



Universiteit  
Leiden  
The Netherlands

## **The common European asylum system and the rights of the child: an exploration of meaning and compliance**

Smyth, C.M.

### **Citation**

Smyth, C. M. (2009, January 29). *The common European asylum system and the rights of the child: an exploration of meaning and compliance*. Meijers-reeks. Uitgeverij Boexpress, 's-Hertogenbosch. Retrieved from <https://hdl.handle.net/1887/20462>

Version: Corrected Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/20462>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/20462> holds various files of this Leiden University dissertation.

**Author:** Smyth, Ciara Mary

**Title:** The common European asylum system and the rights of the child : an exploration of meaning and compliance

**Issue Date:** 2013-01-29

*The Common European Asylum System and the Rights of the Child*  
*An Exploration of Meaning and Compliance*



# The Common European Asylum System and the Rights of the Child

An Exploration of Meaning and Compliance

PROEFSCHRIFT

ter verkrijging van  
de graad van Doctor aan de Universiteit Leiden,  
op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,  
volgens besluit van het College voor Promoties  
te verdedigen op dinsdag 29 januari 2013  
klokke 16.15 uur

*door*

Ciara Mary Smyth

geboren te Dublin, Ireland, in 1970

Promotiecommissie:

Promotor: prof. dr. P. Boeles

Overige leden: prof. dr. P.R. Rodrigues  
prof. dr. M.R. Bruning  
dr. J.J. Rijpma  
prof. dr. A.B. Terlouw (Radboud University Nijmegen)  
prof. dr. S. Mullally (University College Cork, Ireland)  
prof. dr. C. Harvey (Queen's University Belfast, Northern Ireland)

Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

Printed by: Proefschriftmaken.nl – Uitgeverij BOXPress

© 2013 C.M. Smyth

*Behoudens de in of krachtens de Auteurswet van 1912 gestelde uitzonderingen mag niets uit deze uitgave worden vervoelvooudigd, opgeslagen in een geautomatiseerd gegevensbestand of openbaar gemaakt, in enige vorm of op enige wijze, hetzij elektronisch, mechanisch, door fotokopieën, opnamen of enige andere manier, zonder voorafgaande schriftelijke toestemming van de uitgever.*

*Het reprorecht wordt niet uitgeoefend.*

*No part of this publication may be reproduced, stored in a retrieval system, made available or communicated to the public, in any form or by any means, without the prior permission in writing of the publisher, unless this is expressly permitted by law.*

## Acknowledgements

One of the most fortuitous events in the process of conducting this research was meeting Pieter Boeles and his agreeing to be my supervisor. I was familiar with and admired Pieter's work in the area of immigration and asylum law and from the outset appreciated my luck in having him as supervisor. But I could not have guessed how flexible and accommodating Pieter would be throughout the process, from patiently waiting for me to recommence the research after various interruptions, to collecting me and my family in Schiphol airport for our brief and very enjoyable relocation to the Netherlands, to providing me with a space to work in Amsterdam, to giving just the right balance of critical commentary and encouragement. I would like to thank my colleagues at the Institute of Immigration Law in Leiden and especially Marcelle Reneman for her insights on the right of the child to be heard and her sound advice on the many practical issues relating to the defence, Peter Rodrigues for a number of valuable discussions last summer, Mark Klaassen for passing on new family reunification case-law, and Gerri Lodder for her interest and enthusiasm. I hope we can maintain the connections between Galway and Leiden! I would also like to thank Kees Wouters and Blanche Tax who kindly lent us their Amsterdam apartment, bicycles and children's toys last summer which made our stay in the Netherlands possible and enjoyable.

I would like to thank family, friends and colleagues who helped me at various critical stages of the process. Thanks to my father, Leo Smyth, for various discussions over the years and a flip-chart session on a rainy day on the best interests of the child in which he came up with the title of the thesis. Thanks to Niamh Doheny, for her invaluable help with the introduction and conclusion, for sending me texts saying 'this is the sound of the whip cracking!' and for encouraging me to complete the thesis and let it go. Thanks to my sister, Sharon Fitzpatrick, for her friendship over the years and for her very practical help over an intense, coffee-fuelled weekend with the formatting, the table of contents and the references. Thanks to Chris Duke and Michael Coyne for trying to help me automate the table of contents (some people are just beyond help!). Thanks to my colleagues in the School of Law, NUI Galway and in particular to Diarmuid Griffin and Donncha O'Connell for their continued support. Thanks to my friends who patiently listened to me going on about the thesis and who were unfailingly interested and sympathetic,

particularly, Michelle Scully, Fionnuala Dillane, Elizabeth Flynn, Evelyn Stevens, Sinead Curtis and Karoline Aebi-Popp. Thanks to my two lovely children, Niamh and Caoimhe Drea, who set very clear work boundaries and kept me grounded ('Are you *still* doing your PhD mammy? It's taking you an awfully long time...'). Most importantly, thanks to my husband, Geoff Drea, for believing in me all the while and for his unwavering love, support and patience.

September 2012



# Table of contents

1	INTRODUCTION	1
1.1	The thesis of the study	1
1.2	The background to the study	1
1.3	The aims and objectives of the study	7
1.4	The scope of the study	10
1.5	The limitations of the study	11
1.6	The sources and methodology of the study	13
1.7	The structure of the study	15
1.8	The scientific context of the study	17
1.9	A word on terminology	18
2	THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD	21
2.1	Introduction	21
2.2	The meaning of the term 'best interests'	23
2.2.1	One interpretation: 'best interests' is a welfare concept	24
2.2.2	An alternative interpretation: 'best interests' is a rights-based concept	26
2.2.2.1	'Best interests' informs the meaning of rights	27
2.2.2.2	Rights inform the meaning of 'best interests'	28
2.2.2.3	'Best interests' is a composite of rights	30
2.2.2.4	'Best interests' brings a rights-perspective to bear	32
2.2.3	General and specific implications of 'best interests' as a rights-based concept	32
2.3	The nature of the legal obligation	33
2.3.1	The scope of the obligation	34
2.3.1.1	What actions?	34
2.3.1.2	Actions by whom?	35
2.3.1.3	In whose best interests: the child or children?	36
2.3.2	The weight of the child's best interests	38
2.3.2.1	One approach: equivalency or less	39
2.3.2.2	An alternative approach: primacy or more	42
2.3.3	The conduct of the assessment in individual cases	45
2.3.3.1	The best interests assessment	46
2.3.3.2	The best interests determination	47
2.4	The principle of the best interests of the child in the CEAS (Phase One)	49
2.4.1	The scope of the principle	50
2.4.1.1	The Reception Conditions Directive	50
2.4.1.2	The Dublin Regulation	51

2.4.1.3	The Asylum Procedures Directive	53
2.4.1.4	The Qualification Directive	55
2.4.2	The weight of the child's best interests	57
2.4.3	The conduct of the assessment in individual cases	58
2.5	The principle of the best interests of the child in the CEAS (Phase Two)	60
2.5.1	The scope of the principle	61
2.5.1.1	The proposed recast Reception Conditions Directive	61
2.5.1.2	The proposed recast Dublin Regulation	62
2.5.1.3	The proposed recast Asylum Procedures Directive	63
2.5.1.4	The recast Qualification Directive	63
2.5.2	The conduct of the assessment	64
2.6	Final remarks	66
3	THE RIGHT OF THE CHILD TO SEEK AND QUALIFY FOR INTERNATIONAL PROTECTION	69
3.1	Introduction	69
3.2	The right of the child to seek international protection	70
3.2.1	The right of the child to seek asylum	70
3.2.2	Phase One CEAS: compliance with the right of the child to seek asylum	72
3.2.3	Phase Two CEAS: prospects for enhanced compliance	76
3.3	The right of the child to qualify for international protection	78
3.3.1	The relevance of the rights of the child to qualification for international protection	78
3.3.2	Phase One CEAS: eligibility concepts and the rights of the child	83
3.3.2.1	The refugee definition	83
3.3.2.2	The definition of 'serious harm'	91
3.3.2.3	Sources of harm and protection	94
3.3.2.4	Internal protection	96
3.3.2.5	Country of origin information	99
3.3.2.6	Cessation	102
3.3.2.7	Exclusion	103
3.3.2.8	Concepts that restrict inclusion: the example of 'safe country of origin'	107
3.3.3	Phase Two CEAS: eligibility concepts and the rights of the child	110
3.3.3.1	The refugee definition	110
3.3.3.2	The definition of 'serious harm'	112
3.3.3.3	Sources of harm and protection	112
3.3.3.4	Internal protection	112
3.3.3.5	Country of origin information	113
3.3.3.6	Cessation	114
3.3.3.7	Exclusion	115
3.3.3.8	Concepts that restrict inclusion: the example of 'safe country of origin'	115
3.4	Synthesis of findings	116

---

4	THE RIGHT OF THE CHILD TO BE HEARD	117
4.1	Introduction	117
4.2	The right of the child to be heard	118
4.2.1	The right to a hearing	120
4.2.2	The conduct of the hearing	126
4.2.2.1	The right to a representative	126
4.2.2.2	The adaptation of the hearing	127
4.2.3	The evaluation of the child's views	130
4.2.3.1	Assessment of age and maturity	130
4.2.3.2	The 'due weight' requirement	131
4.3	Phase One CEAS: compliance with the right of the child to be heard	133
4.3.1	The right to a hearing	135
4.3.2	The conduct of the hearing	141
4.3.2.1	The right to a representative	141
4.3.2.2	The adaptation of the hearing	144
4.3.3	The evaluation of the child's views	148
4.3.3.1	Assessment of age and maturity	148
4.3.3.2	The 'due weight' requirement	150
4.4	Phase Two CEAS: prospects for enhanced compliance	157
4.4.1	The right to a hearing	158
4.4.2	The conduct of the hearing	160
4.4.2.1	The right to a representative	160
4.4.2.2	The adaptation of the hearing	162
4.4.3	The evaluation of the child's views	166
4.4.3.1	Assessment of age and maturity	166
4.4.3.2	The 'due weight' requirement	166
4.5	Synthesis of findings	169
5	THE RIGHT OF THE CHILD TO PROTECTION AND CARE	171
5.1	Introduction	171
5.2	Family unity	173
5.2.1	The right of the child to family unity	173
5.2.1.1	The concept of derived rights	174
5.2.1.2	The prohibition of separating a child from his/her parents	176
5.2.1.3	The right of the child to family reunification	178
5.2.2	Phase One CEAS: compliance with the right of the child to family unity	182
5.2.2.1	The concept of derived rights	183
5.2.2.2	The prohibition on separating a child from his/her parents	186
5.2.2.3	The right of the child to family reunification	189
5.2.3	Phase Two CEAS: prospects for enhanced compliance	192
5.2.3.1	The concept of derived rights	192
5.2.3.2	The prohibition on separating a child from his/her parents	194
5.2.3.3	The right of the child to family reunification	195

5.3	The protection and care of the unaccompanied and separated child	197
5.3.1	The right of the child without family to special protection and assistance	197
5.3.1.1	Identification of the child entitled to special protection and assistance	198
5.3.1.2	Oversight of care and protection	200
5.3.1.3	The provision of alternative care	201
5.3.2	Phase One CEAS: compliance with the right of the child to special protection and assistance	204
5.3.2.1	Identification of the child entitled to special protection and assistance	204
5.3.2.2	Oversight of care and protection	207
5.3.2.3	The provision of alternative care	208
5.3.3	Phase Two CEAS: prospects for enhanced compliance	211
5.3.3.1	Identification of the child entitled to special protection and assistance	211
5.3.3.2	Oversight of care and protection	212
5.3.3.3	The provision of alternative care	213
5.4	Synthesis of findings	214
6	CERTAIN SOCIO-ECONOMIC RIGHTS OF THE CHILD	217
6.1	Introduction	217
6.2	Health	219
6.2.1	The right of the child to health	219
6.2.1.1	The normative content of the right	220
6.2.1.2	The 'core content' of the right	223
6.2.2	Phase One CEAS: compliance with the right of the child to health	228
6.2.2.1	The Reception Conditions Directive	228
6.2.2.2	The Qualification Directive	232
6.2.3	Phase Two CEAS: prospects for enhanced compliance	236
6.2.3.1	The proposed recast Reception Conditions Directive	236
6.2.3.2	The recast Qualification Directive	238
6.3	Standard of living	239
6.3.1	The right of the child to an adequate standard of living	239
6.3.1.1	The normative content of the right	240
6.3.1.2	The 'core content' of the right	244
6.3.2	Phase One CEAS: compliance with the right of the child to an adequate standard of living	246
6.3.2.1	The Reception Conditions Directive	246
6.3.2.2	The Qualification Directive	249
6.3.3	Phase Two CEAS: prospects for enhanced compliance	249
6.3.3.1	The proposed recast Reception Conditions Directive	249
6.3.3.2	The recast Qualification Directive	252
6.4	Education	252
6.4.1	The right of the child to education	252
6.4.1.1	The normative content of the right	253

6.4.1.2	The 'core content' of the right: the prohibition of discrimination	257
6.4.2	Phase One CEAS: compliance with the right of the child to education	263
6.4.2.1	The Reception Conditions Directive	263
6.4.2.2	The Qualification Directive	267
6.4.3	Phase Two CEAS: prospects for enhanced compliance	268
6.4.3.1	The proposed recast Reception Conditions Directive	268
6.4.3.2	The recast Qualification Directive	268
6.5	Synthesis of findings	269
7	THE RIGHT OF THE CHILD TO LIBERTY	271
7.1	Introduction	271
7.2	The right of the child to liberty	271
7.2.1	Permissible detention	273
7.2.2	Conditions of detention	278
7.2.3	Procedural protection	283
7.3	Phase One CEAS: compliance with the right of the child to liberty	284
7.3.1	Permissible detention	285
7.3.2	Conditions of detention	287
7.3.3	Procedural protection	289
7.4	Phase Two CEAS: prospects for enhanced compliance	290
7.4.1	Permissible detention	290
7.4.2	Conditions of detention	291
7.4.3	Procedural protection	293
7.5	Synthesis of findings	293
8	CONCLUSION	295
8.1	The meaning of the rights of the child	298
8.2	Phase One CEAS: compliance with the rights of the child	299
8.3	Phase Two CEAS: prospects for enhanced compliance	301
8.4	Factors inhibiting compliance	301
	SAMENVATTING	307
	BIBLIOGRAPHY	321
	CASES AND OTHER DOCUMENTS	329
	ANNEX – Typology of rights in the Convention on the Rights of the Child	339
	CURRICULUM VITAE	343

