



# Vulnerable groups pending return

Lithuanian developments and  
challenges

Final Conference, Riga 26-27<sup>th</sup> of May, 2015

*Egle Samuchovaite*  
Lawyer  
Lithuanian Red Cross Society

1



# Regulation

- o In the EU law some aspects of the return procedure of vulnerable persons are regulated by the **Return directive**.
- o In international law there is **no international treaty** regulating return of vulnerable persons.
- o Some aspects related to vulnerability are regulated by **conventions or other instruments**, e. g.
  - o Convention on the Rights of Persons with Disabilities,
  - o Convention on the Rights of the Child,
  - o Parliamentary Assembly Human Rights of Irregular Migrants Resolution and etc.

2

## Definition

### o Paragraph 9 of Article 3 of the Return directive

*vulnerable persons means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.*



Co-funded by  
the European Union



3

## Definition

- o The list of vulnerable persons established in the Return directive is not exhaustive.
- o Returnee who may not fall into one or more of the listed categories may still have specific needs.
- o It is necessary to assess every individual case whether a returnee is vulnerable and what kind of specific support he needs during return.



Co-funded by  
the European Union



4

## Special needs

Special needs may be classified into the following categories:

- o According to the field of applicable guarantees:
  - o Social needs. Vulnerable returnees may have specific needs regarding accommodation, health (physical or mental), social assistance, nutrition and etc.
  - o Procedural needs. Vulnerable returnees may have specific needs regarding procedural rights (guarantees) (e.g. consulting, guardianship, legal assistance and representation, cooperation in the return procedure).
- o According to the causes of vulnerability:
  - o Special health needs: special needs regarding disabilities, serious illnesses, mental disorders and other.
  - o Special needs regarding serious harm: special needs resulted because of suffered torture, violence, human trafficking and etc.
  - o Age, gender, sexual orientation based needs, needs regarding family situation, cultural and social ties.



Co-funded by  
the European Union



5

## Identification of vulnerable returnees

- o In order to ensure adequate protection to vulnerable returnees, the mechanism for identification of vulnerable persons and their specific needs should be established. Unfortunately, neither Return directive, nor other international instruments regulate particularities how the specific needs of vulnerable returnees should be identified.
- o **In Lithuanian practice** vulnerable returnees (but only these who are detained at the Foreigners' Registration Centre) are identified under the same procedure as asylum seekers (who also are accommodated or detained at the Foreigners' Registration Centre). Formally as established in the Order of Identification of Vulnerable Asylum Seekers, it is applicable only to asylum seekers; however, in practice applicable to returnees.



Co-funded by  
the European Union



## Identification of vulnerable returnees

- In Lithuania evaluation of vulnerability is done by social worker, psychologist (“social” interview) and doctor (medical examination). The following factors are taken into account:
  - Information about state of health (signs of torture, rape or signs of other serious violence, sensory and motor disorder, psychiatric disorder, diseases of addiction and etc.);
  - Social independency (sociability, social skills, ability to overcome difficulties and etc.);
  - Physical independency (ability to move, self-care, cognitive functions and etc.).



Co-funded by  
the European Union



## Identification of vulnerable returnees

- According to the results of the “social” interview and medical examination, special needs and vulnerability of the person are identified. This report on vulnerability is a part of the foreigner’s case.



Co-funded by  
the European Union



8

## Return directive

- o Return directive does not regulate guarantees and rights of vulnerable returnees in detail.
- o Provisions may be divided into:
  - o general provisions (applicable to all vulnerable returnees)
  - o specific provisions (applicable to specific vulnerable group).



9

## General provisions

- o Return directive explicitly does not establish general principle that Member States shall take into account the specific situation of vulnerable persons.
- o Point 2 of preamble states that foreigners shall be returned in a **human manner** and with **full respect for their fundamental rights and dignity**.



10

## General provisions

- o **Paragraph 1(d) of Article 14:** *During the period for voluntary departure and during periods for which removal has been postponed Member States shall ensure that as far as possible special needs of vulnerable persons are taken into account.*
- o **Paragraph 3 of article 16** (regulating conditions of detention) states that: *particular attention shall be paid to the situations of vulnerable persons*



Co-funded by  
the European Union



11

## Specific provisions

- o Main attention is paid to the state of health of the returnee.
  - o **Article 5:** *when implementing Directive Member States take due account of the state of the health of the third-country national concerned. It means, that particular attention to the state of the health of returnee should be paid at all stages of the return procedure.*
  - o **Paragraph 2, Article 9:** *the removal of returnee should be postponed when a person is not able to travel regarding his/her physical state or mental capacity.*



Co-funded by  
the European Union



12

## Specific provisions

- o Persons, who are victims of trafficking in human beings, fall into the definition of vulnerable returnees (category of persons who have been subjected to other serious forms of psychological, physical or sexual violence).
- o **Paragraph 3 of Article 11** states that *victims of trafficking in human beings who have been granted a residence permit pursuant to directive 2004/81/EC, shall not be subject of an entry ban.*
- o *During the reflection period and while awaiting the decision of the competent authorities, it shall not be possible to enforce any expulsion decision against above mentioned foreigners and they shall have access to the necessary treatment:*
  - o *Member States shall ensure that these foreigners who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment, psycholog other special needs shall be taken into acc*



Co-funded by  
the European Union



13

## Decision making

- o Firstly, it should be evaluated, whether a return or expulsion decision should be issued at all.
- o This is especially important when a returnee is identified as vulnerable because of his state of health.
- o The disease may cause that a foreigner will not be returned (expelled), e.g.
  - o ECtHR in its case-law regarding expulsion of ill people stated that deportation of a person who was suffering from AIDS, would be in breach of Article 3 (prohibition of inhuman or degrading treatment).



Co-funded by  
the European Union



14

## D. v the United Kingdom

- o The applicant, originally from St Kitts, was arrested for cocaine possession upon his arrival in the United Kingdom and was sentenced to six years' imprisonment. It was discovered that he suffered from AIDS. Before his release, an order was made for his deportation to St Kitts.
- o He claimed that his deportation would reduce his life expectancy as no treatment of the kind he had been receiving in the United Kingdom was available in St Kitts.
- o The Court stated as his illness had been very advanced and he was dependent on the treatment he had been receiving, there was a serious danger that the adverse living conditions in St Kitts would reduce his life expectancy and subject him to acute suffering.
- o Therefore, the Court found that expulsion of the applicant would be incompatible with the Article 3.



Co-funded by  
the European Union



## Decision making

- o As was noted before, if a foreigner who is a victim of trafficking in human beings during the reflection period and while awaiting the decision of the competent authorities, cannot be expelled.
- o If a return decision is taken, vulnerability and special needs of returnee should be taken into account while imposing period for voluntary departure, e. g.
  - o If a foreigner has mental disability it could be difficult for him/her to arrange a travel in a short time period, maybe he/she will need assistance.
  - o If a foreigner had surgery few days before, he/she may not be able to travel for a while; therefore the time period for voluntary return should be longer.
  - o If a returnee is a pregnant woman (late stage of pregnancy), decision to return (expel) may be issued after childbirth, or when decision was already issued, it should be postponed.
  - o A foreigner may lack an ability to arrange a travel because of his/her age (e.g. elderly people) and may need an assistance.

16

## Safeguards pending return

- o Return directive does not state explicitly that vulnerable persons shall only be detained as a measure of last resort, but there is a general rule that foreigner can be detained only if other less coercive measures cannot be applied.
- o The Parliamentary Assembly resolution on Human Rights of irregular migrants: *detention of vulnerable persons should be avoided whenever possible.*



17

## Safeguards pending return

- o However, if a vulnerable foreigner is detained, particular attention shall be paid to the situation of vulnerability. The premises of detention centre should be suitable for vulnerable persons:
  - o it should be adapted to the persons with disabilities,
  - o there should be a possibility to accommodate separately foreigners who have been subject to torture, rape or other serious forms of violence,
  - o in detention centres there should be provided: health care, psychological consultations, social assistance and etc.



## Safeguards during return

- Firstly, before the expulsion, every returnee has to take medical examination in order to evaluate whether he/she is able to travel. The operation of expulsion can only be planned if a returnee fits to travel. On the contrary, the expulsion order must be postponed.
- Special preparation should be made when returning vulnerable persons: special counselling, assistance, if the returnee is sick or disabled, he/she should be provided with necessary medicine.
- In many cases a person with special needs should be escorted during the entire trip. Taking into account vulnerability of returnee medical escort or social escort may be needed .



Co-funded by  
the European Union



19

## Unaccompanied minors



Co-funded by  
the European Union



## Definition of an unaccompanied minor

**Unaccompanied minor** - is a person who is **under the age of eighteen** and who is **separated** from both parents and is **not being cared** for by an adult who by law or custom has responsibility to do so.



## Definition of an unaccompanied minor

*UN Committee on the Rights of the Child. General Comment No 6 (2005) Treatment of an Unaccompanied and Separated Children outside their country of origin:*

**Unaccompanied children** (also called unaccompanied minors) are children, as defined in article 1 of the Convention, 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.



## Definition of an unaccompanied minor

*1997 UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum:*

**Unaccompanied minor** - is a person who is **under the age of eighteen**, unless, under the law applicable to the child, majority is, attained earlier and who is **separated from both parents** and is **not being cared** for by an adult who by law or custom has responsibility to do so.



## Definition of an unaccompanied minor

*EU asylum directives (Recast Reception Conditions' Directive, Recast Qualification Directive):*

**Unaccompanied minor:** means a minor who arrives on the territory of the Member States **unaccompanied by an adult responsible for him** or her whether by law or by the practice of the Member State concerned, and for **as long as he or she is not effectively taken into the care** of such a person; it includes a minor who is **left unaccompanied** after he or she has entered the territory of the Member States.



## Why age is important?

Why age is important?

- o The basic guiding principle in **any child** care and protection action is principle of **the best interests of the child**.
- o Unaccompanied minors fall under definition of **vulnerable groups** and enjoy **special guarantees**:
  - Guardianship;
  - Particular accommodation place;
  - Health care;
  - Social assistance;
  - Education.



## Why age is important?

- o Unaccompanied minors shall only be **detained** as a measure of **last resort** and for **the shortest** appropriate period of **time**.
- o Unaccompanied minors can only be returned if they are **returned to a member of family, a nominated guardian or adequate reception facilities** in the State of return.
- o If there is no possibility to return an unaccompanied minor, his/her s **be legalized** in the country.



## International standards

- o UN Convention on the Rights of the Child, 1989
- o UNHCR. Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, 1997
- o UN Committee on the Rights of the Child. General Comment No. 6 (2005). Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 2005
- o SCEP. Statement of Good Practices 4th revised edition.



Co-funded by  
the European Union



## General Principles

- o In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child** shall be a primary consideration (Article 3).
- o **Non discrimination** principle prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant (Article 2).



Co-funded by  
the European Union



## Identification of unaccompanied minors

- o Authorities at ports of entry should take necessary measures to ensure that unaccompanied children seeking admission to the territory are identified as such **promptly** and **on a priority basis**.
- o Unaccompanied children should be registered through **interviews**.



## Identification of unaccompanied minors

- o A **guardian** or **adviser** should be appointed as soon as the unaccompanied child is identified. The guardian or adviser should have the **necessary expertise** in the field of child caring, so as to ensure that the interests of the child are safeguarded and that his/her needs are appropriately met.



## Identification of unaccompanied minors

- o In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a **legal representative** in addition to a guardian.
- o Initial interviews of unaccompanied children to collect **bio-data** and **social history** information should be done immediately after arrival and **in an age-appropriate manner**.



Co-funded by  
the European Union



## Identification of unaccompanied minors

- o It is desirable that all interviews with unaccompanied children be carried out by **professionally qualified** and persons, specially trained in refugee and children's issues. Insofar as possible, **interpreters** should also be **specially trained persons**.
- o In all cases, **the views and wishes of the child** should be elicited, and considered.



Co-funded by  
the European Union



## Age-assessment procedures

- o Age assessment procedures should only be undertaken as a measure of **last resort**, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age.
- o If an age assessment is thought to be necessary, **informed consent** must be gained and the procedure should be **multi-disciplinary** and undertaken by **independent professionals** with appropriate expertise and familiarity with the child's ethnic and cultural background.



Co-funded by  
the European Union



## Age-assessment procedures

If an assessment of the child's age is **necessary**, the following considerations should be noted:

- o Such an assessment should take into account not only the **physical appearance** of the child but also his/her **psychological maturity**.
- o When **scientific procedures** are used in order to determine the age of the child, **margins of error** should be allowed. Such methods must be **safe** and respect **human dignity**.
- o The least invasive option must always be followed and the individual's dignity respected at all times.



Co-funded by  
the European Union



## Age-assessment procedures

- o Examinations must **never** be **forced** or **culturally inappropriate**.
- o Particular care must be taken to ensure assessments are **gender appropriate** and that an **independent guardian** has oversight of the procedure and should be present if requested to attend by the individual concerned.
- o The procedure, outcome and the consequences of the assessment must be **explained** to the individual in a language they **understand**.



Co-funded by  
the European Union



## Age-assessment procedures

- o The child should be given the **benefit of the doubt** if the exact age is uncertain.
- o In cases of doubt the person claiming to be less than 18 years of age should provisionally be **treated** as such.
- o The guiding principle is whether an individual demonstrates an **“immaturity”** and **vulnerability** that may require more sensitive treatment.



Co-funded by  
the European Union



## Return

The return will not be carried out unless, prior to the return, a suitable **care-giver** such as a parent, other relative, other adult care-taker, a government agency, a child-care agency in the country of origin **has agreed**, and is **able to take responsibility** for the child and provide him/her with appropriate protection and care.

Special efforts must be made to ensure the provision of **appropriate counselling** for a child who is to be returned.



Co-funded by  
the European Union



## Return

Determination of return shall take into account:

- o The **safety, security** and other conditions, including **socio-economic conditions**, awaiting the child upon return;
- o The availability of **care arrangements** for that particular child;
- o The **views** of the child expressed and those of the caretakers;



Co-funded by  
the European Union



## Return

- o The child's level of **integration in the host country** and the **duration of absence** from the home country;
- o The child's right to preserve his or her **identity**, including **nationality, name** and **family relations**;
- o The desirability of continuity in a child's upbringing and to the child's **ethnic, religious, cultural** and **linguistic** background.



Co-funded by  
the European Union



## Return

- o In all cases return measures must be conducted in a **safe, child-appropriate** and **gender-sensitive** manner.



Co-funded by  
the European Union





## EU Return directive provisions

***Unaccompanied minors are included in the definition of vulnerable persons.***

Article 3. **Definitions: ‘vulnerable persons’** means minors, **unaccompanied minors**, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

Co-funded by  
the European Union 



## EU Return directive provisions

Co-funded by  
the European Union 

***Special guarantees regarding return of the unaccompanied minors.***

Article 10. **Return and removal of unaccompanied minors:**

Before deciding to issue a return decision in respect of an unaccompanied minor, **assistance by appropriate bodies** other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child.

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.



## EU Return directive provisions

***Special guarantees regarding detention conditions***

Article 17. **Detention of minors and families:**  
Unaccompanied minors and families with minors shall only be **detained** as a measure of **last resort** and for **the shortest** appropriate period of **time**.

Minors in detention shall have the possibility to engage in **leisure activities**, including play and recreational activities appropriate to their age, and shall have, depending on the length of their stay, **access to education**.

Co-funded by  
the European Union 



## EU Return directive provisions

Co-funded by  
the European Union 

***Special guarantees regarding detention conditions***

Unaccompanied minors shall as far as possible be provided with **accommodation** in institutions provided with personnel and facilities which take into account the needs of persons of their age.

**The best interests of the child** shall be a primary consideration in the context of the detention of minors pending removal.

## Lithuanian challenges

- o **Presumption** that a person claiming he is a child is a child **is not applied** before age assessment procedures.
- o **Guardianship is not established** before age assessment procedures.
- o Question of the **validity of consent** if guardian is not participating in age assessment procedures.



Co-funded by  
the European Union



## Lithuanian challenges

- o If there are doubts about the age of the person the officer must apply for the age-assessment procedure in 48 hours, so there is **no time for establishing the guardianship**.
- o **The only method is applied** – X-ray of the bones.
- o The availability of only one method limits the possibility to challenge age-assessment procedure in the court – no other evidences the one can provide.



Co-funded by  
the European Union



# Lithuanian challenges

- Possibility for the Refugee Reception Center (institutional guardian) to apply for age-assessment procedure raises question of the conflict of interests.



# Questions?

Lithuanian Red Cross Society  
[egle@redcross.lt](mailto:egle@redcross.lt)  
+370 682 48 533

