

Chapter 9 Regularization of Status

9.1 General principles

- Ministries of Interior and/or other relevant state authorities shall establish policies and procedures to ensure that child victims, who are not nationals/residents of the country in which they find themselves, are automatically granted a Temporary Humanitarian Visa and are entitled to stay in the country on a valid legal basis pending identification of a durable solution.
- For children without documentation, Ministries of the Interior and/or other relevant state authorities will provide temporary documents.
- In conjunction with the Ministry of the Interior and, where relevant, social service authorities, the child's assigned guardian is responsible for initiating application procedures for the issuance of a Temporary Humanitarian Visa and the concordant leave of stay, acting on behalf of the child in any administrative presentations or procedures this may require.
- Such status shall be afforded to the child victim until the relevant judicial and administrative bodies have made a decision regarding the disposition of the child.

9.2 Implications of the principles

Children who have been trafficked to another country often have no valid identity documents or no valid entitlement to be in the country into which they have been trafficked. Sometimes they have entered a country with their own passport, but this has been taken from them by their traffickers (as one way of keeping control of them). In other situations they have been issued with a false passport, for example one suggesting they are older than is actually the case. In yet other situations, their entitlement to be in the country to which they have been trafficked (such as a fixed-term visa) has expired. In all these situations child victims have no legal basis to be in the country to which they have been trafficked. At the same time, the authorities responsible for them also need time to get hold of the information they need to make decisions about what should happen to a child

Summarily deporting any child who is believed to have been trafficked is inherently abusive. In fact, repatriating a child facing a risk of torture would violate the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)⁷¹ and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984). In the case of European Union Member States, it would also violate the Charter of Fundamental Rights of the EU. For example, the principle of non-refoulement could be violated if a victim of trafficking is summarily deported without having first assessed whether the child would be at risk of persecution in his/her home country (or in the country to which she/he is deported if this is another one). There is also a risk that the deported child might be subjected to torture by traffickers.

Promptly regularizing the child's legal status is an important step in the protection process so that a trafficked child is not repatriated inappropriately. At a minimum this means granting the child temporary legal status that allow her or him to remain in the country to which they have been trafficked and now find themselves – at least until risk and security assessments are carried out and a durable solution for the child is determined. This process is likely to take months rather than weeks.

In many cases, regularizing the child's legal status also means giving the child a temporary identity document as well as a visa. Any Temporary Humanitarian Visa issued to a trafficked child should be valid for long enough to reassure the child that his or her status is secure for the foreseeable future and the document should be formulated in terms which provide reassurance. In illustration of the last point, in some countries temporary permission to remain takes the form of a delayed expulsion order that authorizes the child to stay for just 45 or 90 days before being expelled. This type of conditional document is unlikely to provide the sense of security which a trafficked child needs to recover.

⁷¹ As amended by Protocol No. 11 (1998). The text of the European Convention is found at: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

9.3 Who has responsibility to take action?

Ministries of the Interior and/or other relevant state authorities have a responsibility to provide non-national children who have been trafficked into the country with temporary documents (if they have none) and a Temporary Humanitarian Visa or other temporary legal authorization to remain in the country while a durable solution for the child is identified.

When a country does not have a policy or procedure for issuing 'Temporary Humanitarian Visas', the Ministry of the Interior is responsible for putting these into place.

Ministries of the Interior and/or other relevant state authorities have a responsibility to ensure that the immigration service has instructions not to deport children who have no legal entitlement to be in the country but who are believed to have been trafficked.

Social services authorities are responsible for working in conjunction with the *Ministry of the Interior and guardians* to facilitate applications for the issuance of a Temporary Humanitarian Visa. The child's guardian is responsible for initiating application procedures for the issuance of a Temporary Humanitarian Visa and acting on behalf of the child in any administrative presentations or procedures this may require.

9.4 Who else may take action?

Only government authorities can regularize the immigration status of a foreign child.

9.5 Key challenges and examples of good/bad practices

9.5.1 Problems arising from imprisonment and deportation

It has been emphasized earlier in this Reference Guide that children who have been trafficked must not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination (see Chapter 5). In addition to not detaining, charging or prosecuting trafficked children, the authorities are also required to refrain from deporting or expelling them, or using any summary, administrative or informal procedures to exclude them from the country into which they have been trafficked.

Although these provisions seem obvious to anyone who has had direct dealings with trafficked children or witnessed the further trauma which both imprisonment and summary deportation cause to children, both practices continue to be reported with alarming frequency. In most cases the authorities responsible have not identified the child concerned correctly as a victim of trafficking. In numerous cases, a child's lack of valid entitlement to be in a country is interpreted as an offence and a reason for detaining or deporting the child concerned. In other cases, it is the child's involvement in offences carried out while in a country, such as theft, which causes the police to assume that she or he is a criminal and should be punished accordingly.

These commonly made presumptions underline the need for law enforcement officers and immigration service personnel who come into contact with foreign children to have undertaken training about trafficking.

In a number of EU countries, the issuance of a temporary stay visa for victims of trafficking is conditional on the victim's willingness to cooperate with the police and provide any evidence they have that would support the prosecution of a trafficker. When trafficking victims are under age 18, this conditionality contravenes the authorities' legal obligation to protect the child concerned. Under the

terms of an EU Council Directive adopted in 2004,⁷² anyone who is the national of a country outside the EU and who has been trafficked into an EU country, whether adult or child, should be allowed “a reflection period” so that they can recover and take an informed decision as to whether to provide information to law enforcement agencies. If they agree to cooperate, they are to be given a temporary residence permit valid for at least six months (under article 8 of the Council Directive). The Directive stipulates that if someone under 18 is offered a reflection period or a temporary residence permit conditional on providing information to law enforcement agencies, the authorities must take account of the best interests of the child concerned.⁷³

⁷² Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subjects of an action to facilitate illegal immigration, who cooperate with the competent authorities. Article 6.1 states: “Member States shall ensure that the third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities.” The duration and starting point of the reflection period are to be determined according to national law. Three EU Member States (Denmark, Ireland and the United Kingdom) opted not to implement this Council Directive.

⁷³ “Member States shall take due account of the best interests of the child when applying this Directive. They shall ensure that the procedure is appropriate to the age and maturity of the child. In particular, if they consider that it is in the best interest of the child, they may extend the reflection period.” (Article 10 a).

