning (4–6 am). For children, aware that they will be deported in the near future, this can lead to severe sleeping disorders and anxiety.
- Even those children who do not themselves face deportation can be expected to witness them from collective accommodation, schools, childcare, etc. Witnessing the deportation of a friend could prove detrimental to the child's mental health.
- National-level reintegration services are narrowly focused on the economic reintegration of adults; only a limited number of bilateral services focus on children.

## Recommendations

*“The UN Committee on the rights of the child has made clear that considerations such as those relating to general migration control cannot override best interests considerations, and recommended that States implement this through law, policy and practice.”<sup>4</sup>*

The principle of the best interests of the child unequivocally directs that the specific interests of children, whether accompanied or unaccompanied, should be of primary consideration in all actions that involve children. Therefore, all stages before a return decision and the return process itself and all actors involved therewith need to adhere to this principle of the UNCRC, otherwise return of children should not be pursued. Based on the research findings, the following recommendations are made:

1. **A formal and multi-disciplinary best interests determination must be conducted for every child** before the return decision. The individual circumstances of the child, the situation in the country of origin, the views of the child, and child-specific reasons for flight or migration should be taken into account in order to find a durable solution for the child.
2. In order to make the nationwide implementation of the UNCRC and other international and national legal frameworks verifiable, **legally binding standards** should be developed and pursued in respect of multiple aspects of the asylum, return, and reintegration process.
3. Data collection on migrant and refugee children in voluntary and forced return should be improved. A **central federalized concept for monitoring** and evaluation should be developed, funded, and centrally implemented to deliver evidence-based results. Data should never be used to the disadvantage of the child or family.
4. **Data on children and families should be generated after return.** This way, the implementation of children’s rights is monitored, and good practices can be evaluated and enlarged.
5. An **individual reintegration plan** should be formed and supplied to each child facing return. This plan should address at least their rights to protection, education, health, participation, non-discrimination, development, as well as their economic situation, their age, gender, and evolving capacities.
6. **It is never in the best interests of the child to be detained** due to their migratory status. Detention of refugee and migrant children should not be permitted. Alternatives to detention have proven highly effective and should replace detention.
7. **Families must never be separated through detention or deportation.**

<sup>4</sup> UNICEF/OHCHR/IOM/Save the Children/PICUM/ECRE/Child Circle: Guidance to respect children’s rights in return policies and practices: Focus on the EU legal framework. (September 2019), p. 5, see also: UN Committee on the Protection of the Rights of Migrant Workers and Members of Their Families and Committee on the Rights of the Child (16 November 2017), Joint general comment No. 3 (2017) and No.22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (CMW/C/GC/3-CRC/C/GC/22), para. 33; UN Committee on the Rights of the Child (2012), Report of the 2012 Day of General Discussion on the Rights of Children in the Context of International Migration; and OHCHR & Global Migration Group (2018), ‘Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants’, Principle 6, Guideline 6.



# PART I: INTRODUCTION & BACKGROUND



## 1 Background and scope of the study

The United Nations Convention on the Rights of the Child (UNCRC or CRC) celebrates its 30th anniversary this year. Germany, as a signatory to the Convention since 1992, and following the withdrawal of its reservations towards the UNCRC in 2010, has pledged to uphold and implement these rights for all children. The principle of the best interests of the child (Article 3) is one of the overarching guiding principles of the UNCRC, and must be taken as a primary consideration in all actions concerning children.

In addition, Article 24 of the EU Charter of Fundamental Rights states that *“Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity”*.

As is made clear in Article 5 of Directive 2008/115/EC of the European Parliament and Council on common standards and procedures in Member States for returning illegally staying third-country nationals (henceforth the Return Directive), the concept of children’s best interests maintains its primacy in EU member state actions related to the return of illegally staying third-country nationals.

Germany, a signatory to the CRC and a member state of the EU, is bound to uphold these mandates. This entails finding durable solutions for the children and families in question.<sup>5</sup>

<sup>5</sup> “A durable, or sustainable, solution: one that, to the greatest extent possible, protects the long-term best interests and welfare of the child and is sustainable and secure from that perspective. The outcome should ensure that the child is able to develop into adulthood, in an environment which will meet their needs and fulfil their rights as defined by the CRC, and will not put the child at risk of persecution or serious harm. When assessing possible solutions for a child, States have a responsibility to investigate the implications of the options under consideration” (UNICEF et al., no date, p. 4). See also: Committee on the Rights of the Child (2017), Joint General Comment No. 3 and No. 22, para. 33; UN Committee on the rights of the child (2012); Global Migration Group (2018), ‘Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations’, Principle 6, Guideline 6.

The child's best interests must therefore be of primary concern from the arrival of the child until a durable solution has been found and thereafter. Additionally, in order to assess and determine the child's best interests and find durable solutions, children's views and individual circumstances must be taken into account in all decisions that affect them. An important question arises: how best can the tension resulting from state interest in migration control and return, which usually overrides the primacy of the principle of the best interests of the child, be resolved? Whether or not giving precedence to state interests is consistent with children's rights on an individual basis, it is the reality for many children, and accordingly it needs to be ascertained how the child's welfare can be ensured when a child is returned.

The process of returning refugee and migrant children or families to their countries of origin (or transit countries) poses numerous risks to specific rights encompassed within the concept of the child's best interests – including the rights to education, development, non-discrimination, child participation, family life, legal representation and appeal, protection, and cultural identity.

The purpose of the present study is to gather and synthesize observations and recommendations from the perspectives of multiple stakeholders regarding criteria and practices for determining and securing the best interests of the child (and other rights of the child) in asylum, return, and reintegration procedures, notwithstanding the above-mentioned inconsistency.

This study was undertaken in parallel with comparable studies in Sweden, the Netherlands, and the United Kingdom. The results of all four countries will be summed up in a joint report.

## 1.1 Scope

UNICEF Germany commissioned SINUS Markt- und Sozialforschung, an independent research institute, to conduct the present study in order to determine how the principle of the best interests of the child is implemented in return decisions and processes in Germany, as well as the impact of such processes on children. This study comprises: a legal analysis; a desk research phase, in which existing data and literature were analysed; and an empirical research stage, during which 18 experts (see details of interviewees below) were interviewed. This report summarizes the findings in order to provide empirical insight into the topic of return, with a specific focus on challenges and deficiencies in the return process relevant to both unaccompanied and accompanied children.

## 1.2 Methodological approach

The present study is based on a two-stage process comprised of desk research (secondary analysis of relevant data and literature) followed by field research (qualitative interviews of experts):

1. **Secondary analysis of relevant data and literature:** Quantitative and qualitative data (e.g. statistics, case studies, governmental and non-governmental policy documents, etc.) were reviewed and analysed in order to understand if and how the best interests of the child are taken into account in asylum, return, and reintegration processes in Germany. Data were collected on the number of accompanied or unaccompanied children who are returned from Germany every year; the proportion of different types of return (e.g. voluntary returns,

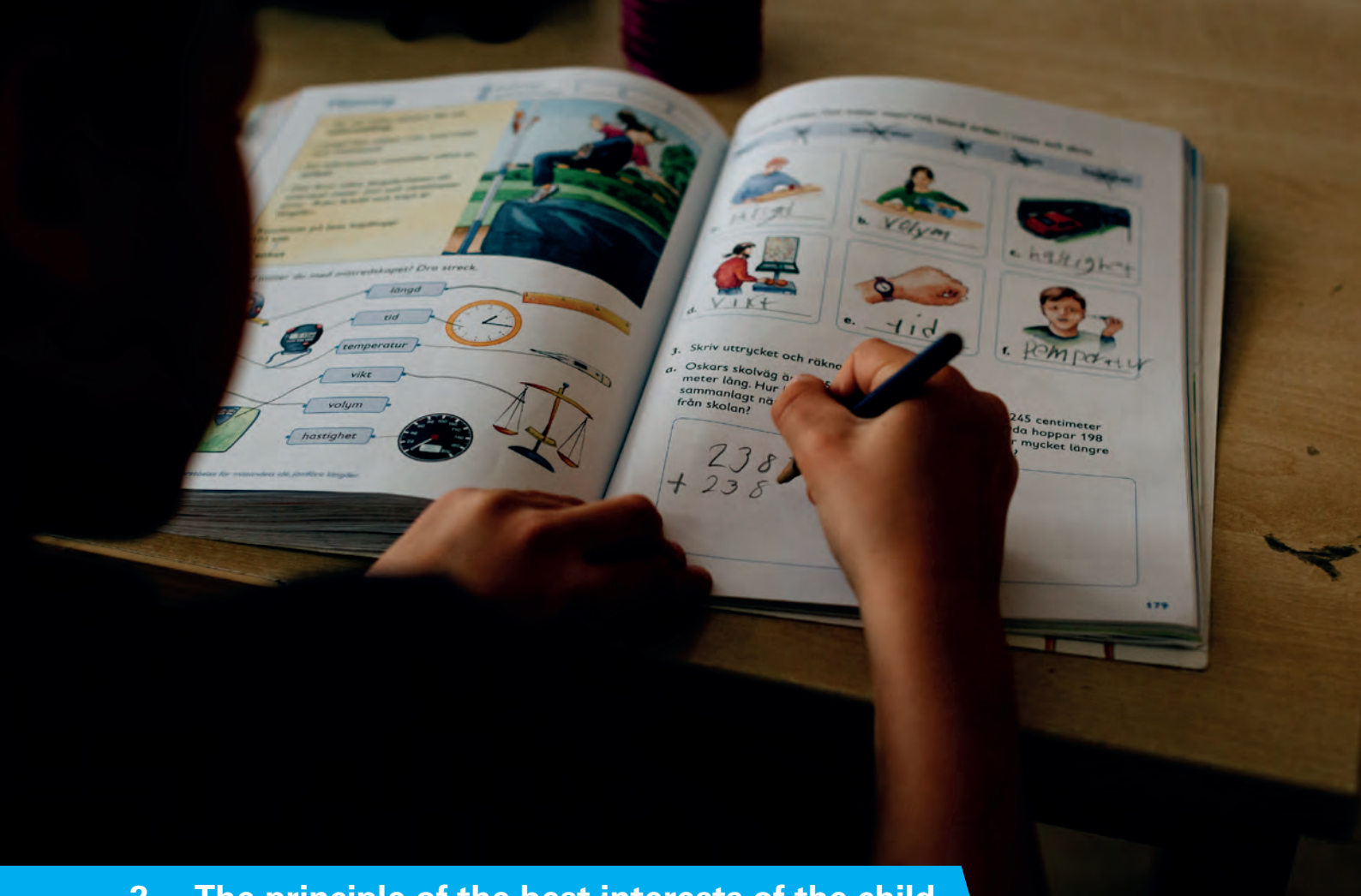
voluntary departures, and deportations); how children are returned; the legal instruments and policies on returns; the reasoning for and nature of return decisions, asylum procedures, and return processes; and how the best interests of the child (amongst other rights of the child) are taken into account.

2. **Qualitative interviews:** From March – April 2019, 18 semi-structured, face-to-face, and telephone interviews were conducted with experts who are actively involved in return and reintegration processes in Germany. The following types of experts were interviewed:
- Practitioners in non-governmental organizations (NGOs) and Welfare Organizations concerned with general counselling, return counselling, pastoral work
  - Practitioners in governmental organizations (GOs) and UN Agencies concerned with return counselling, and reintegration planning and support
  - Specialists from human rights and migrant organizations
  - Legal experts in asylum and family law
  - Workers at reception and accommodation centres for migrants and refugees and at the Central Foreigners' Department (*Ausländerbehörde*), and members of the state police
  - Governmental authorities and policymakers of federal and state ministries

Procedures and instruments for collecting data were agreed upon in all four countries (Germany, Sweden, the Netherlands, and the UK) and a set of nine core themes and 64 research questions were developed by UNICEF. The desk research stage was conducted prior to the interviews. Interview guidelines were developed by SINUS in iterative exchange with UNICEF Germany, maintaining enough flexibility to accommodate questions specifically relevant to the German case. The interviews were conducted in German by SINUS and UNICEF. Informed consent was collected prior to each interview.<sup>6</sup> When interviewees agreed, the interviews were audio-recorded and transcribed for analysis. Transcripts were then coded and analysed using a general inductive approach. The decision to maintain methodological flexibility during the research design and data analysis was based on the novelty of the study and the sensitivity of the topic at hand. The empirical phase of this study should be regarded as exploratory: its purpose is to “help to structure the area under investigation and to generate hypotheses,” rather than test prior hypotheses or produce representative conclusions (Bogner & Menz (2009), p. 46; see also Gläser & Laudel, 2004).

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<sup>6</sup> Handling of data was conducted in accordance with the EU General Data Protection Regulation 2016/679, the European Code of Conduct for Research Integrity, and the ICC/ESOMAR International Code on Market, Opinion and Social Research and Data Analytics.



## 2 The principle of the best interests of the child

### 2.1 The best interests of the child in the UNCRC

The principle of the best interests of the child is one of the four guiding principles of the UNCRC and must be a *primary consideration* in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies (Article 3). Thus, private and public actions must be conducted in accordance with the best interests of the child. This means that a child's welfare (both their present and future well-being) must be adequately provided for by all institutions, services and facilities responsible for the care, protection and participation of children. There is a clear directive from the CRC to all institutions that act on behalf of, or in relation to children (or which are responsible for their care and protection), to take their best interests into primary consideration. The positive notion of children's welfare that the CRC entails asserts responsibility for national legislation and institutions to take the best knowledge and practices of children's welfare into account. This is particularly relevant in the case of refugee and migrant children, who often lack other protections.

### 2.2 The best interests of the child under German law

The closest equivalent to the principle of the best interests of the child in German law is the concept of *Kindeswohl* – literally, "children's well-being", though often translated as "children's

best interests” in official documents.<sup>7</sup> There is no fixed definition of *Kindeswohl* in German law but its principle is an important criterion in all family court decisions (§ 1697a German Civil Code Book).

Book VIII of the German Social Code (henceforth named SGB VIII) outlines the basic rights of children and mechanisms for their protection, participation, and development. The first paragraph states that:

1. “Every young person has the right to have his or her development promoted and to be educated into a responsible and socially competent personality”
2. “The care and education of children are the natural rights of parents and their primary duty. Their activities are watched over by the state community”
3. Youth assistance shall help to realize the right under paragraph 1, in particular
  1. Encouraging young people in their individual and social development and helping to avoid or reduce disadvantages,
  2. Advise and assist parents and other guardians in education,
  3. Protect children and adolescents from dangers to their well-being,
  4. Contribute to maintaining or creating positive living conditions for young people and their families as well as a child and family-friendly environment.

Article 6 of the German Basic Law (GG) sets down the natural right of the parents for the care and upbringing of their children. The parents are primarily responsible for the protection of their children. With the concept of *Kindeswohl*, the state holds the right to intervene if the parents are not capable or willing for any reason to protect their children, or are even themselves an endangerment to the child.

The legislation further follows § 8a SGB VIII in requiring that an assessment by the Youth Welfare Office be carried out when the child’s well-being is at risk (§ 8a (1), SGB VIII). If deemed necessary, the Youth Welfare Office involves the court, which is charged with identifying cases of “child welfare endangerment” (*Kindeswohlgefährdung*) and taking measures requisite to avert the danger (§ 1666, BGB).

Consequently, there is a difference between the best interests principle of the CRC and the concept of *Kindeswohl* in German law. The CRC clearly obliges state institutions to act in children’s best interests at all times. It is important to note that this is different from the *Kindeswohl* concept, wherein the State is only empowered to intervene on behalf of the best interests of the child after determining that the family/caregiver has neglected their responsibility.

From a children’s rights perspective, national legal arrangements, such as the concept of *Kindeswohl* in German legislation, should be examined critically in order to determine whether they comply with the definition of the principle of the best interests of the child as stipulated in the UNCRC. Further examination should be undertaken on whether or not the principle is treated with primacy, particularly with regard to migrant and refugee children in general, and more specifically children facing asylum, immigration, and return processes, for the primacy in many cases seems to be sacrificed for the enforcement of the asylum law.

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<sup>7</sup> Alexander Bagattini, a specialist in child welfare, suggests “*kindliches Wohlergehen*” (“child well-being”) as an adequate German-language construction of “the best interests of the child”. Unlike *Kindeswohl* (“child welfare”), this term does not naturally connect in German common usage to the specific legal category of *Kindeswohlgefährdung* (“endangerment of child welfare”). It is thus better suited for capturing the full spectrum of factors involved in the determination of the best interests of the child.

As the study findings show, the principle of the best interests of the child as stated in the UNCRC does not serve as a binding guideline for practitioners and institutions in Germany, nor is it operationalized in a systematic and complete way, i.e. through formal best interests assessments and determinations. Resultantly, it is often up to first-line institutions and practitioners to defend the best interests of children before the return decision and of children facing return.

## 2.3 Operationalization of the best interests principle

The **best interests principle (BIP)** describes a formal process with strict procedural safeguards designed to determine the best interests of vulnerable persons, i.e. those who are not fully capable of protecting their own interests during decision processes that may affect them in particularly important ways (Brock & Buchanan, 1990). It is anchored in Article 3(1) of the Convention on the Rights of the Child and in Article 24(2) of the Charter of Fundamental Rights of the European Union, and has been operationalized by way of procedures such as best interests assessments and determinations.

In each individual case, the best interests of the child must be established in response to the specific situation of the child concerned. Mechanisms for doing this include the best interests assessment (BIA) and best interests determination (BID).

A **best interests assessment (BIA)** “describes a simple, ongoing procedure for making decisions about what immediate actions are in an individual child’s best interests, e.g. protection and care interventions. BIAs can take place at various points whenever an action is planned or taken which may affect the child. They involve interviews or consultations with the child, as well as additional information gathering as needed, by professionals with the required expertise, knowledge and skills in child protection and, as appropriate, the weighing of elements of the child’s circumstances. This process may be termed differently in different child protection systems, including for example child protection assessment, case assessment, etc.” (UNHCR & UNICEF, ‘Safe & Sound: What States can do to Ensure Respect for the Best Interests of Unaccompanied and Separated Children in Europe’ (2014), p. 20). That is, the best interests assessment refers to the ongoing process of assessing the child’s circumstances and planning actions to be taken with regard to the child. The integrity of this process should be assured through the provision of safeguards such as a legally appointed guardian, (free) access to legal advice and representation, access to complaints mechanisms, access to interpreters, child-friendly interview guidelines and other bureaucratic procedures, and the participation of children themselves.

A **best interests determination (BID)** is “a formal procedure to determine a durable solution” which results in a written, reasoned, multidisciplinary, impartial, and politically independent recommendation (UNHCR & UNICEF, ‘Safe & Sound’, p. 16). The best interests determination is a formal procedure that should be undertaken before making “significant decisions that will have a fundamental impact on a child’s future development” (ibid., p. 20). This procedure should be multidisciplinary, holistic, independent, and impartial. It should result in a written, reasoned, reviewable decision that explains how the final determination was reached, including the factors taken into account and their individual weight (ibid., p. 21).

## 2.4 The relevance of the eighteenth birthday

According to German law and the CRC, a minor is defined as a person under the age of 18. Hence, in a strict sense, the best interests principle and its protections no longer apply to people over the age of 18. While maturity is an important moral and legal norm, there are scientifically grounded arguments for viewing the onset of majority as gradual rather than sudden. Just as children already enjoy some of the liberties that adults have, young adults are often treated more mildly than adults, at least in legal contexts. For example, juvenile criminal law can be applied to youth (14–17 years) and to young adults (18–27 years). Finally, ending children's rights upon the 18th birthday is questionable from the perspective of the public good. Significant private and public resources are invested in the education and integration of migrant and refugee children. If children are denied the opportunity to complete their education, this has a detrimental impact on their lives and future prospects.



## PART II: **FINDINGS**



## 3 Study findings

### 3.1. Asylum Procedures

The Federal Office for Migration and Refugees (BAMF) is the authority under the Federal Ministry of Interior, Building and Community (BMI) in charge of the asylum procedure. The procedure is usually initiated within a few days after the asylum seeker's arrival.

The BAMF investigates whether: refugee status under the Geneva Refugee Convention is applicable (§ 3, sub-s. 1, AsylG); the person is entitled to asylum (Art. 16a, German Basic Law) because they would otherwise be subject to serious human rights violations in the country of origin; or the person would be at risk of serious harm in the country of origin and is therefore entitled to subsidiary protection (Section 4, sub-s. (1), Asylum Act). If none of these forms of protection status apply, a ban on deportation can be issued (Section 60, Residence Act). For persons under 18 years of age, the parents or guardians lodge the asylum application (§ 12, sub s. (3), Asylum Act).

Besides the examination of all evidence and documents in each individual case, the critical moment in the asylum procedure is the personal interview or hearing. For the BAMF, the interviews serve to clarify relevant facts and to "solve any contradictions". The BAMF pays attention to the credibility of the asylum seeker's explanation of their situation.

According to section 25, sub-s. (1) of the Asylum Act, the person "shall present the facts justifying his fear of political persecution or the risk of serious harm he faces and provide the necessary details. The necessary details shall include information concerning residences, travel routes, time spent in other countries and whether a procedure aimed at obtaining recognition as a foreign refugee or as a beneficiary of international protection as defined in Section 1 (1), no. 2, or an asylum application has already been initiated or completed in other countries or on the federal

territory". The Asylum Act further states in sub-s. (2) that "the foreigner shall relate all other facts or circumstances which preclude deportation or deportation to a specific country".

Whereas asylum seekers' obligations are set forth in German law, there are no legally binding standards on how the asylum procedure should be implemented in Germany. The BAMF does however provide some guidelines that are binding for its employees.<sup>8</sup> These include regulations for interviews with families and specific regulations for interviews with unaccompanied children. For example, trained decision makers should conduct personal interviews with unaccompanied children, at which the guardian should be present.

The BAMF has not yet established a formal complaint mechanism for asylum seekers.

### 3.1.1 Child-sensitiveness of asylum procedures

Current asylum procedures have not been found fully child-appropriate by most experts interviewed. According to them, one barrier preventing the active involvement of children in asylum procedures is the complex, bureaucratic nature of the asylum system. Subjecting children to multiple bureaucratic procedures can be stressful and overwhelming, and can indeed counteract the best interests of the child – namely, the right to lead a child-appropriate life (see CRC, Articles 27 and 31). Counselling and a solid assessment of the child's situation are essential. Respondents indicate that careful consideration must be given to the factors in operation – for example, the situation in the country of origin, the child's age and family status, child specific reasons for flight or the child's views. Multiple aspects must be taken into account in order to find a durable solution for the child. For the present study, an analysis of child-sensitive asylum procedures was critical for examining the grounds on which a return decision might have been made. So far, legally binding and multi-disciplinary standards on the best interests assessments performed during this procedure are missing.

#### **Access to child-sensitive information on asylum procedures**

One persistent problem is that children may not be able to fully estimate or explain the risks and harms that they have faced. This is partly due to shame, stress, or other adverse states that arise during hearings in unfamiliar settings with unfamiliar persons, and partly due to misunderstandings of the way evidence is taken into account in hearings. For example, some unaccompanied children paint a rather positive picture of their situations in order to shield their families from judgement for having left them alone or sent them away. In addition, children may interpret their situation differently from those around them; for example, they may not have full awareness of dangers in the country of origin.

It is therefore vital for children to have access to child-sensitive information on the asylum procedure, as well as to be supported by advisors capable of explaining all relevant possibilities and consequences. This way, children are better prepared for the realities of the hearing and more likely to describe their situation evenly.

According to Article 13 of the CRC, children "shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

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<sup>8</sup> See Bundesamt für Migration und Flüchtlinge, 2019 - DA-Asyl. Available in German at [https://www.proasyl.de/wp-content/uploads/DA-Asyl\\_21\\_02\\_2019.pdf](https://www.proasyl.de/wp-content/uploads/DA-Asyl_21_02_2019.pdf) [accessed 21 October 2019].

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice"

The experts interviewed support the assertion that children's information needs are not met, and confirm that many asylum requests are denied due to children struggling to describe their circumstances in a persuasive manner. Some institutions or individuals have created their own child-friendly information materials, but most counsellors and legal advisors preparing unaccompanied children for their asylum hearings use materials that have been designed for adults. Counsellors generally see it as their task to provide stability and psychological support for their clients during their hearings, while legal advisors consider it their responsibility to explain the asylum decision process, the rights of asylum seekers, and the legal resources available to them.

### **Access to legal aid and counselling**

Access to information on counselling during the asylum procedure (e.g. how relevant actors can be contacted) is obligatory in the EU, and is regulated by the EU Reception Condition Directive (Art. 5).<sup>9</sup> Section 22 of the EU Asylum Procedure Directive instructs that:

*"[A]pplicants should be provided at first instance, free of charge, with legal and procedural information, taking into account their particular circumstances. The provision of such information should, inter alia, enable the applicants to better understand the procedure, thus helping them to comply with the relevant obligations."*<sup>10</sup>

Support and counselling for asylum seekers in Germany are generally provided by employees or volunteers of welfare organizations (*Wohlfahrtsverbänden*) with the assistance of lawyers and/or professionals. A recent change in German asylum law (§ 12a) relevant to accompanied children, which entered into force in August 2019, states:

*"The Federal Office carries out voluntary, independent state asylum procedure advice for asylum seekers. This takes place in two stages. In the first stage, all asylum seekers will be provided with information on how to proceed with the asylum procedure as well as return options before submitting their application in group discussions. In the second stage, all asylum seekers receive an individual asylum procedure consultation in one-to-one interviews, which is carried out by the Federal Office or by charities."*<sup>11</sup>

<sup>9</sup> See Official Journal of the European Union, 'Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)', available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN> [accessed 29 September 2019].

<sup>10</sup> See Official Journal of the European Union, 'Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)', available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=de> [accessed 29 September 2019].

<sup>11</sup> See Amendment § 12a of the Asylum Act (dated 21 August 2019), available (in German) at <https://www.buzer.de/gesetz/6406/al75176-0.htm> [accessed 29 September 2019].

This change in law was debated intensely in the public sphere, as the BAMF is the executive authority responsible for the asylum procedure and its independence is contestable.

Asylum seekers can apply for state-funded professional legal aid to pay for a lawyer. The granting of state-funded legal aid is dependent on how the court rates the chances of a successful outcome and the financial situation of the person applying for the aid. This “merits test” is carried out by the same judge who has to decide on the case itself, and is reportedly applied strictly in many parts of Germany. Consequently, some lawyers do not always recommend applying for legal aid, since they are concerned that a negative decision in the legal aid procedure may have a negative impact on the main proceedings.<sup>12</sup>

Since professional legal aid is often not free of charge and not always available, especially in the rush of accelerated procedures, many asylum seekers end up without such support. Respondents report that the workload of attorneys is extremely heavy. As a result, attorneys generally cannot fulfil all requests for legal aid during asylum procedures. In practice, children and families with good chances of being granted residency appear to have an easier time finding attorneys willing to take their cases, while oppositely those with little or no chance of success (e.g. migrants from the countries in the West Balkans and other countries officially considered “safe”) have greater difficulty finding attorneys. This has clear consequences for children and families.

*“Counting my case numbers in active years, I had about 200 to 300 per year in total, both accompanied and unaccompanied children.”*

– Immigration attorney

In some cases, the best interests of the child might be best served not through claiming asylum, but by exploring alternative pathways to residency. For instance, the Apprenticeship Deferment Law (Ausbildungsduldungsgesetz) of 2015/16 provides for the deferment of deportation for young people over the age of 18 if they are able to find a valid apprenticeship (Ausbildung), whereas Section 25a of the Residence Act holds that “well-integrated” young people who have legally resided in Germany for four years may be granted a residence permit if they apply before the age of 21. It is important that support personnel working with young people have access to current, detailed, child-appropriate information on all such possibilities.

### **Duration of the procedure**

The duration of the asylum procedure is relevant to the best interests of the child, with shorter and longer procedures both having their own advantages and disadvantages. Accordingly, respondents often disagree as to whether shorter or longer procedures are preferable for children.

With regard to unaccompanied children, respondents contended that asylum procedures have been expedited to prevent them “aging out.” Until recently, delays in asylum procedures frequently resulted in child applicants reaching the age of legal adulthood (18 years) before their

<sup>12</sup> ECRE, Asylum Information Database. Available online at <https://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/regular-procedure> [accessed 30 September 2019].

asylum decisions were processed. With accelerated procedures now in place, children have less time to prepare for their personal interviews. Several respondents report that it is sometimes difficult for children interviewed shortly after their arrival in Germany to explain their reasons for flight and their flight experiences, because, for instance, they need more time to process the experience, they lack trust, or they require further psychosocial support.

For accompanied children, long asylum procedures can conversely mean extended stays in initial reception centres (e.g. *AnKER-Zentrum* or *Erstaufnahmeinrichtungen*) or other types of collective accommodation facilities. Studies conducted by UNICEF (2017) and Save the Children (2018) have shown that the rights of children in reception and accommodation facilities are often not duly respected. Respondents indicate that children can suffer little or no access to education, psychosocial support, or other services for up to two years and even longer.

Counsellors often manage to establish trusting relationships with families and children – sometimes over long periods of time and with immense perseverance – and to advise them regarding the asylum procedure. This shows that counselling is time-dependent, and with a hearing shortly after arrival the support is in places limited, meaning that children and families cannot fully benefit from it.

### 3.1.2 Asylum procedures for unaccompanied children

#### **Age assessments**

Unaccompanied children without any documents must in certain cases prove their minority. This can lead to the child undergoing an age assessment procedure. The Child and Youth Welfare Office is typically charged with the assessment. If following this procedure doubts persist, a medical assessment is pursued. These medical assessments are of questionable legality, by reason of them potentially transgressing respect of the subject's dignity. If after these medical assessments uncertainty continues, authorities must assume minority. In situations where age assessments are conducted, children can remain without personal guardians, but the Child and Youth Welfare Office will then act as their guardian while the results of the age assessment are awaited. In rare cases, this can mean that children end up without any support in the asylum hearing. If the asylum seeker is determined to be over 18 years of age, this has severe consequences with regard to return or deportation.

#### **Guardianship**

Unaccompanied minors are treated as other vulnerable children and adolescents in Germany. This means that they are accommodated and cared for under the primacy of Child and Youth Welfare Office immediately after arriving in Germany (§ 42, SGB VIII). As a rule, unaccompanied children are assigned an individual guardian. Within a few days of arrival, the Youth Welfare Office must inform the family court to appoint a legal guardian for the child (§ 42a *et seq.*, SGB VIII). The family court must then initiate the necessary steps to appoint a guardian (§ 1774, German Civil Code).

A guardianship system is essential to the protection of unaccompanied children's best interests. Respondents indicate that state-employed guardians are often overworked by having to care for up to 50 children each. Contrastingly, many privately employed and volunteer guardians care for one child, and are provided with support and training by organizations in this field. For some guardians, the training is inadequate, and they remain uncertain when making important decisions for the child.

According to experts interviewed, guardians can become overwhelmed and lose sight of the interests of the children. In worst-case scenarios, guardians can give priority to the perceived overall needs of their institutions/communities over the needs of individual children. It may be inferred, based on the particulars of the interviews, that in part because of the excessive workloads, not all respondents implicitly trust all guardians to act in the best interests of unaccompanied children. Some form of procedural safeguard should thus be put in place.

*“Many professional guardians have far too many cases and this proves challenging. I met someone at court a few days ago who said he was acting as a guardian to 50 children, and I replied that I imagine it to be difficult to comply with mandated standards on maintaining regular contact – which is in the law, which is part of the guardianship law. That’s not so easy. Being a guardian is in fact not easy.”*

– Immigration attorney

#### **Personal interviews with unaccompanied children**

The BAMF specifies that unaccompanied children should be given a personal interview by a specially trained decision-maker (BAMF, ‘Persönliche Anhörung’, 2019). According to some respondents, there is no consistent monitoring or evaluation of hearings for unaccompanied children. The BAMF however declares that it performs on-the-spot quality checks on a regular basis.

Respondents also indicate that personal interviews with unaccompanied asylum-seeking children are not currently conducted in a child-sensitive manner, and could pose a risk to the best interests of the child. Questions are often asked in a specific, formalized, sometimes even adversarial way, which is neither sensitive nor age-appropriate. The contents of applications and interviews are often superficial and can assume a “default position” of mistrust of the asylum seeker. Even in cases where the officials dealing with children are specially trained, respondents showed concern that in practice few improvements are evident. They moreover stated that the quality of interpretation services during interviews with non-German speakers varies widely, and that interpreters do not always appear to have been trained in child-sensitive language and behaviour.

### **3.1.3 Asylum procedures for accompanied children**

#### **Personal interviews with accompanied children**

Whereas adults and unaccompanied children are treated as individual persons bearing specific individual rights and needs during the asylum process, accompanied children are regarded as being under the protection and jurisdiction of their guardians – that is, they are treated as members of a family unit rather than individuals. Experts indicate that no mandatory provisions and few specific procedural steps appear to have been defined for accompanied children. For instance, individual interviews by specially trained personnel are not compulsory (Deutscher Bundestag Innenausschuss, 2016: p. 82). Respondents furthermore indicate that accompanied children are not generally present during their parents’ interviews. The upshot of this is that accompanied children lack opportunities to claim individual, child-specific reasons for flight and migration; rather, they are habitually assumed to share their parents’ reasoning.

In addition, the parents or adult relatives of accompanied children are assumed to bear primary responsibility for safeguarding their children's best interests throughout the asylum procedure, and are expected to represent their children adequately during the hearing.

Parental representation is challenging for several reasons. First, children and parents may not be aware that child-specific reasons for flight can be asserted and given weight in the adjudication of asylum claims. Second, parents' personal interviews can be long, challenging, and emotionally exhausting. According to respondents, by the end of the interview, parents sometimes lack the energy to discuss their children's situation. Third, parents may opt not to draw attention to their children's situation due to culturally contingent perceptions of the role and status of children and/or the family, or with the intention to protect their children. Finally, children may have specific reasons for flight that they are not comfortable revealing to their parents, among them sexual identity, political opinions, and religious beliefs.

According to several experts interviewed, one barrier preventing the involvement of accompanied children in asylum procedures (and other steps in the return process) is the risk of creating conflicts with parents/adult relatives. Experts thus emphasize that accompanied children must be treated in a way that does not disempower the parents, but rather supports them. The exception are cases in which parents pose a threat of child welfare endangerment (Kindeswohlgefährdung) as defined in SGB VIII.

#### **Consideration of child-specific reasons for flight and conditions in countries of return**

Child-specific reasons for flight and child-specific conditions in countries of return are not given due consideration. This is particularly the case when the family comes from a country that has been declared a "safe country of origin" (sicheres Herkunftsland). Respondents indicate that generally in such cases, little consideration is given to whether the country of origin is actually secure for specific vulnerable groups such as children or women. In the respondents' opinions, poor conditions in the returning country are not generally recognized as a threat to the best interests of the child.

*"There are families that don't have anything there anymore [...]. There are some who return and can return to their own house. That happens too, I know. Back to their own land and they could also go back to their old ways. Others literally have nothing, and these are often the Roma families."*

– NGO counsellor

On the one hand it is necessary to examine the child-specific situation in the country of origin, and on the other to analyse the situation and perspectives of the child in Germany. The Youth Welfare Office can, for instance, issue certificates or provide testimony as to why from their point of view it is necessary for children to remain in Germany.

Respondents with experience in asylum procedures indicate that effective interviewing practices are necessary, to ensure a fruitful examination of the individual circumstances of children and families, and to allow the child to express their child-specific reasons for flight, provided that this does not pose any threat to their well-being.

Furthermore, respondents mentioned that the same standardized interview guidelines and the same set of questions are generally used for families who have lived in Germany for two years as for those who arrived a few weeks ago.

#### 3.1.4 Documentation

Asylum procedures are documented by the BAMF. A file is created for every asylum seeker, which includes, for example, records of proceedings, briefings from psychologists and doctors, and records of contacts with authorities. Minutes of personal interviews are translated and should be mailed to asylum seekers. According to the BAMF, asylum seekers then have the option to add to or amend what was stated. However, in the course of this study there was no mentioning of whether or not this is correct practice. While there is a standard documentation protocol of asylum procedures for unaccompanied children, there does not seem to be the same for asylum procedures involving accompanied children. This is because accompanied children are not always regarded as individuals within asylum procedures – for example, they are not usually given individual interviews, since the parents are supposed to speak for their children, or indicate when it is necessary to speak to the child or children individually. Accompanied children may thus instead feature, to a greater or lesser extent, in their parents' files.

Were accompanied children to be heard individually, details or facts could be articulated that the child does not want to share with their parents (for example, revealment of homosexuality), or could even put the child at risk within the family (such as disclosures of sexual assault and other violence) when shared with the parents. Documentation itself can pose a risk for children in such situations and should not therefore be shared with the parents; yet, the absence of the minutes could make the parents suspicious. It is therefore essential that decision-makers receive training on child-specific aspects of the entire interview process, including the preparation of the resulting documentation, to strengthen child protection measures. Additionally, the Child and Youth Welfare Office must be contacted and involved if there is any sign of endangerment to the child's well-being.

#### 3.1.5 Negative asylum decisions

If the BAMF decides that none of the forms of protection (refugee status, entitlement to asylum, subsidiary protection, or ban on deportation) are applicable to the asylum seeker, the application is rejected and applicants receive a negative decision, with notice that they must leave the country within 30 days or face deportation. There is a second form of refusal for "manifestly unfounded" applications, with a one-week deadline to leave the country. This applies in many cases to individuals from so called "safe" countries of origin.

If another EU country is found to be responsible for the asylum application, the BAMF declares the asylum application "inadmissible".<sup>13</sup>

The study findings show that welfare association counsellors and social workers often feel overwhelmed by the task of informing children about negative asylum decisions or other return decisions. In order to deal with the situation adequately and to meet the children's needs within these often difficult circumstances, it is necessary to provide access to supervision, training, and child friendly information materials.

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<sup>13</sup> See the BAMF website > Asylum and refugee protection > Stages of the asylum procedure > 'The decision of the Federal Office', at <http://www.bamf.de/EN/Fluechtlingsschutz/AblaufAsylv/Entscheidung/entscheidung-node.html> [accessed 30 September 2019].

*“They say, ‘why can’t I stay here? I have so many friends here, I can speak German.’ And sometimes I see that they can’t speak their ‘native’ language. How should I answer? ‘No, you have to go now’? How can you prepare these children? Taking away their hope completely, saying ‘No, you have to go back now, back to poverty, back to a war zone, that’s the way it is – that’s what the adults have decided.’ It’s just impossible. How can you prepare a five- or seven-year-old for that?”*

– NGO counsellor

## 3.2 Appeal mechanisms

Section 74 (1) of the Asylum Act establishes the right to appeal against return decisions. The parents must file the appeal; for unaccompanied children, the Youth Welfare Office or another legally appointed guardian must file the appeal. State funding for legal representation is available but not always granted, families and children do then have to pay for the cost themselves. Section 23 of the EU Asylum Procedure Directive states: “In appeals procedures, subject to certain conditions, applicants should be granted free legal assistance and representation provided by persons competent to provide them under national law”.

The Dublin III Regulation decrees that legal advice must be available to individuals for whom decisions for return to another Member State are made (Art. 27).

The possibility of appeal and the deadline for return should be stated in the written notice given by the BAMF. Typically, the appeal must be submitted very quickly and professional legal aid and representation (although not required) should be considered; but the financial aspect is an impassable obstacle to many families and children.

Respondents further state that for unaccompanied children and families alike, achieving a positive appeal outcome requires proactive co-operation between various stakeholders – for example, a legal advisor to draft the initial formal letter and make sure deadlines are met, counsellors to provide background and to help build trusting relationships, and interpreters to ensure that important information is not lost in translation. While the courts themselves are tasked with collecting relevant information on the country of origin, it is up to the client’s legal team to frame the grounds for appeal within a coherent and personalized flight/migration narrative. From a legal point of view, children, whether unaccompanied or accompanied, have the right to be listened to at appeal hearings. Accordingly, judges should be made more aware of children’s rights in general, and give due consideration to child-specific reasons for flight.

When families in appeal procedures are assisted by an attorney, they are sometimes informed of the option of stating child-specific reasons for flight and the right of the child to be heard. However, there is no guarantee that such information would be taken into account. One respondent with decades of experience as an immigration attorney reports encountering only one case in which the court allowed for the best interests of an accompanied child when deciding on a family’s appeal. Normally, once a family has been ordered to return, appeal courts are unlikely to revise the return decision based on a reconsideration of the best interests of the child.

Despite the EU Return Directive citing the principle of the best interests of the child and the principle of non-refoulement in the same article (Article 5), it appears, according to the study findings, that German courts still take the latter more seriously than the former.

Legal precedents affirm that the welfare (*Kindeswohl*) of unaccompanied asylum-seeking children is to be taken into account – but it is up to the child’s advocates to ensure that this is actually put into practice. In some degree because of the lack of a formal best interests procedure, guardians, legal advisors, and other child advocates bear the heavy responsibility of ensuring that decision-makers in courts and all actors involved understand the risks that unaccompanied children might face upon return. Here, proactive collaboration between advocates can yield positive outcomes.

*“The Federal Constitutional Court already decided in 1994, regarding an Afghan case, that if it is not guaranteed that the child’s welfare [Kindeswohl] will be taken into account after the return in the same way that it is in Germany, then a deportation may not take place [...]. But this is not always sufficiently considered. You [the child’s advocate] just have to perform well. The most important thing is always to explain in detail what the situation is like, and to research what the situation will be like if [the child is returned]. And that often happens very insufficiently in my experience.”*

– Immigration attorney

### 3.2.1 Return decision after appeal

**Return decision (*Rückkehrentscheidung*)** is defined in Article 3 of the Return Directive as “an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return”. The term “deportation warning” (*Androhung der Abschiebung*) as specified in Article 59 of the German Residence Act is equivalent to the term “return decision” as defined in the Return Directive (BAMF, 2016a: p. 12). This definition excludes the commonplace use of the term to describe the self-determined decision of a migrant to return to their country of origin.

The BAMF states on their website: “If the individual **does not voluntarily** comply with their **obligation to leave the country**, this can also take place **coercively**, the respective **immigration authority** being **responsible for the return**. This also applies if no court action is brought. If a return is **not possible**, the immigration authority **can** issue **temporary suspension of deportation** (*Duldung*), or indeed a **residence permit**” (emphasis in original).<sup>14</sup>

## 3.3 Return Processes

**Return** is defined in this study according to Article 3 of the Return Directive, as the process of a third-country national going back – whether in voluntary compliance, with an obligation to return, or enforced – to their country of origin; or a country of transit in accordance with community or

<sup>14</sup> See the BAMF website > Asylum and refugee protection > Stages of the asylum procedure > ‘Appeals against the decision’, at <http://www.bamf.de/EN/Fluechtlingsschutz/AblaufAsylv/Rechtsmittel/rechtsmittel-node.html> [accessed 29 September 2019].



bilateral readmission agreements or other arrangements; or another third country, to which the third-country national concerned voluntarily decides to return and in which they will be accepted.

**Voluntary departure (*freiwillige Ausreise*)** is defined in Article 3 of the Return Directive as “compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.” The Return Handbook recommends 7–30 days as a reasonable period for voluntary departure.<sup>15</sup>

**Voluntary return (*freiwillige Rückkehr*)** is defined in the Return Handbook as the “‘truly’ voluntary return” of legally staying third-country nationals to their countries of origin (Return Handbook, p. 12). This category covers third-country nationals in possession of a German or EU permanent residence permit or temporary residence permit (*Aufenthaltserlaubnis*), including temporary residence permits granted on the basis of hardship, humanitarian grounds, the need for protection, or, in the case of minors, demonstrated integration into “the way of life in the Federal Republic of Germany” (Residence Act, Section 25a).

The term “voluntary return” should not apply to third-country nationals who have been subject to a return decision and/or are otherwise under an obligation to return; in such cases, the term “voluntary departure” should be used instead.

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<sup>15</sup> See European Commission: ‘Annex to the Commission Recommendation establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks’ (C(2017) 6505) (Brussels: 27 September 2017). Available online at [https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/whatwedo/policies/europeanagendamigration/20170927\\_recommendation\\_on\\_establishing\\_a\\_common\\_return\\_handbook\\_annex\\_en.pdf](https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/whatwedo/policies/europeanagendamigration/20170927_recommendation_on_establishing_a_common_return_handbook_annex_en.pdf) [accessed 30 September 2019].

In practice, however, these terms are often treated as interchangeable. For example, programmes that assist third-country nationals who are obliged to leave Germany within a certain time period, and who have decided to depart voluntarily, are frequently referred to as voluntary return programmes (rather than voluntary departure programmes).

**The return process** begins with a return decision. In the case of children particularly, the return process needs not end with departure, but can include aspects of emigration and reintegration into the receiving state, which should then be monitored. This broad definition is relevant to the present study, as it creates a categorical basis for the consideration of the principle of the best interests of the child by Member State authorities, from the moment a child crosses the Member State border until a durable solution has been established.

### 3.3.1 Return counselling and meetings

**Voluntary return programmes** are governmental programmes at the national level and programmes at the federal state level, as well as programmes run by welfare organizations, designed to assist those third-country nationals who opt for a voluntary return.

The Federal Ministry of the Interior, Building and Community (BMI), in co-operation with the Federal Ministry for Economic Cooperation and Development (BMZ), are the main actors at the national policy level with regard to voluntary return and reintegration. The executing authority under the Federal Ministry of the Interior, Building and Community is the Federal Office for Migration and Refugees (BAMF), which provides an information centre and counselling on voluntary return (ZIRF).

The key federal-level programme in Germany is **the Reintegration and Emigration Programme for Asylum-Seekers in Germany/Government-Assisted Repatriation Programme (REAG/GARP)**. The operating agency is the IOM. The programme offers financial and operational assistance in the form of:

- reimbursed travel costs
- financial travel allowances
- medical costs for up to three months in the destination country

**Returning to New Opportunities** is a programme administered by the GIZ and commissioned by the BMZ which offers services such as vocational training and counselling to returnees (see section 4.6., “Reintegration”)

A list of **bilateral agreements** on return between Germany and receiving countries (as of June 2018.) can be found at the website of the Ministry of Interior (in German). The list contains the sources of the agreements which entail legal frameworks, operational aspects of return, authorities in charge.<sup>16</sup>

Return counselling in Germany is decentralized, mirroring the federal system of immigration policies and institutions. Major governmental participants in the field include the BAMF (in partnership with the IOM for voluntary returns) and immigration offices. For instance, online return

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<sup>16</sup> See Bundesministerium des Innern, für Bau und Heimat: Abkommen zur Erleichterung der Rückkehr ausreisepflichtiger Ausländer (as of June 2018). Available in German online at: [https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/rueckkehrfluechtlinge.pdf?\\_\\_blob=publicationFile&v=3](https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/migration/rueckkehrfluechtlinge.pdf?__blob=publicationFile&v=3) [accessed 30 September 2019]

counselling is available through the ZIRF programme, as administered by the BAMF and the IOM.<sup>17</sup> Non-governmental participants and welfare organizations include amongst others the German Red Cross, Raphaelswerk, AWO (Arbeiterwohlfahrt, 'Workers Welfare'), Diakonie, Caritas, and many local organizations. Historically, these organizations have taken the lead in developing return counselling; however, since 2015, the state has played a more active role.

In 2015, the BAMF published non-binding Guidelines for Nationwide Return Counselling.<sup>18</sup> These guidelines define return counselling as "individual, comprehensive, qualified counselling on all questions related to the concerned person's return to and reintegration in their country of origin, conducted through governmental or non-governmental means". The guidelines are intended to establish voluntary return and voluntary departure as the priority forms of return, enable returnees' sustainable reintegration into their countries of return, and reduce dependence on governmental transfer services. Among its recommendations are the establishment of common standards nationwide and the provision of voluntary, non-binding, and open-ended counselling services that are tailored to the needs of individuals, conducted by qualified personnel, and sensitive to the special requirements of vulnerable groups such as children. Non-governmental or welfare organizations including Caritas have also developed their own detailed practical guidelines as a result of their experiences of being among the leading actors in the field.<sup>19</sup>

Despite the lack of legally binding standards of practice, respondents consider return counselling in Germany to be good or satisfying. Strong points include clear communication and collaboration between stakeholders, the gradual exchange and systematization of good practices, and the experience and competence of both large welfare organizations, such as Caritas, and local actors including *Coming Home* (a Munich-based project assisting with voluntary returns). At the state and regional levels, smaller organizations sometimes play a proactive role in promoting best practices, either informally through networking activities or by offering training. Experts interviewed recognize that key aspects of return counselling must be improved, but also stress that more specialized resources and tools are available now than were prior to 2015.

Currently, information about return counselling and other aspects of voluntary return and departure is provided early in the process. Concerning asylum seekers, there is some debate as to the propriety of providing information on voluntary return and departure before the case has even been heard. Some respondents frame this as a means of helping migrants realistically assess their options and make a rational, informed decision while there is still time to prepare themselves and their families. These respondents see return counselling as complementary to asylum counselling – especially in cases where, based on the country of origin or other factors, there is little chance of asylum being granted.

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<sup>17</sup> ZIRF provides multilingual country factsheets, compiled using IOM data, on Afghanistan, Albania, Armenia, Azerbaijan, Bosnia & Herzegovina, China, Georgia, India, Iraq, Iran, Kosovo, Lebanon, Morocco, Montenegro, Pakistan, Republic of North Macedonia, Russian Federation, Serbia, Turkey, and Vietnam. ZIRF will furthermore answer individual, case specific questions on conditions in and returns to particular countries by email. All inquiries are anonymized and made available online, where they can be searched by stakeholders or other prospective returnees.

<sup>18</sup> Arbeitsgemeinschaft Freiwillige Rückkehr: Leitlinien für eine bundesweite Rückkehrberatung. Version 2.0 (9 April 2015). Available (in German) online at: [https://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Rueckkehr/leitlinien-zur-r%C3%BCckkehrberatung.pdf?\\_\\_blob=publicationFile](https://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Rueckkehr/leitlinien-zur-r%C3%BCckkehrberatung.pdf?__blob=publicationFile) [accessed 30 September 2019].

<sup>19</sup> See Caritas, 'Fluchtpunkte. Leitlinien für die Rückkehrberatung von Flüchtlingen und Geduldeten' (2017). Available (in German) online at [https://www.caritas.de/cms/contents/caritas.de/medien/dokumente/dcv\\_zentrale/migration/fluchtpunkte/fluchtpunkte-intern1/dcv\\_fluchtpunkte\\_intern\\_rueckkehrberatung\\_2017.pdf?d=a&f=pdf](https://www.caritas.de/cms/contents/caritas.de/medien/dokumente/dcv_zentrale/migration/fluchtpunkte/fluchtpunkte-intern1/dcv_fluchtpunkte_intern_rueckkehrberatung_2017.pdf?d=a&f=pdf) [accessed 30 September 2019].

*"The point is not just to support the people during the return process, but first and foremost to support them in making that decision, to approach it in perspective."*

– NGO employee

*"It would make sense to combine the return counselling and the counselling on asylum, because if the people don't know at all which reasons are relevant to the asylum process, they can't make the decision to return home."*

– UN official

Other respondents are critical, interpreting this practice as a subtle form of pressure and pointing out that many asylum seekers reject return counselling as long as their cases are still being processed. They further note that while this practice is common among government institutions, it is avoided by non-governmental counsellors. This fits into a pattern of low-level tension between non-governmental and governmental counsellors, stemming from perceptions of the latter as coercive or lacking in empathy.

*"If you as an asylum seeker come to the BAMF, you already receive, before you even have the opportunity to apply for asylum, a notice about return counselling. You have to imagine: before I'm even able to express my will or my needs – 'I need protection' – it is suggested that it would be better if I return."*

– NGO counsellor

*"That's the difference [between NGOs] and the governmental authorities. [NGOs offer services] only if people wish for them. [NGOs don't decide] in place of the people – the people themselves decide."*

– NGO employee

There is some disagreement among respondents on when return counselling should end, as well as when it starts: some institutions end counselling upon the final preparations for the return journey being made or at the day of departure itself, while other institutions hold open the possibility for at least some form of transitional co operation between counsellors and reintegration services after the child's arrival in the country of origin.

*“Counselling terminates as soon as the clients receive their flight confirmation and the payment.”*

– NGO return counsellor

*“Some say – and that’s mainly the standpoint of many governmental authorities, especially of the immigration offices – that as soon as the client leaves the country, [counselling] is completed for us and the counselling process is ultimately terminated, the file is closed. Others would say: ‘No, that’s not the case, and that’s the reason for the name of our project, in an integrated return planning we have to integrate the process after the return as well.’”*

– NGO employee

The form and content of return counselling vary widely. Expert respondents indicate that return counselling in Germany can take many courses – for example, it can last for several months or end after a single session. Once return counselling is voluntarily initiated by a client, its form and content depend on the client’s personal and legal situation, as well as the counselling institution’s standards of practice. At one extreme are clients who have decided to return as soon as possible, and mostly need assistance with the logistics for so doing; at the other extreme are clients who take months of consultation to reach a decision. Clients sometimes drop in and out of return programmes and return counselling as they reassess their chances of being allowed to stay in Germany, finally committing only after it has become clear that forced return is the only remaining option. Such complex processes can overmatch the capacities of smaller counselling providers, potentially leading to denials of service.

*“You’ve got returnees [...] who say they’re fed up – ‘Get me a ticket, I want to be at home not later than next week.’ In this case you’re nothing more than a certificated travel agency. But you’ve also got cases [where the asylum seeker] needs several months to make a decision to return [...]. I think it’s extremely individual and finally also depends on how much time you’re allowed to spend [...]. If you’re a small immigration office and you face the task of conducting a month-long counselling process on an individual basis, you won’t do so or even won’t be able to do so.”*

– NGO employee

Regarding duration, respondents indicate that legal standards are a determining factor, as are the ways in which different foreigner registration offices interpret these standards. For instance, the time frame between an asylum seeker’s arrival and first asylum hearing is sometimes less than two weeks, followed in the case of a negative decision by an approximately 7–30-day window for voluntary departure. The recent move toward accelerated asylum procedures can result in time pressure for return counsellors and in worst-case scenarios can lead to children’s rights being disregarded.

*“Child-specific reasons do play a role here. If the child wants to be heard [...] then you have to postpone the hearing, if in doubt, for another week in order to be able to conduct an extra counselling session in advance. This is also part of the UNHCR guidelines on asylum procedures for children. It’s very important for children, of course, that their asylum procedures are expedited. But on the other side, speeding up the process should not lead to disadvantages.”*

– UN official

Whereas official policy is to maintain strict return deadlines, some immigration offices tend to be flexible once a family has taken steps toward a voluntary departure. Child-specific factors can also affect the duration of return counselling. For instance, children sometimes require multiple health checks and medical procedures (e.g. vaccinations), while those enrolled in school may wish to finish the school year or join an end-of-year trip before leaving. It is among the responsibilities of the return counsellor to advocate for extensions in such cases. Generally, when a family facing a return obligation begins return counselling or otherwise makes moves toward voluntary departure, the authorities become more likely to grant concessions such as extended deadlines and improved access to care. Like the provision of information on return counselling prior to a return decision, this could be interpreted as a form of coercion.

*“Some immigration offices determine a concrete day of departure as a last chance for voluntary return. You’ve got other immigration offices that say, as soon as it is signalled that the clients are taking part in the return counselling, ‘OK, we’ll let this rest then, and wait and not apply any pressure.’ So, it’s extremely different.”*

– NGO employee

*“We asserted in one case, ‘They will leave now, but please don’t impose a ban [on returning to Germany] on the child and the mother, so that they can return for medical treatment.’ And it worked out.”*

– Counsellor

Return counsellors sometimes express frustration with the imperative to alert parents to child-specific reasons for and against return. This is because from a legal standpoint, such reasons often have no bearing on whether or not an obligation to return will be imposed by the state. That is, making the best interests of the child a topic in return counselling is troublesome if this was not taken into account in the return decision process as guided by immigration law. This can be frustrating for both counsellors and clients.

Concerning accompanied children with families and unaccompanied children, respondents evaluate the state of the provision of return counselling in Germany as highly uneven. Some institutions have considerable experience working with children and other vulnerable groups, and have invested time and effort in the development of methods suited to their needs. For other institutions, counselling adults is already a challenge, and as a result, families and children are given little if any special attention.

### **Voluntary return of unaccompanied children**

According to the IOM, 51 unaccompanied children returned under REAG/GARP programmes in 2018.

Unaccompanied children are not currently given the right to make their own decisions regarding any aspect of returns. Decision-making power lies with their appointed guardians. By law, it must be confirmed that the parents, a caregiver, or another form of reception for the child is securely in place in the receiving country upon their arrival. A comprehensive assessment must be conducted in order to ensure that the decision is in the best interests of the child.

Performing an assessment of the family situation in the receiving country from afar constitutes a great challenge. Some situations might be clearer than others. This also depends greatly on the child's view and description of the situation, which requires a trusting relationship with the guardian that is not always in place. Further, a best interests assessment and determination must not only secure the child's protection, but must include all other rights of the UNCRC that fall under the principle of the best interests of the child, such as participation, non-discrimination, and the right to education, medical care, and development. In addition, the child needs to be made fully aware of their options and perspectives in Germany respecting, for example, legal status. All options available that can lead to a residence status should be assessed with professional legal aid – access to education, improved prospects to develop, and so on – in a way that the child understands, so that they are better able to judge their situation and to form well-reasoned opinions. Other possibilities for a durable solution should also be explored (e.g. resettlement). Even though a child might want to return, in certain cases this is not necessarily in their best interests (e.g. war and conflict in the country of origin) and is therefore balanced against other aspects that are detrimental to their development, health, and ultimately survival.

Respondents are aware of cases in which unaccompanied children have expressed a desire to return to their families, have been approved to do so, and have been allowed under these conditions to return. The guardian will be responsible for the child until custody is assumed by the parents or a caregiver in the receiving country. After the unaccompanied child's return, decision-making authority – including over continued counselling by German institutions or other communications with Germany – reverts to guardians in the receiving country.

To assess the situation in the country of return, the IOM carries out a so-titled family assessment.<sup>20</sup> The assessment involves, for example, contacting the parents, a legal guardian, or an institution in the country of return by way of IOM country offices, and an evaluation of the socio-economic situation for the children there. It also includes an estimation of potential sources of child endangerment (*Kindeswohlgefährdung*).

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<sup>20</sup> See International Organization for Migration, 'Informationsblatt für antragsübermittelnde Stellen', available (in German) at <https://files.returningfromgermany.de/files/Infoblatt%20UMC-F%C3%A4lle.pdf> [accessed 29 September 2019].

*“IOM conducts research upon request on the circumstances in the country of return, and provides facts in order to provide guardians with more opportunities in the decision-making process. For example: in what conditions do the parents live there, what is the situation actually like? This must all be incorporated into the decision.”*

– Ministry official

Moreover, the IOM assesses the relationship between the guardian in Germany and the child, the child's conditions in Germany, the conditions of life and prospects in the country of return, and the degree to which the child has been informed of the consequences of returning. Personal conflicts – for example, between the child and the guardian, the child and German institutions, etc. – can further complicate matters.

*“Imagine you are a guardian and you are responsible for an adolescent, a 16- or 17-year-old boy [...]. He doesn't want to listen, doesn't want to go to school, isn't able to integrate – and all of a sudden, you get the information that he wants to voluntarily return. The question is, is it really his own desire to return, or is he being pushed back? It's difficult to judge.”*

– UN official

In the course of this study, there was no information available on whether family assessments are monitored independently. It is unclear to what extent family assessments as currently conducted are successful in identifying potential risks to the best interests of the child, especially so because analysing this complex matter is difficult from afar.

Interviewees who were well-informed about family assessments said that counselling unaccompanied children is particularly challenging for a number of reasons; among them is that the legally unresolved question of how to define and operationalize the best interests of the child becomes unavoidable.

*“It's open to negotiation what “child welfare” (Kindeswohl) is, which is the Youth Welfare Office's problem here in Germany. We encounter this problem directly in the case of unaccompanied children, because the Youth Welfare Office is responsible, and indirectly in the case of accompanied children, as the Office is responsible only in the second place – first and foremost the parents have to take care of it. But very different ideas exist of what “child welfare” should actually look like. And many counsellors don't have any idea.”*

– NGO employee

Another complicating factor in the counselling of unaccompanied minors is the range of institutions with which the return counsellor must co-ordinate: The Youth Welfare Office, the guardian, the IOM, the family or guardian in the country of return, and in some cases, other institutions in the country of return. If there is insufficient evidence that the unaccompanied

minor will be looked-after in the country of return, the IOM will refuse to proceed with the case. This is correct practice from the standpoint of the best interests of the child, but results in a heavy workload and much frustration for the return counsellor.

### **Voluntary return and departure of accompanied children and their families**

Regarding both voluntary return and voluntary departure (i.e. voluntary compliance with a return decision), parents are legally empowered to make decisions on behalf of their entire families. No specific guidelines for counselling exist to ensure that the views of the children are adequately taken into account.

Counselling families with children brings with it challenges in terms of co-ordination and content. One such example is that children born in Germany require an international birth certificate in order to attend school in their receiving countries; if the counsellor fails to procure one, this can cause problems for the family after their return. Institutions experienced in working with families and children have recorded their knowledge in the form of guidelines and checklists, but currently no central authority exists to ensure that such materials are disseminated and used nationwide. As a result, at institutions with less proficiency in return counselling, simple and avoidable mistakes continue to be made.

*“There are some states – Lower Saxony for example – which actually have implemented the standards [we would like to see in place], in the form of a regulation. There are others which don’t care at all.”*

– NGO employee

Another challenge that respondents observed is that parents do not always know how to talk to their children about difficult subjects like return. To avoid the discomfort of telling their children that their social lives are about to be uprooted, some parents simply say that they are going on vacation rather than leaving for good. It is therefore necessary that the situation and prospects in the country of origin or transit are properly examined, and that children are involved in this process. Parents should be encouraged to bring their children to counselling appointments, so that the children’s views may be taken into account and their situation assessed in detail. Accompanied children can in general only be singularly prepared for return within the context of return counselling if: (1) the counsellor sees it as necessary; and (2) the parents agree. Neither of these conditions can be taken for granted.

In many cases, children are uninvolved in the decision-making process. Notwithstanding this, many counsellors and other relevant personnel, such as social workers, do endeavour to lessen the emotional burden on accompanied children who are uncomfortable with their parents’ or guardians’ decisions. They also support the parents, and encourage them to involve their children to an extent with which or if possible greater than the parents are comfortable.

In cases where families apply to REAG/GARP for financial support for the period after returning, the amount offered, according to the respondents, is generally calculated based on an analysis of the family’s needs and the conditions in the receiving country. Child-specific factors can be incorporated into this analysis. However, respondents indicate that this analysis is not currently performed as a matter of policy; it must be recommended by the individual counsellor. Moreover, depending on

the client's personal situation (e.g. their country of origin), non-REAG/GARP sources of funding and support may also be available, including some that take children's needs into account (see Annex 2). Whether or not the client can take advantage of such opportunities currently depends on the knowledge, experience, and proactivity of the return counsellor. Respondents remarked that a standardized method of connecting clients to appropriate sources of support, based on their personal situations, could help reduce the pressure on return counsellors.

*"We had, for example, a programme to provide so-called "bridging money." If a single mother returns with an infant, she won't be able to simultaneously care for the child and earn a living by herself. So, we have the possibility to say, we will support this woman on a monthly basis for a certain period of time, so that she has a chance to settle in and develop some positive structures, just to give her an easier start."*

– Ministry official

### 3.3.2 Child-sensitive information

Respondents note that some non-governmental institutions and welfare organizations have produced child-appropriate informational material on return counselling, but that no central authority oversees the distribution and use of this material. One complicating factor that has contributed to the decision not to offer child-specific informational materials is the potential for parents to be suspicious or offended by the provision of material to their children with which they might not agree, or which they might not fully understand. Nevertheless, discussions on creating child-appropriate informational material are currently ongoing within professional working groups and the BAMF.

*"Yes, some things do exist. As far as I know, IOM developed some materials abroad and examined whether you could transfer it. But if you asked for a nationwide information pool that all counselling centres have access to, that doesn't exist."*

– NGO return counsellor

*This [provision of child-specific information materials] can lead to conflicts very quickly. It can lead to mistrust from the parents' side if a return counsellor hands something out to the child separately, which the parents don't understand at all.*

– GO employee

### 3.3.3 Dublin III Regulation

**Dublin III Regulation** (EU) refers here to Regulation No. 604/2013 on establishing the criteria and mechanisms for determining the EU Member State, or Iceland, Norway, Switzerland, or Liechtenstein, responsible for examining an asylum application for international protection lodged in one of these States. Normally, the Member State at which the third-country national first arrived is deemed responsible for the application.



**“Transfer” or “passing back”** rather than “return”, are the terms recommended in the Return Handbook to describe the conveyance of a third-country national to another EU Member State under the Dublin III Regulation (Return Handbook, p. 9). Article 6 of Regulation 604/2013 dictates that “the best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in [Regulation 604/2013]”. The present study takes into account information on transfer under the Dublin III Regulation where appropriate.

Experts state that most deportations conducted in Germany are transfers to other EU Member States under the Dublin III Regulation. From an operational standpoint, these transfers do not differ from deportations to countries of origin. According to one respondent, families subject to transfer under the Dublin III Regulation are seldom offered the option of voluntary departure or access to voluntary return programmes. This is detrimental, since voluntary departure is less traumatic for children than deportation. Giving parents the option of voluntary departure is requisite in view of their children’s well-being.

#### **3.3.4 Detention**

Article 17 of the Return Directive permits the detention of unaccompanied children and families with children in principle, but only “as a measure of last resort and for the shortest appropriate period of time”; it furthermore specifies that “the best interests of the child shall be a primary consideration in the context of the detention of minors pending removal”. Section 62 of the

German Residence Act carries over these terms.<sup>21</sup> As with other aspects of immigration law, detention is the responsibility of the federal states. As some experts indicate, the number of detention facilities has decreased in recent years. However, with the new changes in asylum law, detention facilities are currently being expanded; once these amendments are in force, it will be possible to carry out detention in extra sections of ordinary prisons.

### 3.3.5 Forced return

**Deportation (*Abschiebung*)** is described in Section 58 of the German Residence Act as supervised deportation “on grounds of public security and order”. Prior to deportation, a deportation warning (*Androhung der Abschiebung*) is generally issued, which provides between 7 and 30 days within which to appeal the deportation decision or voluntarily depart Germany.

With regard to children, Section 58 specifies that, “before deporting an unaccompanied foreign minor, the authority must ensure that in the state to which he is to be returned he will be handed over to a member of his family, to a person possessing the right of care and custody or to an appropriate reception centre.” However, the term “appropriate” here is not defined.

**Removal (*Zurückschiebung*)** Section 57 of the German Residence Act decrees that foreigners “apprehended in conjunction with unlawful entry into the federal territory [...] shall be removed from the territory (*zurückgeschoben werden*)”.

In Article 3 of the EU Return Directive, the term ‘removal’ (instead of deportation) is used for “the enforcement of the obligation to return, namely the physical transportation out of the Member State”. In this study, the term ‘removal’ is used according to the definition given in Section 57 of the German Residence Act (*Zurückschiebung*).

**Refusal of entry (*Zurückweisung*)** is when an individual is refused entry at the border (Section 15, German Residence Act).

**German ministries and authorities in charge of return:** Deportation and transfer are matters for the Federal States in Germany, under the direction of the immigration authority (*Ausländerbehörde*). Deportations are carried out by the police. At the national policy level, the Federal Ministry of the Interior, Building and Community (BMI) is responsible.

Accompanied children are regularly deported along with their families. Several studies, among them the UNICEF study “Stilles Leid”, point out the risks that deportations pose to children’s safety and their mental health.<sup>22</sup>

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<sup>21</sup> Section 62 (1) of the Residence Act decrees that: “Custody awaiting deportation shall not be permissible if the purpose of the custody can be achieved by other, less severe means which are also sufficient. The detention shall be limited to the shortest possible duration. Minors and families with minors may be taken into custody awaiting deportation only in exceptional cases and only for as long as is reasonable taking into account the well-being of the child”. See [https://www.gesetze-im-internet.de/englisch\\_aufenthg/englisch\\_aufenthg.html#p1167](https://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.html#p1167) [accessed 30 September 2019].

<sup>22</sup> See UNICEF, ‘Stilles Leid: Zur psychosozialen Gesundheit abgeschobener und rückgeführter Kinder’, available (in German) at: <https://www.unicef.de/blob/9302/86af5cefb0c6fc109352876244275d53/studie-stilles-leid-kosovo-abschiebestudie-2012-pdf-data.pdf> [accessed 30 September 2019].

The status quo regarding the deportation of unaccompanied children is ambiguous. As stated above, Section 58 (1a) of the Residence Act holds that unaccompanied minors cannot be returned without the assurance that they will be transferred to a person with the right of care and custody in the country of return. This echoes Article 10 of the Return Directive, which states that “before removing an unaccompanied minor from the territory of a Member State, the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.”

Insofar as it was possible to determine during the desk review, all federal states permit forced returns of unaccompanied children in theory, provided that the above-mentioned Section 58 (1a) of the Residence Act is fulfilled.<sup>23</sup> But in practice, deportations of unaccompanied children are rarely proceeded, though some sources suggest that deportations of unaccompanied minors have in fact occurred recently.<sup>24</sup>

Authorities are permitted to enforce deportations of young people upon their 18th birthday, which often results in people around this age going to ground, rather than face deportation. Economic and financial considerations serve as rationale for enforcing the return of young people, who are hypothetically regarded as capable of supporting themselves financially (see, for example, the judgement of VG Augsburg, 12.12.2017 – Au 6 K 17.32980).<sup>25</sup> Respondents observe that those young people who take to ground face grave threats to their well-being, by way of destitution and exposure to human traffickers and other criminal elements.

As for other aspects of immigration law enforcement, deportations are the responsibility of the federal states. Experts indicate that in those states with which they are familiar, no special procedures apply to the deportation of families with children. If the obligation to return is enforceable, the appeal proceedings have ended, and the family has not agreed to voluntary departure, the central foreigner department will request an enforced return. This request is received by the central police, who are responsible for the logistics of the enforcement. The deportation is then carried out by the riot police (*Bereitschaftspolizei*). Generally, within a given

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<sup>23</sup> This contradicts the observation made by the BAMF that “certain federal states, as a matter of principle, do not consider deportations of unaccompanied minors” (Tangermann & Hoffmeyer-Zlotnik, 2018: p. 68). For an English-language version of this report, see [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/11a\\_germany\\_uam\\_2018\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/11a_germany_uam_2018_en.pdf) (p. 70 for the point cited) [accessed 30 September 2019]. According to our reading, the legal documents cited by Tangermann and Hoffmeyer-Zlotnik do not support this interpretation (see Deutscher Bundestag 2016a: 82 ff.; Deutscher Bundestag 2012, pp. 66-69).

<sup>24</sup> See BumF, ‘Aus der Jugendhilfe in den Abschiebecharter – Abschiebungseifer geht in Brandenburg vor Kindeswohl’, available (in German) at: <https://b-umf.de/p/aus-der-jugendhilfe-in-den-abschiebecharter-abschiebungseifer-geht-in-brandenburg-vor-kindeswohl/> [accessed 30 September 2019].

<sup>25</sup> This case, judged by the Verwaltungsgericht (VG, the Administrative Court) of Augsburg, concerned an appeal made by an unaccompanied Afghan minor against the refusal of his asylum application. The child’s father and been murdered for teaching female students at a school in a Taliban-controlled village, and his eldest brother was later also killed by the Taliban for attempting to teach females, an event witnessed by the child. The child said that he had been beaten and repeatedly threatened by the Taliban, who demanded that he work with them, and expressed his concern for the safety of his remaining siblings and his mother. The application was however rejected by the Federal Office for Migration and Refugees, principally on the grounds that the child could not substantiate that he was being persecuted, but further because it was decided that he was able to support himself financially. The child appealed the decision, pointing out that the person who denied the application was different to the one who had directly heard his plea, and restating the various grave dangers that he and his family faced should he be returned to Afghanistan. The appeal court however upheld the original decision to deny asylum, reiterating that there was inadequate evidence that the child was under threat of serious harm in Afghanistan and that he was capable of financial self-sufficiency. Nonetheless, pursuant to standard German legislation, a ban on the child’s deportation was granted due to his status as an unaccompanied minor. The full ruling is available in German online at <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2017-N-139027?hl=true> [accessed 30 September 2019].

time period, the riot police go to the deportees' accommodation, announce themselves, supervise any packing that must be done, and convey the deportees straight to the airport, where custody is transferred to the central police or border patrol. As one legal expert relates, children are assumed to "share their parents' destinies".

Respondents indicated that police officers are trained as a matter of course in operations involving children, e.g. domestic disputes. Additional training for deportations involving children is therefore thought not to be required. While including external support personnel/safeguards would be admirable in theory, it would be difficult in practice, as one respondent commented. However, it was also remarked that deportations involving children are stressful for officers as well.

It was further noticed by respondents that police can take some individual circumstances into account when deporting families with children, but are not mandated to do so. In cases where families are to be deported, the information received on the deportees by the police includes data on children, e.g. their age, any medical conditions, psychosocial and other special needs, and schools or day care centres which they are attending. According to respondents with experience in deportation, the police do take such information into account when planning and carrying out deportations.

It was said that the police try to avoid retrieving children from schools or day care centres. However, there is no official prohibition against doing so, and respondents suggest that this in fact occurs. Despite criticism from the social sector, practitioners consider it inevitable that children will be exposed to unwarned deportations, e.g. at shared accommodation, schools, kindergarten, and day care centres.

In cases where a family is to be deported and the parents do not speak German, it is possible to use an interpreter to prevent children from having to act as translators. Families should generally be given more time to pack, though this does not appear to be a matter of protocol according to the respondents.

Respondents point out that in some cases, families who have been handed a deportation warning end up awaiting deportation for long periods. This is stressful, particularly for children.

Deportations are seldom if ever monitored by independent experts. Respondents explain that this is partially because deportations are often conducted by night at the deportees' homes (though this should not preclude monitoring). There is no established mechanism for the independent review of deportation records.

As external monitoring is not conducted, the only way to achieve better insight into deportation procedures would be to interview both officers and deportees, and to gain access to police data and documentation. In the long run, this could yield useful insights for all parties involved.

### **Family separation through detention or deportation**

Respondents recall cases in which families facing deportation were separated, with the fathers being placed in detention, and the mothers and children in other accommodation. Experts furthermore report cases in which fathers were deported whilst their families remained in Germany.

*“If there have to be coercive measures in the deportation process, there still should be no separation of families. It is very important that this doesn’t happen, not even in the short term –where, say, you deport a family member one or two days earlier than the others – because there could always be situations, there are dozens of examples, where the rest of the family was not ultimately deported, because an obstacle to deportation was identified and then they were separated permanently.”*

– UN official

The police, however, said that such situations would not occur:

*“We cannot take care of the children separately from the persons holding parental authority without their consent. That would not be possible.”*

– Police officer

Better data collection and the independent monitoring of such processes would be required to gain a clearer picture of the detention and deportation practices of the federal states.

### 3.4 Departure

Whereas the Youth Welfare Office and the appointed guardian assume responsibility for the protection of unaccompanied children prior to their departure from Germany, respondents indicate that such responsibility during departure is delegated to the IOM for voluntary returns arranged, for example, through the REAG/GARP. This is however not representative of all departures from Germany.

As Save the Children has observed in the report *From Europe to Afghanistan. Experiences of child returnees*, children often relate feeling unsafe during their departures and journeys (2018: p. 9).

The IOM has established mechanisms for assisting unaccompanied children, and some children with specific needs, during departure from Germany and reception in the receiving country. Such services are not generally available for accompanied children, though exceptions occur (e.g. when concerning a single woman with two young children). Respondents support the expansion of such services to cover a wider range of cases.

### 3.5 Reception

Respondents indicate that the German authorities do make efforts to ensure a secure reception for both unaccompanied and accompanied children, by establishing contact with authorities in the receiving country and procuring necessary documentation before departure from Germany (e.g. school leaving certificates and, in the case of children born in Germany, international birth certificates). However, the prospect of doing so depends on whether there are credible and responsive institutions in the country of return.

In some cases, respondents report comparatively smooth collaborations with participants in the country of return, and recommend that similar procedures be adopted for accompanied children. They also indicate that it is not always assured that the transfer of guardianship will be untroubled for all children. This is because in the end, there is very little or no control over actors in the country of return.

### 3.6 Reintegration

Reintegration services for children are essential to the fulfilment of the best interests principle. There are two major programmes operating at a federal level:

- The Reintegration and Emigration Programme for Asylum-Seekers in Germany/Government Assisted Repatriation Programme (REAG/GARP), which is funded by the BMI (alongside state- and EU-led institutions) and administered by the IOM.
- Returning to New Opportunities, which is funded by the BMZ and implemented in collaboration with the GIZ and numerous third-country partners.

Since 2017, the REAG/GARP has been complemented by “StarthilfePlus”, programme which offers additional financial assistance to returnees, including the opportunity to apply for “start-up assistance” grants. The level of financial support provided by the programmes is based on several criteria, such as the financial situation of the person or country of origin. For example, persons who are returning through the REAG/GARP after a ‘tolerated stay’ in Germany of at least two years, and who are travelling back to Albania, Bosnia and Herzegovina, Republic of North Macedonia, Montenegro, Republic of Moldova, Serbia, Georgia, or Ukraine, are eligible for supplementary assistance with medical and housing costs.

The Returning to New Opportunities programme is primarily aimed at the economic reintegration of adults. It offers assistance such as counselling and support in Germany and receiving countries, training in Germany and receiving countries, and resources for starting a business in receiving countries. It comprises the reintegration scouts programme; the *startfinder.de* information portal; a network of advice centres in selected countries of return, jointly run with government ministries or agencies in the receiving countries (to date, in Afghanistan, Albania, Kosovo, Serbia, Morocco, Tunisia, Ghana, Senegal, Nigeria, and Iraq); and additional funding for bilateral development programmes in support of reintegration efforts. There are currently seventeen reintegration scouts with specialist knowledge of the aforementioned countries advising return counsellors in Germany, while *startfinder.de* offers multilingual information for returnees.

Important international programmes include the EU-funded European Return and Reintegration Instrument Network (ERRIN), which co-ordinates individual support for voluntary and obliged returnees in their countries of origin.

Multiple other publicly and privately funded reintegration services operate at the state or local levels. These smaller programmes are often aimed at third-country nationals by their place of residence (e.g. Landesinitiative Rückkehr Rheinland-Pfalz; Informations- und Rückkehrberatungsstelle Berlin), country of origin (e.g. Kosovo URA; Reintegration für Rückkehrer in den Nordirak), or both (e.g. Hamburg-Ghana Bridge).

Respondents clarify that the principal focus of Returning to New Opportunities is the economic reintegration of adults. The REAG/GARP with StarthilfePlus is similarly viewed by respondents as a programme that chiefly takes economical considerations into account.

According to respondents, there are several reasons for this:

- Firstly, sustainable reintegration is primarily the responsibility of the government of the country of origin. However, structural support for the governing body, could be afforded through development cooperation programmes such as Returning to New Opportunities which has a focus on economic reintegration but could be transitioned to broader reintegration needs in the future.
- Second, most current co-operations between German institutions and institutions in specific third countries give priority to economic support for adults (see Annex 2).
- Third, children are seen as one of several vulnerable groups, the needs of which are not yet receiving directed attention due to a lack of political priority given by relevant authorities.
- Finally, adults are assumed to be responsible for protecting their families' best interests, and the economic security of the family is taken to be the key factor for assuring the well-being of the child.

Some of the reintegration services funded by the BMI and BMZ have a direct impact on children, but this tends to be the exception rather than the rule.

*"The GIZ also has partner organizations in the countries of origin that have the measures to create employment opportunities for parents, where they can go to upon their return. And of course, we hope that this will also benefit the children as well as their entire families by creating an economically stable base, so that families can live comfortably in their home countries. That is at least the idea behind this system."*

– State-level immigration official

*"In the Western Balkans we often look after families, usually not unaccompanied minors, but more often parents – a father and mother, alone or together, who return with their children. In Iraq and Afghanistan, we also have such cases. Which is why we have further developed our services, with the focus remaining on employment prospects, support for self-employment, or really any type of income perspective for parents. These are the bilateral programmes we have with countries of origin."*

– Ministry official



None of the national-level programmes encompass a comprehensive framework for the reintegration of children. The German government does make efforts to arrange language classes and other school support in countries of return, but respondents point out that one possibility for implementing a fuller scheme is to place it within the network of development co-operation agreements with specific third countries.

*“For the children, we have had various support measures for some years in the Western Balkans. Many of our clients are from ethnic minorities, who have often had negative experiences with official structures in their country. We often support school enrolment. It may be that certain certificates are needed. One issue for the children is the language challenge; that children are not used to their mother tongues, and so do not have the level needed to keep up in school. In such cases, we have the possibility to support language courses and such things.”*

– Ministry official

Many reintegration services are organized within the structure of bilateral development co-operations or programmes.

The above-mentioned Save the Children study on returnees to Afghanistan confirms that children are sometimes returned without a reintegration plan or guarantees of access to education, or physical and psychological security, or the possibility of transfer to parents or other appropriate adult caregivers.

According to the respondents, children with specific needs must accordingly be provided specific support. Assurances should be in place that adequate care is available and will be provided in the receiving country. An assessment of the situation in the country of return therefore needs to be undertaken. If the structures and systems do not allow for the adequate care of a child with special needs and the return means a worsening of the child's situation, these circumstances must be considered and should be given priority when deciding whether or not a child and their family must return.

The sum of the available information urges that the circumstances in the country of return, and the outlook for each individual child in the country to which they are to return, should be considered as part of the asylum procedure. The asylum procedure is the period during which perspectives must first be considered and the process for finding durable solutions should begin. At present, this is only sometimes the case; the respondents remark that the support available to children in the receiving country is for the most part dependent entirely on that country. In certain countries where there is little support available, programmes for ongoing medical support exist, but only offer such assistance for a limited period.

Experts interviewed as representatives of governmental organizations acknowledge that the needs and rights of children should be more comprehensively dealt with in the reintegration process. However, they also maintain that reintegration is primarily the responsibility of receiving countries rather than the German government. German institutions are open to supporting child-specific reintegration programmes when they apply for funding through the standard channels, but do not consider giving priority to child-specific services as being part of their mandates. This thinking is partly a matter of priorities and partly a matter of practicality: experts assert that it would be nearly impossible for German organizations to assure that reintegration efforts aimed at children were being effectively administered in most countries of return. However, some respondents point out that it might not be the duty of German institutions to assure that reintegration efforts will be effectively administered in other countries. But development co-operation can support these efforts, and child rights could receive a similarly high degree of attention as is already given in the reintegration process to job creation.

The respondents further suggest that current reintegration programmes could play a part in the development of child-specific and child-sensitive services, namely by contributing data on children and families in the country of return and providing feedback mechanisms which could bring child specific needs to the attention of policymakers. Similarly, each time a BMZ partner organization successfully implements a child-oriented programme or puts children and other vulnerable groups in focus, momentum builds.

From the respondents' point of view, children's reintegration needs could be well-met through the promotion of more inclusive bilateral programmes. A one-size-fits-all solution would most likely prove ineffective, given that local circumstances and institutions are essential in mediating reintegration.

*“To give one example, in Kosovo, we have been very successful with a project spanning 12–13 years with nine federal states on our side, to offer reintegration measures such as school enrolment and accompaniment and psychosocial counselling, job placement and such things [...]. We basically provide start-up aid so that returnees are treated in the same way as all other children there [...]. This may be unsatisfactory in many respects, it may not fulfil every wish, but I think it is a good approach and could be something we would work towards in negotiations with other countries of origin. We would say: “Here, take your responsibility, we can help a bit, let’s say with housing support that would benefit the whole family.”*

– Ministry official

### 3.7 Data on returns and the post-return period

During the desk research stage of the study, statistics were collected on children in return processes in Germany. Public portals and official reports were reviewed and data requests made to relevant federal and regional authorities. In addition, interview participants were asked about data collection procedures in their fields.

The study findings show that there is no centralized data collection on returns at the national level in Germany, as return policies are the responsibility of the federal states. Besides, the experts interviewed attribute the lack of centralized data collection at least in part to the return policies being under the jurisdiction of the 16 federal states rather than the federal government. It is thus challenging to generate aggregated and/or differentiated/specific data on children in return processes. Moreover, the states collect data in differing ways and use different definitions. As a result, comparison across the federal states is difficult. According to experts interviewed, there is currently no common definition of ‘return’. The lack of comparable figures makes it troublesome for experts at the policymaking level to gain a clear understanding of the situation and to develop an adequate response.

*“The numbers are hard to compare between the federal states, simply because they are counted differently. [For example], if somebody does not deregister officially, does he count as having left the country or not? There are different variants of departure and return [that are recorded differently in each state].”*

– Ministry official

No sources collecting the full range of data points needed to assess the situation of children in return processes in Germany were found during this data analysis. The basic data source on migration to and from Germany are the “migration statistics” (*Wanderungsstatistik*) gathered by the Federal Statistical Office. Other data sources, such as state statistics from bureaus and voluntary return programmes or information received through small requests by parliamentarians, partially make up this deficiency. However, due to the varying programmes or actors in the field and different data collection techniques, significant gaps in knowledge remain.

The current data do not provide a clear picture of how many migrant and refugee children have left Germany by way of the differing types of return processes, their age or gender, and much less so the extent to which the best interests of the child were taken into consideration during these processes. The return programme REAG/GARP, administered by the IOM, systematically collects data at the national level. However, data recording individuals who returned from Germany under the auspices of state or local programmes could not be found or are fragmented. Further, there is little information available on individuals who returned without any support from certain programmes. Consequently, it is impossible to get a clear picture of the total number of people who have returned from Germany voluntarily (see Annex 1).

### 3.7.1 Monitoring and evaluation after return

Respondents concur that there is no single mechanism for monitoring child returnees or their families after return. However, multiple channels for (limited) contact do exist. At present, the most extensive monitoring activities appear to take place under the superintendence of voluntary assistance programmes such as REAG/GARP, which have an interest in ensuring that returnees take advantage of the assistance measures offered. For instance, respondents indicate that returnees usually report back to confirm the receipt of primary and secondary financial assistance packages. Attempts are also made to contact returnees (including children) who receive educational, vocational, or medical assistance. While unsystematic, data on outcomes is critical to the evaluation and improvement of reintegration programmes.

*“The first vehicle for this is the second payment made available through StarthilfePlus, which is paid out 6–8 months after return to the country of origin via IOM. This provides an opportunity to get in contact again with the persons concerned and do some monitoring – perhaps not comprehensive and without gaps, but nevertheless a chance to ask them, how are you doing? [If we discover for example that] 15% of those who returned have started a business, or something like that, that is of course very interesting – or whether a child has been integrated into the school system and is successful there – that would be nice to know.”*

– Ministry official

*“If support measures are necessary because a child has a certain problem, we support up to 3 months [of care]. In such cases, IOM maintains contact until the end [of this period].”*

– UN official

Unfortunately, respondents assert that there are both legal and practical barriers to the expansion of such monitoring activities. On the legal side, German institutions have no authority to collect data on or maintain contact with third-country nationals outside German borders.

*"Of course, it is not at all within our mandate to assume responsibility in third countries [...]. We can offer support, but the extent to which it is used is up to the clients."*

– GO employee

*"I mean, when someone has returned to their home country, they are first and foremost in the care and responsibility of that country, and there are limited possibilities for us. We are, of course, interested, [...] but there are, of course, limited possibilities, and you have limited resources and limited influence."*

– Ministry official



# **PART III: CONCLUSIONS & RECOMMENDATIONS**



## 4 Conclusions

The present study explores the situation of and challenges faced by children before a return decision is made and in return and reintegration processes, from the perspective of diverse stakeholders. It also contemplates how the best interests of children are considered in these processes and the impact that this has on the children's lives. The study shows that these processes are complex at multiple levels, from the operational to the political.

At the operational level, no nationwide standards exist for the consideration of the best interests of children in asylum, return, and reintegration processes in Germany. Federal structures make it difficult to obtain a clear picture of how return processes are implemented. The study shows that whether the best interests of the child are taken into consideration depends in most cases on the practitioners concerned in the procedures and their experience and knowledge. The child's well-being is predominantly considered when children are endangered. There is however little available insight into how far the Child and Youth Welfare Office is involved in the processing of cases where there is a threat to the child's well-being. This is true principally for accompanied children, but also applies to unaccompanied children.

At the political level, measures that could be taken to protect children's best interests, both system wide and on a case-by-case basis, are sometimes set aside in favour of measures thought to increase the likelihood of return.

Overall, the topic is sensitive and polarising. Return decisions and return processes profoundly influence the lives of children and families. During the interviews, many respondents expressed concern, disappointment, and frustration. Some of them struggle to reconcile their moral

principles with existing regulations and institutions that they believe to be flawed. Others defend these regulations and institutions from a pragmatic standpoint and/or respect for the rule of law. Based on the primary findings of this study, it can be argued that there is significant scope for improvement in the application of the best interests principle to the discussed processes for children in Germany. Defining key concepts and establishing standardized nationwide guidelines could be first steps toward ensuring the effective implementation of the principle of the best interests of the child, strengthening institutional safeguards, raising stakeholder and public awareness, and empowering migrant and refugee children and parents alike.

## Key findings

- There is a systemic deficiency of consideration of children and their best interests in return decisions and processes. All experts interviewed agreed that laws, procedures, and services regarding return and the return decision are structured primarily with adult returnees in mind. The best interests principle is currently not given the same primacy as other legal principles; child-specific reasons for flight are not consistently considered; the processes are not child appropriate and often neglect the right of the child to be heard and to participate; the planning and administration of returns do not take account of children's vulnerabilities and views; and reintegration services do not provide for children's needs and rights. There are few if any child appropriate informational materials available throughout the return process.
- Certain child-specific guidelines and age-adapted tools are not implemented for all children. Accompanied children are treated only in conjunction with their families (under the cover of parental rights and obligations). Formal, binding, and multi-disciplinary best interests assessments and determinations need to be in place for all children. Procedures should allow children to express their views and have their individual circumstances taken into account, provided that this does not interfere with their best interests.
- Parents or caregivers and guardians are assumed to be fully capable of safeguarding the best interests of their children. Parents are sometimes overwhelmed by the new situation, which often goes along with complicated bureaucratic procedures in a language that they have to learn themselves. On occasions, parents might suffer from psychological problems or even trauma when facing the additional stress created by these demands. The situation can be overburdening, bearing in mind that even experts in the field do not often have a comprehensive picture or knowledge thereof.
- There is only limited support of parents, who are in few cases made aware of the bearing that their children's individual situation and child-specific reasons for flight can have on the asylum procedure. Further, most children remain unaware of the option to claim their right to be heard during the asylum procedure as well as the return process.
- Guardians are often particularly overloaded by the legal frameworks on asylum. Some have little experience and receive insufficient support and training. The assumption that parents and guardians are fully capable of safeguarding the children is often false. Even in cases where parents or guardians do no active harm to the children, specific conditions in Germany and/or the country of return may impede their capacity to safeguard the best interests of the child, thus necessitating state intervention.

Asylum decision-makers and counsellors in Germany do not systematically take such conditions into account.

- The very limited options for state funding of professional legal aid often lead to children and families bearing the costs of the appeal themselves – an expense which may contribute to destitution and further harm the best interests of children.
- Standards for the operationalization of the best interests principle are lacking. The respondents of this study confirm that the best interests concept is not yet successfully implemented in Germany. It is necessary to establish best interests assessment and best interests determination procedures as standard elements before the return decision and throughout return processes involving children.
- Germany's federal structure poses a challenge to standardization. Immigration policy in Germany is mainly the responsibility of the 16 *Bundesländer* or federal states. This includes policies and practices on return. As a result, there are no central regulations, guidelines, or common practices, but rather 16 different legal landscapes. This affects all stages of return processes. For instance, there is no centralized, systematic collection of data on child returnees. Furthermore, there are no common standards for the training and qualification of actors in return processes (e.g. return counsellors). The lack of shared practices allows for arbitrariness and human error, and puts undue stress on practitioners in the field as well as, of course, the children and their families.
- There is no independent monitoring of deportations. Respondents stated that deportations are carried out in such a way that could be detrimental to the mental health not only of the deported child, but also that of any children who are present during the deportation.
- Strong stakeholder networks offer opportunities for the gradual improvement of practices. National and regional NGOs and welfare organizations in Germany have accumulated valuable experience and taken a proactive approach to the development of good practices. Experts describe effective co-operation between their organizations and authorities – for example, between counsellors and youth welfare offices. Networking events are held regularly at all levels and on different topics (e.g. return counselling and voluntary return), and are supplemented by online forums, working groups, and other spaces for the exchange of observations, experiences, constructive criticism, and good (and bad) practices.



## 5 Recommendations

A set of recommendations has been identified that is relevant to various stages of the asylum and returns procedure and the actors concerned therewith, both before the return decision and during the return process. The principle of the best interests of the child unequivocally directs that the specific interests of children, whether accompanied or unaccompanied, should be of primary consideration in all actions in which they are involved. Accordingly, all stages before and after the return decision and all actors involved therein need to be guided by this principle of the UNCRC otherwise return of children should not be pursued.

### 5.1 General recommendations

1. **A formal and multi-disciplinary best interests determination must be conducted for every child** before the return decision. The individual circumstances of the child, the situation in the country of origin, the views of the child, and child-specific reasons for flight or migration should be taken into account in order to find a durable solution for the child.
2. In order to make the nationwide implementation of the UNCRC and other international and national legal frameworks verifiable, **legally binding standards** should be developed and pursued in respect of multiple aspects of the asylum, return, and reintegration process.
3. Data collection on migrant and refugee children in voluntary and forced return should be improved. A **central federalized concept for monitoring** and evaluation should be developed,

funded, and centrally implemented to deliver evidence-based results. Data should never be used to the disadvantage of the child or family.

4. **Data on children and families should be generated after return.** This way, the implementation of children's rights is monitored, and good practices can be evaluated and enlarged.
5. An **individual reintegration plan** should be formed and supplied to each child facing return. This plan should address at least their rights to protection, education, health, participation, non-discrimination, development, as well as their economic situation, their age, gender, and evolving capacities.
6. **It is never in the best interests of the child to be detained** due to their migratory status. Detention of refugee and migrant children should not be permitted. Alternatives to detention have proven highly effective and should replace detention.
7. **Families must never be separated through detention or deportation.**

## 5.2 Specific recommendations

### Development and adoption of standards and child-sensitive procedures for migrant and refugee children

- Sensitive, case-relevant, and binding guidelines for interviewing children during the asylum or return procedure, and for interacting with migrant and refugee children, must be developed. The setting, atmosphere, and tonality of bureaucratic procedures should be assessed and optimized for child-friendliness.
- The written, reasoned report must be given primary consideration by the return decision-maker, and must be reviewed and taken into account during appeals and in any subsequent decisions.
- The durations of asylum procedures involving children matter: children and families should be given time to prepare for the procedure and build trust with counsellors, guardians, legal advisors, and all other actors of importance to the process. This is necessary to thoroughly assess the situation of the persons in question. At the same time, children should not be allowed to "age out" of childhood while waiting.
- Multilingual, child-appropriate informational materials should be made available during all stages of the asylum and return process, from arrival and explanation of their basic rights in Germany to reintegration in the country of return.

### Best interests of the child principle

- Migration authorities and asylum decision-makers, alongside police, translators, and counsellors, should receive specialized training on child rights and child-appropriate practices.
- When assessing the security situation in a country of return, actors involved in the asylum and return process should account for child-specific information as well as knowledge about the prospective situation of the child or family in question. This includes the study of country reports focusing on children and other similar material, as well as first-hand accounts from reliable sources.
- Careful consideration should be given to the right of all children to be heard, and officials be mindful that every child has specific reasons for flight that they might not wish to share with parents, guardians, caregivers, or relatives (e.g. their sexual orientation).

- The individual situation of children should be assessed and be considered before and after a return decision is made.
- Children should be made aware of the prospect of having their specific reasons for flight taken into account.
- All participating authorities and actors should have systems and procedures in place as provision against potential or actual endangerment to the child's well-being. The Child and Youth Welfare Office should be contacted and involved immediately, and necessary child protection measures taken.

#### Unaccompanied children in asylum procedures

- Relevant actors, such as the Child and Youth Welfare Office, social workers, counsellors, teachers, guardians, and lawyers, should be included in the best interests assessment process and their views taken into account when determining the best interests of the child.
- The transition from childhood to legal adulthood should be treated as a process, not a "light switch" activated the moment a person reaches their 18th birthday.

#### Accompanied children in asylum procedures

- Childcare must be provided during parents' asylum interviews and similar procedures, and these interviews should accordingly be scheduled for and take place when childcare facilities are open.
- Parents should be informed of their own rights and best interests, as well as the best interests of their children; for example, parents should be told at the onset of the asylum procedure that child-specific reasons for flight can and should be stated.

#### Data collection

- Federal states should use common key definitions and criteria (e.g. gender, age, country of origin, time spent in Germany after registration, etc.) when generating data on children facing return.
- Measures should be taken to collect both qualitative and quantitative data, as this would support the evidence-based evaluation of programmes and personnel and help to develop concrete measures based on the needs of children as well as on those of communities, systems, and structures in the country of return.

#### Legal and social support

- Free professional legal representation should be made available to all children and families from the very beginning of their arrival, and a team of professionals (e.g. a counsellor, social worker, guardian, and lawyer) should oversee the whole process (asylum procedure and if necessary appeal and return process) for the children and their families.
- Information events on return for migrants should be held, e.g. presentations by experienced and independent lawyers and counsellors in collective accommodations and community centres.

#### Forced return

- Participation in education and vocational training, as well as the health of children and parents, should be taken into account when coming to a decision on their deportation (e.g. whether children can be allowed to finish the school year).
- The option of voluntary departure and all associated incentives should be made available up to "the last minute" for all children and families facing deportation.
- Deportees and support actors alike should be informed of the time and date of pending deportations.

- Specific guidelines and training must be provided to the police for deportations involving children. Independent experts should be permitted to monitor and document such deportations.
- Children and families should not be collected at night nor from locations such as schools, hospitals, kindergartens, or other public places.
- Trained personnel should be present and adequate safeguarding principles adhered to when a child or family is deported.
- Under no circumstances must physical or psychological violence be employed in the process of deportation; the protection of children must always be ensured.
- Establish an effective forced-return monitoring system and appoint an independent body to carry out this function.

#### **Return support and reintegration**

- Travel companions should be provided for all unaccompanied child returnees and should be available for accompanied child returnees upon request.
- German institutions should give priority to the development of multilateral and bilateral reintegration services for children, especially in decisive areas such as first and second language education or psychosocial support.
- Safe and smooth transitions to country-of-return institutions should be ensured, including at an administrative level (e.g. school certificates should be translated into the relevant language of the receiving country, school pathways in the receiving country must be clear, and adequate health services are to be available in the return country).

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## ANNEX 1 – DATA ON CHILD RETURNS

Due to the lack of systematic data collection, it is difficult if not impossible for non-governmental actors to achieve a comprehensive longitudinal overview of the situation regarding child returns from Germany. The table further below, which draws on the following data sources, makes this clear.

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Type of return	Type of minor	Country of return	Year			
			2015	2016	2017	2018
Dublin III transfers	Total		NA	872 (a)*	1.280 (b)	881 ** (c)
	Accompanied		NA	NA	NA	NA
	Unaccompanied		NA	29 (a)	66 (b)	14 (d)***
Dublin III refusals of entry	Total		NA	NA	NA	NA
	Accompanied		NA	NA	NA	NA
	Unaccompanied		NA	620 (a)	171 (b)	15 (d)***
Voluntary departure: REAG/GARP (Germany total)	Total		NA	19.343 (e)	10.270 (e)	NA
	Accompanied	Total	NA	NA	NA	NA
		Afghanistan	NA	875 (f)	252 (f)	36 (f)**
	Unaccompanied	Total	NA	170 (e)	80 (e)	51 (h)
		Afghanistan	NA	73 (f)	21 (f)	0 (f)
Voluntary departure: REAG/GARP (from Nordrhein-Westfalen only)	Total		NA	NA	NA	NA
	Accompanied		NA	NA	NA	NA
	Unaccompanied		23 (g)	40 (g)	33 (g)	16 (g)
Removals/ deportations	Total		0 (b)	0 (a)	0 (b)	NA
	Accompanied		NA	NA	NA	NA
	Unaccompanied		NA	NA	NA	NA

NA Not Available

\* The letters in parentheses, as here, correspond to the source (listed above) from which the data was derived.\*\*

\*\* First six months of 2018 only.

\*\*\* Second quarter of 2018 only.

## ANNEX 2 – SELECTED REINTEGRATION AND INTER-AGENCY PROGRAMMES

Country	Programme description	Organization	URL
Albania	Reuniting families: family tracing and reunification assistance	Albanian Red Cross	<a href="https://www.startfinder.de/en/opportunities/albp15-reuniting-families">https://www.startfinder.de/en/opportunities/albp15-reuniting-families</a>
	Help for children from low-income families: financial support for clothing and school materials; summer camp for underprivileged children	“Today for the Future” Network; Albanian Red Cross	<a href="https://www.startfinder.de/en/opportunities/albp19-help-children">https://www.startfinder.de/en/opportunities/albp19-help-children</a>
	Social-cultural integration for children aged 5–14: the adaptation of particularly Roma, Egyptian, and illiterate children into public schools; social and economic support for those children who attend school regularly; efforts to take children from the streets and end child labour; psychosocial support and legal assistance for child victims of abuse and domestic violence; provision of arts classes; assistance with homework, etc.	“Today for the Future” Network	<a href="http://www.cdc-tff.org/web/en/children-age-5-14/">http://www.cdc-tff.org/web/en/children-age-5-14/</a>
Ethiopia	Reintegration support for returnees, especially women, children, and persons affected by human trafficking, based on their individual needs: support offered includes help with finding suitable education and a healthcare provider	Nolawi Services Äthiopien; Dutch Council for Refugees	<a href="https://www.returningfromgermany.de/en/programmes/nolawi-services-ethiopia">https://www.returningfromgermany.de/en/programmes/nolawi-services-ethiopia</a>
Kosovo	Principal aim is the sustainable reintegration of voluntary returnees to Kosovo and their families: offers counselling adapted to the particular needs of the returnee, both in-centre and if required at the returnee's home; assists returnees with administrative tasks including obtaining school certificates; provides financial support for medical care, school supplies, travel costs to school, etc.	AWO Nürnberg in Kosovo	<a href="https://www.returningfromgermany.de/en/programmes/awo-nuernberg-im-kosovo">https://www.returningfromgermany.de/en/programmes/awo-nuernberg-im-kosovo</a>
Iraq	Finding educational opportunities for returnees: help with finding schools and enrolling at university, including assistance with preparing important documentation	German Centre for Jobs, Migration and Reintegration (MAC); Representation of the Kurdistan Regional Government in Germany	<a href="https://www.startfinder.de/en/opportunities/irqp17-finding-new-educational-opportunities">https://www.startfinder.de/en/opportunities/irqp17-finding-new-educational-opportunities</a>
Morocco	Support for women and children: career advice, social centres, psychosocial support, legal advice, help with school, assistance for those with disabilities	Entraide Nationale (Moroccan Ministry of Family, Solidarity, Equality and Social Development)	<a href="https://www.startfinder.de/en/opportunities/marp17-support-women-and-children">https://www.startfinder.de/en/opportunities/marp17-support-women-and-children</a>
	Language courses for young people (from the age of 15) in, for example, Darija, French, and Arabic	Deutscher Volkshochschul-Verband e. V. (DVV) International	<a href="https://www.startfinder.de/en/opportunities/marp10-language-courses-young-people">https://www.startfinder.de/en/opportunities/marp10-language-courses-young-people</a>
	Low-cost vocational training programmes for persons age 15–30, in the areas of craft trade, handicrafts, hotel trade, and tourism	Ministère du Tourisme, du Transport aérien, de l'Artisanat et de l'Economie Sociale	<a href="https://www.startfinder.de/en/opportunities/marp07-training-programmes-young-people">https://www.startfinder.de/en/opportunities/marp07-training-programmes-young-people</a>

Country	Programme description	Organization	URL
<b>Serbia</b>	Children's rights hotline: free legal advice by telephone, currently available on Tuesdays and Thursdays	Child Rights Center (CPD)	<a href="http://cpd.org.rs/projects/network-of-free-legal-aid-providers-in-the-field-of-child-rights/?lang=en">http://cpd.org.rs/projects/network-of-free-legal-aid-providers-in-the-field-of-child-rights/?lang=en</a>
	Support for school children: help in finding a school, financial assistance for school materials, etc.	HELP – Hilfe zur Selbsthilfe e. V.	<a href="https://www.startfinder.de/en/opportunities/srbp23-i-support-school-children">https://www.startfinder.de/en/opportunities/srbp23-i-support-school-children</a>
	Integration support for children and young people: drop-in shelter for children living and working on the streets of Belgrade; education programme for impoverished children; a café bar social enterprise offering employment opportunities; a regional resource centre for on measures to prevent children from abuse and other violence	Center for Youth Integration (CYI/CIM)	<a href="http://cim.org.rs/en/">http://cim.org.rs/en/</a> ; <a href="https://www.startfinder.de/en/opportunities/srbp39-i-day-centre-children">https://www.startfinder.de/en/opportunities/srbp39-i-day-centre-children</a>

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