

TRAINING MANUAL

- MODULE 2 - FUNDAMENTAL PROCEDURAL RIGHTS FOR UNACCOMPANIED ASYLUM-SEEKING CHILDREN



Fostering Quality Legal Assistance in the Asylum Procedure



Co-funded by the Rights, Equality and Citizenship (REC)
Programme of the European Union

TABLE OF CONTENTS

.....	1
GENERAL INTRODUCTION	3
MODULE CONTENT	3
LEARNING OBJECTIVES.....	3
INTRODUCTION	3
1. ACCESS TO THE ASYLUM PROCEDURES.....	4
2. RIGHT TO BE HEARD	11
3. RIGHT TO PROTECTION BY A GUARDIAN, A REPRESENTATIVE, AND A LAWYER AND ACCESS TO CHILD-FRIENDLY LEGAL AID	22
4. PRECONDITIONS FOR AN EFFECTIVE AND PROTECTIVE GUARDIANSHIP	40
5. RIGHT TO AN EFFECTIVE REMEDY/RIGHT TO APPEAL	46
6. TIME-LIMITS IN THE ASYLUM PROCEDURES AND THE URGENCY PRINCIPLE IN ALL PROCEEDINGS INVOLVING CHILDREN	48

GENERAL INTRODUCTION

All children are holders of rights, including unaccompanied asylum-seeking children (UASC). In the asylum procedures, specific procedural and substantive rights are triggered for UASC, and it is important to know about them in order to ensure that the proper safeguards are in place when accompanying or representing UASC in their asylum applications. In this module we will review key safeguards for the asylum procedure, the scope of the right to be heard, and learn about UASC's right to be appointed a guardian, a representative and a lawyer. We will also see the right to an effective remedy and the time-limits which apply to asylum procedures and the urgency principle in all matters affecting children.

MODULE CONTENT

LEARNING OBJECTIVES

- To learn about the asylum procedure for unaccompanied asylum-seeking children, and the related necessary safeguards (access to the territory, access to information and an interpreter and the right to a personal interview)
- To be aware of the scope and the implications of the child's right to be heard in asylum procedures
- To learn about the right to be protected – by a guardian, a representative and a lawyer – and about child-friendly legal aid
- To learn about the right to an effective remedy and appeal
- To be aware of time-limits for the asylum procedure and the urgency principle in all matters affecting children.

INTRODUCTION

Procedural rights and safeguards necessary to ensure children's access to fair and efficient asylum procedure include several important rights, which all need to be respected and impose obligations on States and professionals – lawyers, legal representatives, guardians, social workers, etc. – who work with children.

The relevant procedural rights and safeguards include: access to the asylum procedures, the right to be heard; the appointment of a guardian; access to legal aid and representation; information to children in a language they understand and in a child-friendly manner; respect for the urgency principle in all proceedings involving children; the ability to challenge a decision and to have access to an effective remedy, and child-sensitive assessment of protection needs.

1. ACCESS TO THE ASYLUM PROCEDURES

Children should be entitled to access to asylum procedures, regardless of their age.

The EU's legal framework for the examination of asylum applications is described in [Module 1](#).

On the application of the Dublin Regulation and the determination of the Member State responsible for analyzing an unaccompanied child's international protection claim, [refer to Module 3](#).

The Asylum Procedures Directive incorporates specific procedural guarantees for children regarding the personal interview and the competence protection officers listening to asylum-seeking children should have. The UNHCR Guidelines also provide guarantees regarding unaccompanied asylum-seeking children when accessing to the territory.

1.1 ACCESS TO THE TERRITORY

In line with the prohibition of *refoulement*, as provided by Article 33 of the Convention relating to the Status of Refugees, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 3 ECHR and Articles 6 and 37 of the CRC, an unaccompanied asylum-seeking child should not be refused access to the territory.

UNHCR, "Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum" (1997)

4. ACCESS TO THE TERRITORY

4.1 Because of his/her vulnerability, an unaccompanied child seeking asylum **should not be refused access to the territory** and his/her claim should always be considered **under the normal refugee determination procedure**.

Parliamentary Assembly of the Council of Europe Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return

5.3. **No child should be denied access to the territory or be summarily turned back at the borders of a member state.** Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's best interest [...].

Recasting of the EURODAC Regulation

The [EURODAC Regulation](#) establishes an EU asylum fingerprint database. Any person over the age of 14 who makes an asylum application in the EU must provide her fingerprints, which are transmitted to the EURODAC central system. It provides fingerprint comparison evidence to assist with determining the Member State responsible for examining an asylum application made in the EU under the Dublin Regulation.

In May 2016, the Commission initiated a review of the Common European Asylum System, including the revision of the EURODAC Regulation.

On the [Commission's proposal](#), concerning minors, the objective was to strengthen the protection of unaccompanied children who do not always officially request international protection and are exposed to dangers when they are outside the control of care institutions or child welfare social services. In the Commission's view, the current legal and technical framework does not allow for the establishment of their identity and it is therefore difficult to avoid situations that compromise their well-being. The Commission's proposal included in particular the lowering of the age from which children's fingerprints and facial image would be taken over and integrated into EURODAC at the age of 6.

In December 2016, the Council of the EU agreed on a common position following the Commission's proposal to open negotiations with the European Parliament, broadly incorporating the Commission's proposal.

Following this proposal, the European Parliament adopted its position in a report in June 2017. Regarding minors, the members of the Parliament adopted the following points:

- In order to strengthen the protection of all migrant and refugee children, in particular unaccompanied minors who have not applied for international protection and children at risk of separation from their families, they call for the possibility of collecting their biometric data to be stored in the central system and to help a Member State find a family member or to identify possible links that these children may have with another Member State. This type of operation can only be carried out in strict compliance with the Convention on the Rights of the Child and the best interests of the child.
- In this case, the collection of biometric data could improve procedures for identifying missing children or victims of crime.
- Fingerprinting would apply to children from 6 years of age. The minor should always be informed in an age-appropriate manner, orally and in writing, using specially designed brochures, computer graphics and demonstrations to explain the procedure for taking fingerprints and facial image in a language that is understandable to the minor. He must be accompanied by an adult.
- Where a minor, in particular if unaccompanied or separated from his or her family, refuses to give fingerprints or facial image and there are reasonable grounds to suspect that there are risks to his or her safety or protection, the minor should be referred to the national child protection services and/or national referral mechanisms. These authorities should then assess the particular needs of the minor in order to find a durable solution for him/her. In any event, the detention of minors is prohibited.

The European Parliament and the EU Council reached an interim agreement on the recasting of EURODAC in June 2018. In this agreement, the minimum age for taking fingerprints and facial images will be lowered from 14 to 6 years to help identify and trace missing children, as well as identify family links. Coercion should never be used to obtain fingerprints or facial images of minors. However, as a last resort, and where permitted by relevant national or European legislation, a "proportionate degree of coercion" could be exercised on minors, subject to respect for their dignity and physical integrity.

In addition, in addition to fingerprints, facial images and alphanumeric data (name, identity card or passport number) of asylum seekers and irregular migrants will also be stored. EUROPOL, the European Police Agency, will be able to query the database more effectively in order to detect and prevent terrorist offences and other serious criminal offences¹.

¹ For more information on EURODAC and the reforms implications on fundamental rights, see: FRA, "[The impact of the proposal for a revised Eurodac Regulation on fundamental rights](#)", (December 2016).

1.2 ACCESS TO INFORMATION

In order to ensure children's access to fair and efficient asylum procedure, it is fundamental to give them access to information on their rights and procedures.

Information should be age-appropriate and adapted to the needs of children. It should be presented in ways (formats, manners and language(s)) that children understand. The right to translation is an important element of the right to information.

In addition, information about the rights of children and remedies should be made available to persons acting as legal representatives of children when these children are unaccompanied.

([FAIR Module I](#))

International Law

CRC, Article 17

States Parties recognize the important function performed by the mass media and shall ensure that **the child has access to information and material** from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

Based on Article 17 of the CRC, the Committee elaborated on the scope of children's right to information.

The Committee, General Comment n°12

16. [...] States parties have to ensure that the child **receives all necessary information and advice to make a decision in favour of her or his best interests.**

25. The realization of the right of the child to express her or his views requires that **the child be informed about the matters, options and possible decisions to be taken and their consequences** by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be **informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child's clarified decisions.**

65. All States parties should develop administrative procedures in legislation which reflect the requirements of article 12 and ensure the child's right to be heard along with other procedural rights, **including the rights to disclosure of pertinent records**, notice of hearing, and representation by parents or others.

82. Fulfilment of the child's right to information, consistent with article 17 is, to a large degree, a prerequisite for the effective realization of the right to express views. **Children need access to information in formats appropriate to their age and capacities on all issues of concern to them.** This applies to information, for example, **relating to their rights, any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaints procedures.** [...]

Parliamentary Assembly of the Council of Europe Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return

5.3. No child should be denied access to the territory or be summarily turned back at the borders of a

member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's best interest;

5.6. Legal, social and psychological assistance should be provided without delay to unaccompanied children. **Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and their implications [...].**

1.3 RIGHT TO A QUALIFIED AND FREE INTERPRETER

To be heard, unaccompanied children seeking protection need to be understood. Therefore, the right to an interpreter is a procedural right inherent to an effective implementation of the right to be heard.

The recast Asylum Procedures Directive provides for the appointment of an interpreter in the asylum procedures. The right to an interpreter is also specifically provided in Article 40 of the CRC for children in penal proceedings.

Recast Asylum Procedures Directive

Article 12 - Guarantees for applicants

1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants enjoy the following guarantees:

a) they shall be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2011/95/EU, as well as of the consequences of an explicit or implicit withdrawal of the application. That information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13;

b) they shall receive the services of an interpreter for submitting their case to the competent authorities whenever necessary. Member States shall consider it necessary to provide those services at least when the applicant is to be interviewed as referred to in Articles 14 to 17 and 34 and appropriate communication cannot be ensured without such services. In that case and in other cases where the competent authorities call upon the applicant, those services shall be paid for out of public funds [...].

Article 15 - Requirements for a personal interview

[...] 3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions **which allow applicants to present the grounds for their applications in a comprehensive manner.** To that end, Member States shall:

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;

(b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such

a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(c) **select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview.** The communication shall take place **in the language preferred by the applicant** unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, **Member States shall provide an interpreter of the same sex if the applicant so requests**, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(d) ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform;

(e) ensure that interviews with minors are conducted in a child-appropriate manner.

Article 40(2) - Convention on the Rights of the Child

40 [...] 2. [H]aving regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: [...] (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used [...].

However, in the context of **refugee status determination**, the right to a qualified and free interpreter for UASC is crucial. Children should also be given the option of choosing to communicate with interpreters of the sex they feel more comfortable with.

UNHCR Procedural Standards for Refugee Status Determination

2.5.1 Applicants for RSD should have access to the services of trained and qualified interpreters at all stages of the RSD process.

[...] Wherever possible, female interpreters should be assigned to interviews with female applicants, and all applicants should be given the option to communicate with interpreters of the sex they prefer.

Guidelines of the Committee of Ministers of the CoE on child-friendly justice

IV. Child-friendly justice before, during and after judicial proceedings

A. General elements of child-friendly justice

1. Information and advice

From their first involvement with the justice system or other competent authorities (such as the police, immigration, educational, social or health care services) and throughout that process, children [...] should be promptly and adequately informed of, inter alia: [...]

k. the availability of the services (health, psychological, social, **interpretation and translation**, and other) or organisations which can provide support and the means of accessing such services along with emergency financial support, where applicable;

1.4 THE RIGHT TO BE APPOINTED A REPRESENTATIVE

Regarding the appointment of a representative for the asylum procedures, refer to section 3.

1.5 THE RIGHT TO A PERSONAL INTERVIEW

Article 14 of the recast Asylum Procedures Directive encompasses the principle that before a first instance decision is taken, the asylum seeker must be given the opportunity for a personal

interview, with a person who is competent to conduct such an interview. Member States will no longer be able to omit a personal interview except where they can take a positive decision on refugee status without an interview or where the determining authority is of the opinion that the applicant is unfit or unable to be interviewed.

Therefore, unaccompanied asylum-seeking children should also be given the opportunity of a personal interview in their applications for international protection.

Personnel conducting interviews and preparing decisions must be competent to take account of the personal and general circumstances surrounding the application and have the necessary knowledge of the special needs of minors. (See ECRE, [Information Note on 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 \(recast\)](#) at pp 19-21 for more details).

Recast Asylum Procedures Directive

Article 14 - Personal interview

1. Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. Personal interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority. This subparagraph shall be without prejudice to Article 42(2)(b).

[...] Persons conducting personal interviews of applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect an applicant's ability to be interviewed, such as indications that the applicant may have been tortured in the past.

[...]

Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

Article 15 - Requirements for a personal interview

[...] 2. A personal interview shall take place under conditions which ensure appropriate confidentiality.

3. Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;

(b) wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests, unless the determining authority has reason to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(c) select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has

reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner;

(d) ensure that the person who conducts the interview on the substance of an application for international protection does not wear a military or law enforcement uniform;

(e) ensure that interviews with minors are conducted in a child-appropriate manner.

Article 25 - Guarantees for unaccompanied minors

[...] 3. Member States shall ensure that:

(a) if an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;

(b) an official **with the necessary knowledge of the special needs of minors** prepares the decision by the determining authority on the application of an unaccompanied minor.

The Committee, General Comment n°6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin

71. Minimum procedural guarantees should include that **the application will be determined by a competent authority fully qualified in asylum and refugee matters. Where the age and maturity of the child permit, the opportunity for a personal interview with a qualified official should be granted before any final decision is made.** Wherever the child is unable to communicate directly with the qualified official in a common language, the assistance of a qualified interpreter should be sought. Moreover, the child should be given the “benefit of the doubt”, should there be credibility concerns relating to his or her story as well as a possibility to appeal for a formal review of the decision.

72. The interviews should be conducted by representatives of the refugee determination authority who will **take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child.** The assessment process should comprise a **case-by-case examination of the unique combination of factors presented by each child, including the child’s personal, family and cultural background.** The guardian and the legal representative should be present during all interviews.

BACKGROUND DOCUMENTS

International instruments

- ❖ [Convention relating to the Status of Refugees, 1951](#)
- ❖ [Protocol relating to the Status of Refugees, 1967](#)
- ❖ [Convention on the Rights of the Child, 1989](#)
- ❖ [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 \(or recast Asylum Procedures Directive\)](#)
- ❖ [Parliamentary Assembly of the Council of Europe Resolution 1810 \(2011\): Unaccompanied children in Europe: issues of arrival, stay and return](#)

Key international comments, guidelines and reports

- ❖ UN Committee on the Rights of the Child, [General Comment n°12 \(2009\): The right of the child to be heard](#) UN Doc. CRC/C/GC/12
- ❖ UN Committee on the Rights of the Child, [General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin](#), UN Doc. CRC/GC/2005/6 (1 September 2005), paras 71-72
- ❖ UNHCR, ["Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum" \(1997\)](#)
- ❖ UNHCR Guidelines ["Refugee Children – Guidelines on Protection and Care" \(1994\)](#)
- ❖ UNHCR, ["The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the EU" \(2014\)](#)
- ❖ [UNHCR Procedural Standards for Refugee Status Determination](#)
- ❖ ECRE, [Information Note on 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 \(recast\)](#)
- ❖ [Guidelines of the Committee of Ministers of the CoE on child-friendly justice](#)

2. RIGHT TO BE HEARD

2.1 THE RIGHT TO BE HEARD IN INTERNATIONAL LAW AND EU LAW

Children are the holders of rights and have the right to be heard in every decision that affects them. The right to be heard is key to a child's access to her/his rights and to fair procedures so that decisions can be made in her/his best interests. The right to be heard is considered to be among the four principles central to respecting children's rights under the *Convention on the Rights of the Child* (CRC), which shall be considered in the interpretation and implementation of all other rights of the CRC. These guiding principles include:

1. The principle of non-discrimination;
2. The best interest of the child;
3. The right to life, survival and development,
4. The right to participate and to be heard.

These principles are all to be applied to migrant children. ([FAIR Project Module 1](#))

International law

The right to be heard is specifically provided by the CRC and has been extensively interpreted by the Committee on the Rights of the Child (the Committee) and other international and intergovernmental bodies.

Article 12 - Convention on the Rights of the Child

1. States Parties shall assure to the child who is capable of forming his or her own views the **right to express those views freely in all matters affecting the child**, the views of the child being given **due weight in accordance with the age and maturity of the child**.
2. For this purpose, the child shall in particular be provided the opportunity **to be heard in any judicial and administrative proceedings** affecting the child, either **directly, or through a representative or an appropriate body**, in a manner consistent with the procedural rules of national law.

The Committee interpreted Article 12 in its General Comment n°12, providing guidance on the scope and the implementation of the right to be heard:

Committee on the Rights of the Child - General Comment n°12: The right of the child to be heard

1. Article 12 of the [CRC] is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand, lacks the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.

2. The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. [...] [T]his article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.

❖ Concept of participation

12. The views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.

13. These processes are usually called participation. The exercise of the child's or children's right to be heard is a crucial element of such processes. The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives.

❖ Obligations imposed on States to accord children's views due weight

15. Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity. This right imposes a **clear legal obligation on States parties to recognize this right and ensure its implementation** by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.

❖ "Every child "capable of forming his or her own views"

20. States parties shall assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an **obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible**. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, **States parties should presume that a child has**

the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.

21. The Committee emphasizes that article 12 imposes **no age limit on the right of the child to express her or his views**, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

- First... full implementation of article 12 requires **recognition of, and respect for, non-verbal forms of communication** including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences;

- Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he **has sufficient understanding to be capable of appropriately forming her or his own views on the matter**;

- Third, States parties are also under the **obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard**. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language;

- Lastly, States parties **must be aware of the potential negative consequences of an inconsiderate practice of this right**, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised **ensuring full protection of the child**.

23. States parties must ensure conditions for expressing views that account for the child's individual and social situation and an **environment in which the child feels respected and secure when freely expressing her or his opinions**.

28. The views of the child must be "given due weight in accordance with the age and maturity of the child". This clause refers to the capacity of the child, which has to be assessed in order to give due weight to her or his views, or to communicate to the child the way in which those views have influenced the outcome of the process. Article 12 stipulates that **simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views**.

- ❖ "Any judicial and administrative proceedings affecting the child"

32. Article 12, paragraph 2, specifies that opportunities to be heard have to be provided in particular "in any judicial and administrative proceedings affecting the child". The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, **asylum-seeking and refugee children**, and victims of armed conflict and other emergencies. [...]

34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. **Proceedings must be both accessible and child-appropriate**. Particular attention needs to be paid to the provision and delivery of **child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms**.

- ❖ "Either directly, or through a representative or an appropriate body"

35. After the child has decided to be heard, he or she will have to decide how to be heard: "either

directly, or through a representative or appropriate body.” The Committee recommends that, wherever possible, the child must be given the **opportunity to be directly heard in any proceedings**.

36. The representative can be the parent(s), a lawyer, or another person (inter alia, a social worker). However, it must be stressed that in many cases (civil, penal or administrative), there are **risks of a conflict of interest** between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the **child’s views are transmitted correctly to the decision maker by the representative**.[...]

EU law

Under EU law, Article 24 (1) of the EU Charter of Fundamental Rights provides that children may express their views freely, and that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. This provision is of general applicability, and is not restricted to particular proceedings (ICJ [FAIR Project Module 1](#), p. 6 and FRA, Handbook on European law relating to the rights of the child, p. 41).

Charter of Fundamental Rights of the European Union

Article 24(1) - The rights of the child

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.

The Court of Justice of the European Union (CJEU) interpreted the meaning of Article 24(1) of the Charter in conjunction with States’ obligations under the Brussels II bis Regulation. The Court found that hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to tensions among the parents and adversely affected by them. The national court must take into account the best interests of the child in assessing this. See the Court’s reasoning below in *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, CJEU, C-491/10 PPU (22 December 2010).

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II bis Regulation)

Article 11 Return of the child (...) 2. When applying Articles 12 and 13 of the 1980 Hague Convention [emphasis added]

Joseba Andoni Aguirre Zarraga v. Simone Pelz, CJEU, C-491/10 PPU (22 December 2010)

62. In that regard, it must first be observed that it is clear from Article 24 of that charter and from Article 42(2)(a) of Regulation No 2201/2003 that those provisions refer not to the hearing of the child per se, but to the child’s having the opportunity to be heard.

63. First, it is a requirement of Article 24(1) of the Charter that children should be able to express

their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. Secondly, it is a requirement of Article 42(2)(a) of the regulation that the child be given the opportunity to be heard 'unless a hearing was considered inappropriate having regard to his or her age or degree of maturity'.

64. Consequently, it is for the court which has to rule on the return of a child to assess whether such a hearing is appropriate, since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights.

65. It follows that, as provided for in Article 24 of the Charter of Fundamental Rights and the first subparagraph of Article 42(2) of Regulation No 2201/2003, it is not a necessary consequence of the right of the child to be heard that a hearing before the court of the Member State of origin take place, but that right does require that there are made available to that child the legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court.

66. In other words, whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of Regulation No 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views.

The right to be heard is also a general principle of EU law. As part of the right to effective judicial protection, the right to be heard comprises the principle of equivalence and the principle of effectiveness. The principle of equivalence means that domestic procedural law must operate in the same way for rights derived from domestic law and their EU law equivalents. In other words, domestic procedural law must not discriminate against EU law. The principle of effectiveness first means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law. Second, the principle of effectiveness requires national law to ensure the full effectiveness of EU law: EU law requires that domestic law give full effect to EU directives, and it sets minimum standards which domestic law must meet so as to be fit for purpose in fully protecting EU law rights. (Lenaerts, "[Effective judicial protection in the EU](#)" 2013)

Charter of Fundamental Rights of the European Union

Article 47 - Right to an effective remedy and to a fair trial

[...] Everyone is entitled to a **fair and public hearing** within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the **possibility of being advised, defended and represented**. [...]

Other EU secondary sources require States to take into consideration (unaccompanied) children's views. The EU law right to be heard, which is recognized by the Court of Justice of the EU as a general principle of EU law, guarantees to every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to adversely affect her or his interests.

The Asylum Procedures Directive provides for the right to a personal interview. The right to a personal interview is broad: it also applies at the decision-making process from the very beginning. The asylum applicant's right to a personal interview is crucial for a fair asylum procedure, rooted in general principles of EU and international law, such as the principle of effectiveness and the right to be heard. The lack of access to a personal interview can result in a violation of the right to asylum guaranteed by Article 18 of the EU Charter of Fundamental Rights, of the non-refoulement principle, guaranteed by Article 19(2) of the EU Charter, and in a violation of the prohibition of collective expulsions, set out in Article 19(1) of the Charter.

Article 14 - Asylum Procedures Directive

Personal interview

1. Before a decision is taken by the determining authority, the applicant shall be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview. Personal interviews on the substance of the application for international protection shall be conducted by the personnel of the determining authority. This subparagraph shall be without prejudice to Article 42(2)(b).

Where simultaneous applications for international protection by a large number of third-country nationals or stateless persons make it impossible in practice for the determining authority to conduct timely interviews on the substance of each application, Member States may provide that the personnel of another authority be temporarily involved in conducting such interviews. In such cases, the personnel of that other authority shall receive in advance the relevant training which shall include the elements listed in Article 6(4)(a) to (e) of Regulation (EU) No 439/2010. Persons conducting personal interviews of applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect an applicant's ability to be interviewed, such as indications that the applicant may have been tortured in the past.

Where a person has lodged an application for international protection on behalf of his or her dependants, each dependent adult shall be given the opportunity of a personal interview.

Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

2. The personal interview on the substance of the application may be omitted where:

(a) the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available; or

(b) the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control. When in doubt, the determining authority shall consult a medical professional to establish whether the condition that makes the

applicant unfit or unable to be interviewed is of a temporary or enduring nature.

Where a personal interview is not conducted pursuant to point (b) or, where applicable, with the dependant, reasonable efforts shall be made to allow the applicant or the dependant to submit further information.

3. The absence of a personal interview in accordance with this Article shall not prevent the determining authority from taking a decision on an application for international protection.

4. The absence of a personal interview pursuant to paragraph 2(b) shall not adversely affect the decision of the determining authority.

5. Irrespective of Article 28(1), Member States, when deciding on an application for international protection, may take into account the fact that the applicant failed to appear for the personal interview, unless he or she had good reasons for the failure to appear.

Article 6 - Dublin III Regulation

1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation. [...]

3. **In assessing the best interests of the child**, Member States shall closely cooperate with each other and shall, in particular, **take due account of [...]** (d) **the views of the minor, in accordance with his or her age and maturity.**

Anti-Trafficking Directive

Article 13 - General provisions on assistance, support and protection measures for child victims of trafficking in human beings *Knowing about child victims' rights and specific needs*

1. Child victims of trafficking in human beings shall be provided with assistance, support and protection. In the application of this Directive the **child's best interests shall be a primary consideration.**

2. Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.

Article 14 - Assistance and support to child victims

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, in the short and long term, in their physical and psychosocial recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, **taking due account of the child's views, needs and concerns** with a view to finding a durable solution for the child.

Key international guidelines and reports

The right to be heard has also been commented in **several international guidelines and reports**. These numerous developments on the right to be heard indicate the importance of that right, but also the difficulties that may emerge while implementing it.

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 Nov 2010

1. The **right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard** in proceedings involving or affecting them should be

respected. This includes **giving due weight to the children's views** bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful.

2. Children should be considered and treated as **full bearers of rights** and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views and the circumstances of the case. [...]

44. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

45. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.

46. The right to be heard is **a right of the child, not a duty** of the child.

47. A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.

48. Children should be **provided with all necessary information on how effectively to use the right to be heard**. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision.

49. Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed.

Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013

59. States must also ensure that the views of children, including children from the youngest age, even when they may be unable to express themselves verbally, are given due consideration. Moreover, in order to avoid (re-)victimization of children participating in judicial processes, States should make sure that their privacy and confidentiality are safeguarded at all times. States also must ensure that children are protected from all forms of violence when coming into contact with the justice system.

UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime

Article 8 (d) **Right to participation**. Every child has, subject to national procedural law, the **right to express his or her views, opinions and beliefs freely**, in his or her own words, and to contribute especially to the decisions affecting his or her life, including those taken in any judicial processes, and to have those views taken into consideration according to his or her abilities, age, intellectual maturity and evolving capacity.

2.2 IMPLEMENTATION OF THE RIGHT TO BE HEARD

The Committee identified 5 steps to implement the right to be heard, to allow legal practitioners, guardians, social workers or other persons dealing with children to fully respect the child's right to be heard in any given context where a child is invited to give her or his views.

Committee on the Rights of the Child

40. Implementation of the two paragraphs of article 12 requires **five steps to be taken in order to effectively realize the right of the child to be heard** whenever a matter affects a child or when the

child is invited to give her or his views **in a formal proceeding as well as in other settings**. These requirements have to be applied in a way which is appropriate for the given context.

(a) Preparation

41. Those responsible for hearing the child have to ensure that the child is **informed about her or his right to express her or his opinion in all matters affecting the child** and, in particular, in any judicial and administrative decision-making processes, **and about the impact that his or her expressed views will have on the outcome**. The child must, furthermore, receive information about the option of either communicating directly or through a representative. She or he must be aware of the possible consequences of this choice. **The decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be**, and has to take account of the views of the child in this regard.

(b) The hearing

42. The **context** in which a child exercises her or his right to be heard **has to be enabling and encouraging**, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate. The person who will hear the views of the child can be an adult involved in the matters affecting the child (e.g. a teacher, social worker or caregiver), a decision maker in an institution (e.g. a director, administrator or judge), or a specialist (e.g. a psychologist or physician).

43. Experience indicates that the situation should have **the format of a talk rather than a one-sided examination**. Preferably, a child should not be heard in open court, but under conditions of **confidentiality**.

(c) Assessment of the capacity of the child

44. The child's views must be given due weight, when a **case-by-case analysis indicates that the child is capable of forming her or his own views**. If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a **significant factor in the settlement of the issue**. Good practice for assessing the capacity of the child has to be developed.

(d) Information about the weight given to the views of the child (the feedback)

45. Since the child enjoys the right that her or his views are given due weight, **the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered**. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.

(e) Complaints, remedies and redress

46. Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated. Children should have the possibility of addressing an ombudsman or a person of a comparable role in all children's institutions, inter alia, in schools and day-care centres, in order to voice their complaints. Children should know who these persons are and how to access them. In the case of family conflicts about consideration of children's views, a child should be able to turn to a person in the youth services of the community.

47. If the right of the child to be heard is breached with regard to judicial and administrative proceedings (art. 12, para. 2), the child must have **access to appeals and complaints procedures** which provide remedies for rights violations. Complaints procedures must provide reliable mechanisms to ensure that children are confident that using them will not expose them to risk of violence or punishment.

The Committee underlined the particular vulnerable situation of unaccompanied and separated asylum-seeking children and General Comment n°12 calls for **an urgent implementation of the right to be heard**.

Committee on the Rights of the Child

123. Children who come to a country [...] as refugees are in a particularly vulnerable situation. For this reason **it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings**. In the case of migration, the child **has to be heard on his or her educational expectations and health conditions** in order to integrate him or her into school and health services. In the case of an asylum claim, the child **must additionally have the opportunity to present her or his reasons leading to the asylum claim**.

124. The Committee emphasizes that these children **have to be provided with all relevant information, in their own language, on their entitlements, the services available**, including means of communication, **and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings**. A guardian or adviser should be appointed, free of charge. Asylum-seeking children may also need effective family tracing and **relevant information about the situation in their country of origin to determine their best interests**.

Key elements regarding children's right to be heard

- ✓ The right to be heard is a fundamental right, which has both a **substantive** and an **interpretative** component, and is connected to all the other children's rights.
- ✓ Children have the **right to be heard in all proceedings or matters affecting them**.
- ✓ If participation of children is to be effective and meaningful, it needs to be **understood as a process, not as an individual one-off event**.

All processes in which children are heard and participate must be:

- ✓ **Transparent and informative**: children must be provided with **full, accessible, diversity-sensitive and age-appropriate information** about their right to express their views freely and their views to be given due weight;
- ✓ **Voluntary**;
- ✓ **Respectful**;
- ✓ **Relevant**;
- ✓ **Child-friendly, adapted to children's capacities**;
- ✓ **Inclusive, avoid existing patterns of discrimination, and encourage opportunities for marginalized children, including both girls and boys, to be involved**;
- ✓ **Supported by training**;
- ✓ **Safe and sensitive to risk**;
- ✓ **Accountable**: children must be informed as to how their views have been interpreted and used and provided with the opportunity to challenge and influence the analysis of the findings.

BACKGROUND DOCUMENTS

International Law

- ❖ [European Convention on Human Rights](#)
- ❖ [Convention on the Rights of the Child](#)
- ❖ [Charter of Fundamental Rights of the European Union](#)
- ❖ [Asylum Procedures Directive](#)
- ❖ [Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA](#)
- ❖ [Council Regulation \(EC\) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation \(EC\) No 1347/2000 \(Brussels II bis Regulation\)](#)
- ❖ [Dublin III Regulation \(604/2013\)](#)

Key international reports, comments and guidelines

- ❖ ECHR [Guide on Article 6 of the European Convention on Human Rights](#) (2017)
- ❖ International Commission of Jurists, Fostering Access to Immigrant Children's Rights (FAIR Project), "I. Access to fair procedures for migrant children including the right to be heard and to participate in proceedings". To learn about the project: icj.org/wp-content/uploads/2016/09/FAIR-Project.pdf
- ❖ [General Comment n°12 \(2009\): The right of the child to be heard UN Doc. CRC/C/GC/12](#)
- ❖ [Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime](#) and more specifically:
 - Implementation checklist 4: the right to be informed (p. 37)
 - Implementation checklist 5: the right to be heard and to express views and concerns (p. 46)
- ❖ [UNHCR Procedural Standards for Refugee Status Determination](#)
- ❖ [UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime](#)
- ❖ [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#)
- ❖ [Report of the UN High Commissioner for Human Rights on Access to justice for children \(A/HRC/25/35\), 16 December 2013](#)
- ❖ HELP Course, "[Child-Friendly Justice and Children's Rights](#)", online

Legal Literature

- ❖ Koen Lenaerts, « Effective judicial protection in the EU » (2013) (<http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf>)
- ❖ Denis Edwards, “The impact of the EU law principle of effectiveness”, 19 June 2012 SJ 156/24 23 (<https://www.ftbchambers.co.uk/sites/default/files/the-impact-of-the-eu-law-principle-of-effectiveness.pdf>)

3. RIGHT TO PROTECTION BY A GUARDIAN, A REPRESENTATIVE, AND A LAWYER AND ACCESS TO CHILD-FRIENDLY LEGAL AID

When a child is unaccompanied or separated, they need protection and help in a number of areas of their life to make sure that their well-being is being cared for and their best interests are safeguarded, as provided by Article 24 of the Charter of Fundamental Rights of the EU and Articles 18(2) and 20(1) of the CRC. Therefore, every unaccompanied or separated child is entitled to the appointment of **a guardian** as soon as the child is identified as being unaccompanied or separated, as required by many key international guidelines and comments. Two EU Directives, the Anti-Trafficking Directive and the Qualification Directive specifically provide for the appointment of a guardian.

In addition, when involved in particular civil, administrative or judicial proceedings, such as an asylum claim, a child needs a **representative** to act on his behalf as he or she has a limited legal capacity until he or she reaches 18 years old, as provided by several EU Directives.

Furthermore, unaccompanied children should be entitled to be appointed **a lawyer** not only in judicial proceedings but at all stages of the asylum process, including at the personal interview stage: providing legal assistance from the start of the asylum procedure is an important tool to achieve the highest possible quality of the first instance decision. Many errors in first instance decisions result from miscommunications or from an applicant's misunderstanding of procedural requirements. Such errors are often difficult to correct at the appeal stage and may result in the failure to identify those in need of protection and thus potentially lead to refoulement. Ensuring asylum seeker's access to legal assistance from the start of the procedure may help to avoid unnecessary complications at the appeal stage and reduce the need for persons in need of international protection to submit subsequent asylum applications. (ECRE, [Information Note on 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 \(recast\)](#) at pp 25-28)

3.1 SOURCES OF THE PROTECTION

EU law, the CRC and case law of the European Court of Human Rights (ECtHR) underline children's right to special protection from the States as necessary for their well-being.

Article 24 - The Charter

1. 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.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. [...]

Articles 18(2) and 20(1) - CRC

18(2). For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render **appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities** and shall **ensure the development of institutions, facilities and services for the care of children**.

20(1). A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, **shall be entitled to special protection and assistance provided by the State**.

The European Court of Human Rights (ECtHR) has consistently held that children, due to their age and personal situation, are amongst the most vulnerable persons in society. (*Rahimi v. Greece*, App no 8687/080 (5 July 2011), para 87.) When considering asylum seeking children their vulnerability is increased. (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App no 13178/03 (12 October 2006), para 55). Respect for this increased vulnerability of the asylum seeking child must be a primary consideration taking precedence over their irregular migration status, and entails a number of tailored protective measures under the Convention. Moreover, the ECtHR has ruled that children do not lose the rights they are entitled to as children simply because they have the good fortune of being accompanied.

Tarakhel v. Switzerland [GC], App no 29217/12 (4 November 2014)

118. [...] It [the Court] further reiterates that, as a "particularly underprivileged and vulnerable" population group, asylum seekers require "special protection" under that provision (see M.S.S., § 251).

119. This requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when, as in the present case, the children seeking asylum are accompanied by their parents (see Popov, cited above, § 91).

3.2 DEFINITIONS

Guardians, legal representatives and lawyers have distinct and complementary roles regarding UASC. We provide below more details regarding their roles, based on EU law, international law and key international guidelines and comments.

3.2.1 DEFINITION OF A GUARDIAN

EU Law

EU law does not provide a definition of the notion of a “guardian”, nor does it define his or her functions. In addition, there is no explicit general obligation in EU law to appoint a guardian for children without parental care. The Anti-Trafficking Directive and the Qualification Directive are the only EU Directives to provide for the appointment of a guardian regarding unaccompanied children. And only the Qualification Directive details a little bit the mandate of a guardian: to ensure an unaccompanied child’s well-being and that his or her needs are duly met.

The word “guardian” is absent from the recast Asylum Procedure Directive and from the recast Reception Condition Directive, which only mention “representatives”. Nevertheless, Article 25 of the recast Asylum Procedure Directive allows for the representative, who shall represent and assist the child, to be the same representative as referred to in the recast Reception Conditions Directive (Article 24), providing unaccompanied children with a unique focal point. In addition, the more detailed description of the role of the representative in Article 24 of the recast Reception Conditions Directive is much more in line with the duties of a legal guardian under Article 18 of the CRC as it includes an obligation to ensure the child’s well-being in light of his protection and developmental needs. This allows for a holistic approach to the role of the representative under the asylum acquis, taking into account the general well-being of the child beyond complementing the child’s limited legal capacity. Therefore it is necessary to go beyond the actual terms used (being “guardian”, “legal representative” or “representative”) to look at the concrete tasks defined by EU Law. (ECRE, [Information Note on 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 \(recast\)](#), December 2014 at pp 30-31).

Article 16 - Anti-Trafficking Directive - Assistance, support and protection for unaccompanied child victims of trafficking in human beings

1. Member States shall take the necessary measures to ensure that the specific actions to assist and support child victims of trafficking in human beings, as referred to in Article 14(1), take due account of the personal and special circumstances of the unaccompanied child victim. [...]
3. Member States shall take the necessary measures to ensure that, where appropriate, **a guardian is appointed to unaccompanied child victims of trafficking in human beings**. [...]

Article 31 - [Qualification Directive](#) - Unaccompanied minors

1. As soon as possible after the granting of international protection Member States **shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian** or, where necessary, by an organisation **responsible for the care and well-being of minors**, or by any other appropriate representation including that based on legislation or court order.
2. Member States shall **ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian** or representative. The appropriate authorities shall make regular assessments.

Article 2 (j) - [Reception Conditions Directive](#) and Article 2 (n) - [Asylum Procedure Directive](#)

‘representative’ means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view **to ensuring the best interests of the child and exercising legal capacity for the minor where necessary**. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive;

Key international guidelines and reports

The limited EU law on the definition and the role of guardians is substantiated by several key international policy and legal documents, endorsed at the highest levels, which insist on the paramount role of guardians for all children without parental care and describe their functions.

A guardian's mandate covers **all aspects of a child's life and development**. The appointment of a guardian should take place in all cases where a child is deprived of the parental environment, irrespective of the appointment of a legal representative.

Both the European Union Fundamental Rights Agency's report entitled "Guardianship for children deprived of parental care, A Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking" [hereafter *Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*] (2014) and the [Handbook on European law relating to the rights of the child](#) jointly prepared by FRA and the Council of Europe together with the Registry of the European Court of Human Rights originate from key European institutions and provide important guidelines on EU and international law.

[UN Guidelines for the Alternative Care of Children](#)

19. No child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body at anytime.

General Comment n°6

33. The guardian should be **consulted and informed regarding all actions taken in relation to the child**. The guardian should have the **authority to be present in all planning and decision-making processes**, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution.

The FRA Handbook definition of the guardian is similar to the definition of a representative under the recast Asylum Procedure Directive and the recast Reception Condition Directive:

FRA - Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, 2014 (pp. 15-18)

“The guardian plays a central role in ensuring access to legal assistance for unaccompanied children or in supporting the child in finding an adviser. The guardian is considered to be **an independent person who safeguards the child’s best interests and general well-being**, and to this effect **complements the limited legal capacity of the child**, when necessary, in the same way that parents do. [...]”

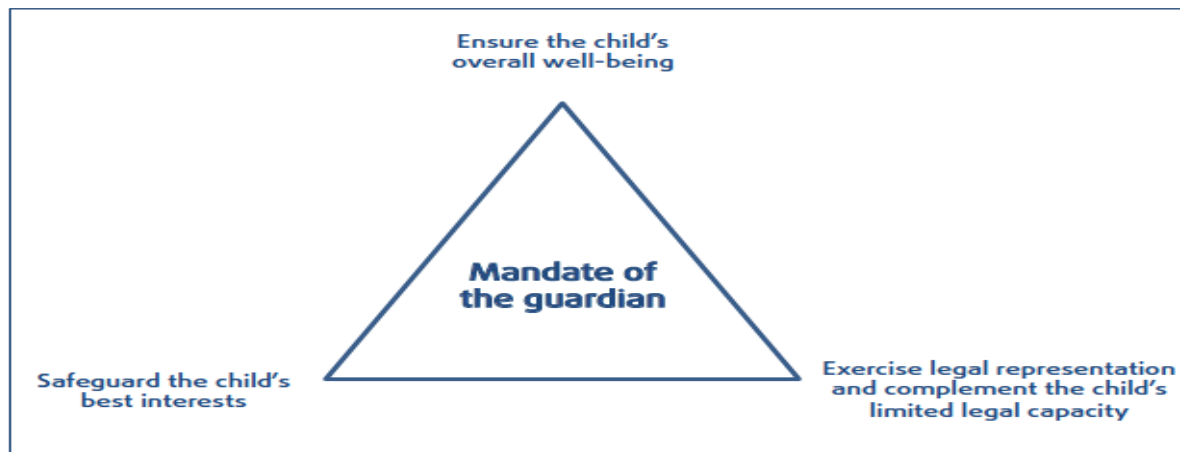
The guardian should be the person with the **most comprehensive view of the child’s situation and individual needs**. A guardian is in a unique position to connect the various authorities and the child. The guardian can also help to **ensure continuity** in the protection of the child and **to enable the child to participate effectively** in all decisions affecting him or her, in line with the provisions of Article 12 of the CRC.”

Handbook on European law relating to the rights of the child (p. 96)

“[T]he child’s right to a guardian or representative is key to securing his or her broader rights. [...] Most often the mandate of a legal guardian is to **safeguard the child’s best interests, ensure his or her overall well-being and complement his/her limited legal capacity** (and also sometimes to exercise legal representation).”

The figure below drawn from the FRA “Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking” (p. 15) and illustrates the full scope of the mandate of the guardian.

Figure 1: The mandate of the guardian



Source: FRA

The [UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate](#), also insists on the need to appoint a guardian for all unaccompanied and separated children to assist them at all stages of the asylum procedure. In these Standards, UNHCR uses the term “guardian” to address both the legal representation dimensions and the other two

dimensions of a guardian's mandate: ensuring the well-being of a child and safeguarding his or her best interests.

UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate

3.25. A guardian should be designated for all unaccompanied and separated children **to assist the child in all stages of the process and to ensure that the child is properly represented, that his/her views are expressed, and that any decisions taken are in his/her best interests.** *In some cases, an adult may already have assumed the role of **providing care** to an unaccompanied or separated child. In such cases, it might be appropriate that the adult be designated as **the child's guardian**.* The decision to designate an adult guardian should take into consideration the nature of any existing relationship between the adult and the child (including any indications that the child may be at risk of abuse or exploitation) as well as the adequacy of the care the adult is able and willing to provide for the child. The child's views and wishes should be taken into account in the appointment of a guardian.

3.2.2 DEFINITION OF A REPRESENTATIVE

A representative can do the legal representation part of the mandate of a guardian. In these circumstances, a representative is appointed in addition to the guardian. The representative differs from a lawyer: a representative complements the limited legal capacity of a child in specific procedures, like a parent, but a lawyer might still need to intervene to represent a child in certain courts proceedings.

The complementarity of the roles of a guardian and of a legal representative is highlighted by the Committee in its General Comment n°6 on the "Treatment of unaccompanied and separated children outside their country of origin".

CRC - General Comment n°6

36. **In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.**

EU Law

EU law uses the terms "representative", to describe the person appointed to assist and represent unaccompanied children in specific procedures. In the context of reception of applicants for international protection, Article 24 of the [Reception Conditions Directive](#) (2013/33/EU) refer to the appointment of a "representative" to represent and assist the unaccompanied minor in the implementation of the rights and the obligations of the Directive.

The term "representative" is defined with the exact same words in the Reception Conditions Directive and the Asylum Procedure Directive.

Article 2 (j) and Asylum Procedure Directive, Article 2 (n) - [Reception Conditions Directive](#)

'representative': means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view

to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive [...].

Article 24 – Reception Conditions Directive - Unaccompanied minors

1. Member States shall as soon as possible take measures to ensure that **a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive.** The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties **in accordance with the principle of the best interests of the child**, as prescribed in Article 23(2), and **shall have the necessary expertise** to that end. **In order to ensure the minor's well-being and social development** referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

Article 23 - Minors

1. The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

2. In assessing the best interests of the child, Member States shall in particular take due account of the following factors:

- (a) family reunification possibilities;
- (b) the minor's well-being and social development, taking into particular consideration the minor's background;
- (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
- (d) the views of the minor in accordance with his or her age and maturity. [...]

The Asylum Procedures Directive provides for the appointment of a legal representative as soon as possible in order to enable a child to make an application for international protection, and during the asylum procedures.

Article 7 – Asylum Procedures Directive - Applications made on behalf of dependant or minors

[...] 3. **Member States shall ensure that a minor has the right to make an application for international protection** either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, **or through a representative.**

Article 25 - Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 14 to 17, **Member States shall:**

- a) **take measures as soon as possible** to ensure that a representative **represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive.** The unaccompanied minor **shall be informed immediately of the appointment of a representative.** The representative shall perform his or her duties in

accordance with the principle of the **best interests of the child** and **shall have the necessary expertise** to that end. The person acting as representative shall be changed only when necessary. [...];

b) ensure that the representative is given the opportunity to **inform the unaccompanied minor** about the meaning and possible consequences of the personal interview and, where appropriate, **how to prepare** himself or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are **present at that interview** and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview.

The [Dublin III Regulation](#), which applies from the moment an unaccompanied minor applies for international protection in a member state of the EU, provides for similar guarantees for minors.

Article 6 - [Dublin III Regulation](#)

1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

2. Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the **qualifications and expertise** to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative **shall have access to the content of the relevant documents in the applicant's file** including the specific leaflet for unaccompanied minors. [...]

The [Anti-Trafficking Directive](#) provides for the appointment of a representative for child victims of trafficking.

Article 15 - [Anti-Trafficking Directive](#) - Protection of child victims of trafficking in human beings in criminal investigations and proceedings

1. Member States shall take the necessary measures to ensure **that in criminal investigations and proceedings**, in accordance with the role of victims in the relevant justice system, competent authorities appoint a **representative for a child victim of trafficking in human beings** where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim. [...]

Key international handbook

The FRA *Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking* also clarifies that the different functions of a guardian can be dissociated, the representative having a more limited mandate than the guardian.

[FRA - Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking](#) at p. 15

Responsibility for legal representation of the child within particular legal or administrative proceedings might be dissociated from the other two functions of guardianship [being to complement the limited legal capacity of the child and to exercise responsibility for the well-being of the child]. In this case, **such responsibility is assigned solely to an independent person or institution, usually called the 'legal representative' or 'representative'**. Representatives, unlike guardians, have a **restricted mandate**, which is often **precisely defined when they are appointed**: to represent the child in particular proceedings.

3.2.3 ROLE OF A LAWYER AND ACCESS TO FREE LEGAL ASSISTANCE OR LEGAL AID

Lawyers play a crucial role in ensuring respect, protection and access to rights of all persons, even more so in cases of children.

Quality legal assistance and representation throughout the asylum procedure is an essential safeguard to ensure fairness and efficiency. Due to the growing complexity of asylum procedures, professional and independent legal advice and assistance during the procedure has become in many countries indispensable for asylum seekers in order to assert their rights under the EU asylum acquis and to ensure that all aspects of their case are taken into account by asylum authorities. (ECRE, [Information Note on 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 \(recast\)](#), December 2014 at p 25).

A lawyer representing a child explains the child her or his rights and the procedures. They should also be present at a personal interview. In the course of his **legal representation** mandate, a lawyer also ensures that children's views are heard and taken due account of in the court proceedings. Lawyers need to be specifically trained on child's rights and on working with children. ([FAIR Project Module 1](#))

Availability of free legal assistance or legal aid

Justification of the right to legal representation, legal assistance and legal aid

Why should unaccompanied or separated children seeking asylum get access to legal representation, legal assistance and legal aid? UASC cumulate several vulnerabilities: as children, as separated children, as asylum seekers, and they potentially also suffer from other vulnerabilities such as victims of trafficking, disability, etc. Children can exercise their rights, and in particular their right to seek asylum and their right to non-*refoulement*, only if all children specific safeguards are in place. Access to legal representation, to legal assistance and legal aid are key safeguards in these respects, which States have an obligation to implement.

ECRE, [“Right to Justice: Quality Legal Assistance for Unaccompanied Children. Comparative Report” \(2014\) at pp. 11-12.](#)

“Due to their inherent vulnerability, unaccompanied children require **additional special assistance and protection to navigate asylum and migration procedures** which are becoming increasingly complex across Europe. **The need for additional procedural guarantees for children is not only important in terms of their understanding of the procedure** in the host Member State but also due to the fact **that it is often more challenging for unaccompanied children seeking asylum to substantiate their claim for international protection** or for unaccompanied children in other migration procedures to substantiate their application permits. Unaccompanied children also face **administrative obstacles and linguistic barriers among other challenges in accessing legal aid in practice.** [...]”

In Europe, **without proper support and guardianship, unaccompanied children as migrants and asylum applicants may also be at heightened risk of further exploitation** such as child trafficking, economic, criminal and sexual exploitation. Similarly, evidence has shown that asylum seekers and

migrants without access to legal advice are **more likely to be socially excluded and destitute**. All of these factors mean that a concerted effort is needed at the EU and national level to protect unaccompanied children, regardless of their immigration status.”

Availability of free **legal assistance** – provision of assistance to people otherwise unable to afford legal representation and access to the court – often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.

The right to free legal assistance in the asylum procedures derives from the **right to an effective remedy, the right to *non-refoulement* and access to asylum**.

To go further:

In the context of criminal charges, the right to free legal assistance also derives from the **right to a fair trial**, as provided by Article 47 of the Charter read in conjunction with Articles 6 and 13 of the European Convention on Human Rights (right to a fair trial and right to effective remedies). The right to effective judicial protection, which is enshrined in Article 47 of the Charter, is an essential element of the ‘rule of law’ within the EU. Article 47 of the Charter applies to the EU institutions and to the Member States when they are implementing EU law. This means that an individual may rely on the right to effective judicial protection with a view to protecting the substantive rights which EU law confers on him or her. ([Explanations relating to the Charter of Fundamental Rights](#) prepared under the authority of the Praesidium of the Convention which drafted the Charter, which do not as such have the status of law but which are a valuable tool of interpretation intended to clarify the provisions of the Charter.)

International Law

Articles 37 and 40 of the CRC provide for the right to assistance for children deprived of liberty or/and facing criminal charges, but the Committee on the Rights of the Child specifically mentions that asylum-seeking children should be provided with free legal representation as well.

Article 37 - CRC

States Parties shall ensure that: (...)

(d) Every child deprived of his or her liberty shall have the right to **prompt access to legal and other appropriate assistance**, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

[...] 2. [...] States Parties shall, in particular, ensure that: (...)

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (...) (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to **have legal or other appropriate assistance in the preparation and presentation of his or her defense**;

The Committee, General Comment n°6

69. An asylum-seeking child should be represented by an adult who is familiar with the child’s background and who is competent and able to represent his or her best interests [...]. The unaccompanied or separated child should also, in all cases, be given access, **free of charge**, to a

qualified legal representative, including where the application for refugee status is processed under the normal procedures for adults.

EU Law

Article 47 - Charter of Fundamental Rights EU - Right to an effective remedy and to a fair trial

[...] Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Asylum Procedures Directive

Article 25, Guarantees for unaccompanied minors

[...] **4.** Unaccompanied minors and their representatives shall be provided, **free of charge, with legal and procedural information** as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.

Article 19, Provision of legal and procedural information free of charge in procedures at first instance

1. In the procedures at first instance provided for in Chapter III, Member States shall ensure that, on request, applicants are provided with **legal and procedural information free of charge**, including, at least, information on the procedure in the light of the applicant's particular circumstances. In the event of a negative decision on an application at first instance, Member States shall also, on request, provide applicants with information — in addition to that given in accordance with Article 11(2) and Article 12(1)(f) — in order to clarify the reasons for such decision and explain how it can be challenged. [...]

Article 15 - Anti-Trafficking Directive

[...] **2.** Member States shall, in accordance with the role of victims in the relevant justice system, ensure that **child victims have access without delay to free legal counselling and to free legal representation**, including for the purpose of claiming compensation, unless they have sufficient financial resources

Jurisprudence

✓ European Court of Human Rights

In accordance with the case law of the ECtHR, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECtHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11). There is also a system of legal assistance for cases before the Court of Justice of the European Union.

✓ Court of Justice of the European Union

In DEB, the CJEU found that **the principle of effective judicial protection**, as enshrined in Article 47 of the Charter, **must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer**. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts

which undermines the very core of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which the national rule seeks to achieve. (DEB, Case C-279/09 DEB [2010] ECR I-13849, paras 59 and 60).

The CJEU further held that, in making that assessment, the national court must take into consideration the subject-matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively. In order to assess the proportionality of the national rule, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard, more specifically, to legal persons, the national court may take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings. (DEB, Case C-279/09 DEB [2010] ECR I-13849, paras 61 and 62).

Key international reports and comments

Several key reports and comments mention that the right to legal aid is **key to the effective protection of children's rights and interests**, including their rights to claim asylum.

Report of the UN Special Rapporteur on the independence of judges and lawyers, Legal aid, UN Doc. A/HRC/23/43 (9 April 2013)

3. [...] **Legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law.** It is a foundation for the enjoyment of other rights, including the right to a fair trial and the right to an effective remedy, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the administration of justice.

20. Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice.

Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013

40. As children are **usually at a disadvantage in engaging with the legal system**, whether as a result of inexperience or lack of resources to secure advice and representation, **they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system.** Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.

Report of the Special Rapporteur on the independence of judges and lawyers, Protecting children's rights in the justice system, 1 April 2015

Child-friendly legal aid

35. **The right to access justice is inextricably connected to the right to legal assistance.** As highlighted in previous reports, the purpose of legal aid is “to contribute to the elimination of obstacles and barriers that impair or restrict access to justice **by providing assistance to people who would otherwise be unable to afford legal representation and access to the court system**” (...).

Accordingly, the Special Rapporteur has advocated for a definition of legal aid that is as broad as possible, including “not only the right to free legal assistance in criminal proceedings, as defined in article 14 (3) (d) of the International Covenant on Civil and Political Rights, but also **the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations**”(ibid). **A broad definition and application of legal aid is all the more important when dealing with children and children's rights.**

36. As already noted by the Special Rapporteur, legal systems can be immensely confusing and difficult, if not impossible, to navigate for children, especially without the help of a legal professional. “Legal assistance provides children with the means to understand legal proceedings, to defend their rights and to make their voices heard” (...). The right of children to have access to legal assistance is recognized in a number of international instruments, including the Convention on the Rights of the Child (in particular, in articles 12 and 40), and the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. [...]

38. As noted in a 2011 study, “the provision of timely, competent, and developmentally appropriate legal assistance directly advances a child's right to a fair, just, and participatory legal process. Child-friendly legal aid also has the potential to promote children's substantive rights”. In this respect, lawyers have a professional responsibility towards children and should therefore acquire the special skills to be able to take into account the unique attributes and needs of child clients and effectively deliver child-friendly legal aid.

UN Human Rights Committee General Comment no. 32, on Article 14 of the ICCPR, Right to equality before courts and tribunals and to fair trial, UN Doc. CCPR/C/GC/32 (2007)

10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), **States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it.** In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.

3.3 CHILD-FRIENDLY LEGAL AID

Providing legal aid to UASC requires to take into account their specific situation and maturity. Legal professionals interacting with UASC must adapt their way of interacting with them and make sure the context and the proceedings are child-friendly. Please refer to Module 5: “Ensuring a Child-friendly Approach to Unaccompanied Children in Asylum Procedures” for further developments on the topic, in addition to the elements below.

To implement these rights in an effective manner, the following preconditions should be met:

1. A legal aid that is child-friendly

“Child-friendly legal aid’ is the provision of legal assistance to children in criminal, civil and administrative proceedings that are **accessible, age-appropriate, multidisciplinary and effective, and that is responsive to the range of legal and social needs faced by children and youth**. Child-friendly legal aid is delivered by lawyers and non-lawyers who are **trained in children’s law and child and adolescent development and who are able to communicate effectively with children and their caretakers.**”

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

(footnote 18)

The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

require States to:

58. [...] take appropriate measures to establish **child-friendly and child-sensitive legal aid systems**, taking into account children’s evolving capacities and the need to strike an appropriate balance between the best interests of the child and children’s right to be heard in judicial proceedings, including [...]

(b) **Adopting legal aid legislation, policies and regulations that explicitly take into account the child’s rights and special developmental needs**, including the right to have legal or other appropriate assistance in the preparation and presentation of his or her defence; **the right to be heard in all judicial proceedings affecting him or her; standard procedures for determining best interest**; privacy and protection of personal data; and the right to be considered for diversion;

(c) **Establishing child-friendly legal aid service standards and professional codes of conduct**. Legal aid providers working with and for children should, where necessary, be **subject to regular vetting to ensure their suitability for working with children**;

(d) **Promoting standard legal aid training programmes**. Legal aid providers representing children should be **trained in and be knowledgeable about children’s rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding**. All legal aid providers working with and for children should receive **basic interdisciplinary training on the rights and needs of children of different age groups and on proceedings that are adapted to them, and training on psychological and other aspects of the development of children**, with special attention to girls and children who are members of minority or indigenous groups, and on available measures for promoting the defence of children who are in conflict with the law [...].

Report of the Special Rapporteur on the independence of judges and lawyers, Protecting children’s rights in the justice system, 1 April 2015

Child-friendly legal aid

38. As noted in a 2011 study, “the provision of **timely, competent, and developmentally appropriate legal assistance directly advances a child’s right to a fair, just, and participatory legal process**. Child-friendly legal aid also has the **potential to promote children’s substantive rights**”. In this respect, lawyers have a **professional responsibility towards children** and should therefore acquire the **special skills** to be able to take into account the **unique attributes and needs of child clients** and effectively deliver child-friendly legal aid.

2. Specific training for legal representatives dealing with unaccompanied children

General comment n°6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin

95. Particular attention should be paid to the training of officials working with separated and unaccompanied children and dealing with their cases. **Specialized training** is equally important for legal representatives, guardians, interpreters and others dealing with separated and unaccompanied children.

96. Such training should be **specifically tailored to the needs, and rights of the groups concerned**. Nevertheless, **certain key elements should be included in all training programmes**, including:

- **Principles and provisions of the Convention;**
- **Knowledge of the country of origin of separated and unaccompanied children;**
- **Appropriate interview techniques;**
- **Child development and psychology [...].**
- **Cultural sensitivity and intercultural communication.**

97. Initial training programmes should also be followed up regularly, including through on-the-job learning and professional networks.

Guidelines of the Committee of Ministers of the CoE on child-friendly justice

14. All professionals working with and for children **should receive necessary interdisciplinary training on the rights and needs of children of different age groups, and on proceedings that are adapted to them.**

15. Professionals having direct contact with children should also be **trained in communicating with them at all ages and stages of development, and with children in situations of particular vulnerability.**

39. Lawyers representing children should be trained in and knowledgeable on **children's rights** and related issues, receive ongoing and in-depth training and be **capable of communicating with children at their level of understanding.**

67. Training in communication skills, in using child-friendly language and developing knowledge on child psychology, is necessary for all professionals working with children (police, lawyers, judges, mediators, social workers and other experts), as stipulated by Guideline 14.

3. In line with the **right to be heard** (see section 2.2 Implementation of the right to be heard), children's views must be taken into consideration by legal representatives and must be kept informed of all the proceedings affecting them:

General comment n°6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin

37. At all times children should be informed of arrangements with respect to [...] legal representation and **their opinions should be taken into consideration.**

EU Law

Article 47 - Charter of Fundamental Rights EU - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated **has the right to an effective remedy before a tribunal** in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. **Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.**

Resolution 1810 (2011) - Council of Europe Parliamentary Assembly: Unaccompanied children in Europe: issues of arrival, stay and return

5.8 (...) All unaccompanied children in asylum proceedings **must be represented by a lawyer in addition to a guardian**, provided free of charge by the state and be able to challenge before a court decisions regarding their protection claims.

Recital 19 of the Anti-Trafficking Directive

Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceeding establishes a set of victims' rights in criminal proceedings [...]. [V]ictims of trafficking in human beings should **be given access without delay to legal counselling** and, in accordance with the role of victims in the relevant justice systems, **to legal representation**, including for the purpose of claiming compensation. [...] The purpose of legal counselling is to enable victims to be informed and receive advice about the various possibilities open to them. **Legal counselling should be provided by a person having received appropriate legal training without necessarily being a lawyer.** Legal counselling and, in accordance with the role of victims in the relevant justice systems, legal representation should be provided free of charge, at least when the victim does not have sufficient financial resources, in a manner consistent with the internal procedures of Member States. ***As child victims in particular are unlikely to have such resources, legal counselling and legal representation would in practice be free of charge for them.***

Key international comments and reports

The Committee - General Comment n°14 on the right of the child to have his or her best interests taken as a primary consideration

96. The child **will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.** In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, **he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views**, when there is a potential conflict between the parties in the decision.

FRA- Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, 2014 at p. 15

The guardian differs from a qualified lawyer or other legal professionals who provide legal assistance, speaks on behalf of the child and legally represents him or her in written statements and in person before administrative and judicial authorities in criminal, migration or other legal proceedings as provided for in national law.

Key elements on the right to protection of unaccompanied asylum-seeking children

1. Every unaccompanied or separated child has the right to have access to a legal representative when he applies for international protection;
2. Free legal assistance and legal representation must be provided to every unaccompanied child;
3. At all times children must be informed with respect to legal representation and their views should be taken into consideration;
4. Legal representatives working with, and persons providing legal assistance to, unaccompanied children must get a specialized training tailored to the needs of unaccompanied children.

BACKGROUND DOCUMENTS

Binding instruments

- ❖ [Charter of Fundamental Rights of the European Union](#), Article 24
- ❖ [Convention on the Rights of the Child](#), Articles 20(1) and 18(2)
- ❖ [Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011](#) on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [Qualification Directive]
- ❖ [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](#) [Reception Conditions Directive]
- ❖ [Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA](#) [Anti-Trafficking Directive]
- ❖ [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](#) [Asylum Procedures Directive]
- ❖ Resolution 1810 of the Council of Europe Parliamentary Assembly (2011): [Unaccompanied children in Europe: issues of arrival, stay and return](#)

Key international comments, guidelines and reports

- ❖ ECRE/ELENA, [Legal Note on Access to Legal Aid in Europe](#), November 2017

- ❖ ECRE, [Information Note on 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 \(recast\)](#), December 2014.
- ❖ Fundamental Rights Agency (FRA), [“Guardianship for Children Deprived of Parental Care. A Handbook to Reinforce Guardianship Systems to Cater for the Specific Needs of Child Victims of Trafficking”](#) (2014)
- ❖ FRA, CoE and the Registry of the ECHR, [“Handbook on European law relating to the rights of the child”](#) (2015)
- ❖ [General comment n°6 \(2005\): Treatment of Unaccompanied and Separated Children Outside their Country of Origin](#)
- ❖ General Comment n°12 “The right to be heard”
- ❖ [UN Guidelines for the Alternative Care of Children, Resolution adopted by the UN General Assembly \(2010\) A/RES/64/142](#)
- ❖ UNICEF, [“A Call for Effective Guardianship for Unaccompanied and Separated Children”](#), Advocacy Brief, Refugee and Migrant Crisis in Europe, August 2016
- ❖ [Explanations relating to the Charter of Fundamental Rights](#), Article 47

Jurisprudence

- ❖ ECtHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11
- ❖ CJUE, DEB, [CASE C-279/09 DEB \[2010\] ECR I-13849](#)

Key international reports, comments and guidelines

- ❖ Explanations relating to the Charter of Fundamental Rights: <http://fra.europa.eu/en/publications-and-resources/publications/article/13794>
- ❖ [UNHCR Procedural Standards for Refugee Status Determination under UNHCR's Mandate](#)
- ❖ [Guidelines of the Committee of Ministers of the CoE on child-friendly justice](#)
- ❖ [United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems](#)
- ❖ ECRE, [Right to Justice: Quality Legal Assistance for Unaccompanied Children. Comparative Report](#), 2014
- ❖ [Report of the Special Rapporteur on the independence of judges and lawyers, Protecting children's rights in the justice system, 1 April 2015](#)
- ❖ [General Comment n°6](#)
- ❖ UN Human Rights [General Comment no. 32, on Article 14 of the ICCPR, Right to equality before courts and tribunals and to fair trial](#), UN Doc. CCPR/C/GC/32 (2007)

Awareness raising material

- ❖ « My Lawyer, My Rights - Every child in conflict with the law needs a good lawyer » of Defence Children International: <https://vimeo.com/232350847>

4. PRECONDITIONS FOR AN EFFECTIVE AND PROTECTIVE GUARDIANSHIP

EU law, international instruments and soft law agree on a number of prerequisites to ensure that guardians can effectively act in the best interests of unaccompanied children and ensure their well-being.

- ✓ **Determination of the child's best interests** as soon as a child is identified as being unaccompanied

General Comment n°6

20. A determination of what is in the best interests of the child requires **a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs**. Consequently, **allowing the child access to the territory is a prerequisite to this initial assessment process**. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.

- ✓ **Timely appointment of guardians:**

According to international organizations such as UNICEF and key policy documents, a guardian should be appointed as soon as an unaccompanied or separated child is identified, *no matter the context*.

General Comment n°6

21. Subsequent steps, such as **the appointment of a competent guardian as expeditiously as possible**, serves as a **key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child**. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. 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.

33. [...] States **should appoint a guardian [...] as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements** until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State.

UN Guidelines for the Alternative Care of Children

19. **No child should be without the support and protection of a legal guardian or other recognized responsible adult or competent public body at anytime.**

145. As soon as an unaccompanied child is identified, **States are strongly encouraged to appoint a guardian** or, where necessary, representation by an organization responsible for his/her care and well-being to accompany the child throughout the status determination and decision-making process.

UNICEF - "A call for effective guardianship" (2016)

Guardianship should be an integral part of the national child protection system, which equally protects all children on the territory, regardless of their nationality and/or migration status. **Once an unaccompanied and separated child is identified**, a guardian should **be immediately appointed** to represent the child's interests in various initial procedures and act as a link between the child and service providers to ensure the required continuum of care required.

On the contrary, EU law defines different timing for appointing a guardian depending on the context:

- ✓ In the context of trafficking, the *Anti-Trafficking Directive* (2011/36/EU), in line with the Council of Europe's *Convention on Action against Trafficking in Human Beings* (Article 10(4)), requires Member States to appoint a guardian or a representative for a child victim of trafficking from the moment the child is identified by the authorities as unaccompanied.

Article 14 - *Anti-Trafficking Directive* - Assistance and support to child victims

[...] 2. Member States shall appoint a guardian or a representative for a child victim of trafficking in human beings **from the moment the child is identified by the authorities** where, by national law, the holders of parental responsibility are, as a result of a conflict of interest between them and the child victim, precluded from ensuring the child's best interest and/or from representing the child.

- ✓ In the context of international protection, however, EU law distinguishes between the appointment of a *legal representative* when a child applies for asylum (Article 25 of the *Asylum Procedures Directive*) and the appointment of a *legal guardian* as soon as a child is granted refugee status (Article 31 of the *Qualification Directive*).

Article 25 - *Asylum Procedures Directive* - Guarantees for unaccompanied minors

1. With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 14 to 17, Member States shall:

a) **take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive.** The unaccompanied minor shall be informed immediately of the appointment of a representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting as representative shall be changed only when necessary.

Article 31 - *Qualification Directive* - Unaccompanied minors

1. **As soon as possible after the granting of international protection** Member States **shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian** or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

The delay in ensuring the appointment of a guardian for UASC is contrary to the CRC and the Charter.

✓ **Qualification and training of guardians**

There is a broad consensus over the need for appropriate training and qualification of guardians, both in EU law and soft law:

EU Law

Article 18 - Anti-Trafficking Directive - Prevention

[...] 3. Member States shall promote **regular training for officials likely to come into contact with victims or potential victims of trafficking in human beings**, including front-line police officers, aimed at enabling them to identify and deal with victims and potential victims of trafficking in human beings.

Article 24 - Reception Conditions Directive - Unaccompanied minors

[...] 4. Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

Article 31 - Qualification Directive -- Unaccompanied minors

[...] (6). Those working with unaccompanied minors **shall have had and continue to receive appropriate training concerning their needs**.

Soft Law

General Comment n°6

33. [...] The guardian [...] should have the **necessary expertise in the field of childcare**, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, **the guardian acting as a link** between the child and existing specialist agencies/individuals who provide the continuum of care required by the child.

FRA - Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, at p. 32

Guardians **must be qualified and equipped** to deal with the wide variety of laws and procedures that regulate asylum, migration or other issues they may need to engage with.

✓ **Independency and absence of conflict of interest**

The absence of conflict of interest is one of the criteria used by EU directives to determine who can and who cannot be appointed as a guardian. The same concern for absence of interest at the time of selecting a guardian and during all the time while the guardianship relationship is in place is found in soft law instruments.

EU Law

Article 25 - Asylum Procedures Directive - Guarantees for unaccompanied minors

1. [...] a) [...] The person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Article 24(1) - Reception Conditions Directive

Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives.

Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

Soft Law

General Comment n°6

33. Agencies or individuals **whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship**. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.

The absence of conflict of interest must continue at all times while the guardianship relationship is in place.

General Comment n°12, "The right of the child to be heard"

37. The representative must be aware that she or he **represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies** (e.g. residential home, administration or society). **Codes of conduct should be developed** for representatives who are appointed to represent the child's views.

✓ **Respect of the right to be heard**

In line with Article 12 of the CRC which protects children's right to be heard (see chapter 1 2. Right to be **HEARD**), in guardianship children must be listened to and their views taken into consideration.

General Comment n°6

25. [...] **In guardianship, care and accommodation arrangements, and legal representation, children's views should also be taken into account**. Such information must be provided in a manner that is **appropriate to the maturity and level of understanding** of each child. As participation is dependent on reliable communication, where necessary, **interpreters** should be made available at all stages of the procedure.

37. **At all times** children should be **informed of arrangements with respect to guardianship and legal representation** and **their opinions** should be **taken into consideration**.

✓ **Specific attention to child victims**

To ensure that guardians truly protect unaccompanied children, as some of them are victims of trafficking, guardians must have specific knowledge and pay specific attention to child victims.

FRA - Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, p. 33

Guardians play a vital role in preventing child abuse and exploitation. They should therefore be aware of child-specific risk factors relating to trafficking and be familiar with strategies to avoid children disappearing from residential facilities. [...]

Guardians must have the **necessary knowledge to identify and detect child victims**. Those working with child victims should also **know and understand the specific rights and needs of child victims of trafficking** and should be capable of **assessing their needs and dealing with them in a respectful, sensitive, professional and non-discriminatory manner**.

✓ **Professional qualifications of guardians**

ENGI (European Network for Guardianship Institutions) (2011), Care for unaccompanied minors: Minimum standards, risk factors and recommendations for practitioners, Guardianship in practice, p. 17

Without denying the added value of individual volunteers or the exemplary dedication and commitment of some, a system of professional guardianship is in this regard preferred over a voluntary system. Should this be impossible, volunteers may well be a second best option or a back-up.

FRA - Handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, pp. 32-33

Guardians must be qualified and equipped to deal with the wide variety of laws and procedures that regulate asylum, migration or other issues they may need to engage with. The professional qualifications required to become a guardian should be laid down in domestic law or in official documents. Guardianship authorities should have written policies setting out clear procedures, methods and standards for the recruitment, training, monitoring, evaluation and supervision of appointed guardians.

Guardianship authorities should ensure that appointed guardians have the professional knowledge and expertise required to effectively represent the child's best interests and perform their duties.

Key elements regarding guardianship

- ✓ Timely appointment of guardians
- ✓ Appropriate training and qualifications of guardians
- ✓ Independency and absence of conflict of interest at the time of appointment and during all the guardianship relationship
- ✓ Respect for the right to be heard in guardianship: participation of the child in all decisions affecting him or her
- ✓ Specific attention to child victim's needs and vulnerabilities
- ✓ Professional guardianship rather than volunteer

BACKGROUND DOCUMENTS

EU Law

- ❖ [Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted](#) [Qualification Directive]
- ❖ [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](#) [Reception Conditions Directive]
- ❖ [Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA](#) [Anti-Trafficking Directive]
- ❖ [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](#) [Asylum Procedures Directive]
- ❖ Resolution 1810 of the Council of Europe Parliamentary Assembly (2011): [Unaccompanied children in Europe: issues of arrival, stay and return](#)

Key international comments, guidelines and reports

- ❖ Fundamental Rights Agency (FRA), [“Guardianship for Children Deprived of Parental Care. A Handbook to Reinforce Guardianship Systems to Cater for the Specific Needs of Child Victims of Trafficking”](#) (2014)
- ❖ FRA, CoE and the Registry of the ECHR, [“Handbook on European law relating to the rights of the child”](#) (2015)
- ❖ UN Committee on the Rights of the Child, [General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin](#), UN Doc. CRC/GC/2005/6 (1 September 2005)
- ❖ UN Committee on the Rights of the Child, [General Comment n°12 \(2009\): The right of the child to be heard](#) UN Doc. CRC/C/GC/12
- ❖ [UN Guidelines for the Alternative Care of Children](#), Resolution adopted by the UN General Assembly (2010) A/RES/64/142
- ❖ UNICEF, [“A Call for Effective Guardianship for Unaccompanied and Separated Children”](#), Advocacy Brief, Refugee and Migrant Crisis in Europe, August 2016

- ❖ ENGI (European Network for Guardianship Institutions) (2011), [Care for unaccompanied minors: Minimum standards, risk factors and recommendations for practitioners, Guardianship in practice](#), final report, Utrecht

5. RIGHT TO AN EFFECTIVE REMEDY/RIGHT TO APPEAL

International human rights treaties require States to ensure effective remedies against violations of rights. The remedy/remedies must be prompt, effective, accessible, enforceable, and lead to a reparation for the human rights violation concerned. Those conducting the investigation and adjudicating on the remedy must be independent and impartial. In certain cases, the remedy must be provided by a judicial body. The remedy must be accessible and effective in practice as well as in law.

Such remedies must be available to all persons including migrants without discrimination.

Migrant children, even more when undocumented, are often practically unable to access remedies when their rights are violated. States have the obligation to ensure an effective access to remedies for all migrants. (ICJ [FAIR Project Module I](#))

On remedies and international mechanisms available, also refer to [Module 4](#) of the UPRIGHTS Project (which is the module 5 of the ICJ FAIR Project).

International law

The ECHR secures to “everyone” whose human rights are violated, including children, the right to “an effective remedy before a national authority”.

Article 13 - European Convention on Human Rights - Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated **shall have an effective remedy before a national authority** notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 2 - International Covenant on Civil and Political Rights (ICCPR)

[...] 3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

Human Rights Committee - General Comment No. 31 on the Nature of the General Legal Obligation

Imposed on States Parties to the Covenant

15. (...) States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. **Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.** (...)

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. **Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy**, which is central to the efficacy of article 2, paragraph 3, **is not discharged.** (...)

UNHCR, "Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum February" 1997

8.5 An asylum seeker or his/her legal representative should be able to seek a review of the decision. Appropriate deadlines should be set out for a child to appeal a negative decision. Every effort should be made to reach a decision in an efficient manner in order not to keep children in limbo for a long period of time regarding their status and their future. **All appeals should be processed fairly and as expeditiously as possible. This may require children's appeals to be prioritized over other outstanding appeals.**

EU Law

The Charter guarantees the right to an effective remedy before a court. The Court of Justice enshrined that right in its judgment of 15 May 1986 as a general principle of Union law (Case 222/84 Johnston [1986] ECR 1651; see also judgment of 15 October 1987, Case 222/86 Heylens [1987] ECR 4097 and judgment of 3 December 1992, Case C-97/91 Borelli [1992] ECR I-6313). According to the Court, that general principle of Union law also applies to the Member States when they are implementing Union law. Article 47 applies to the institutions of the Union and of Member States when they are implementing Union law and does so for all rights guaranteed by Union law.

Charter of Fundamental Rights EU

Article 47 - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the **right to an effective remedy before a tribunal** in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

BACKGROUND DOCUMENTS

European and international instruments

- ❖ [European Convention on Human Rights](#)
- ❖ [International Covenant on Civil and Political Rights](#) (ICCPR)

- ❖ [Charter of Fundamental Rights of the European Union](#)

Key international comments, reports and guidelines

- ❖ Human Rights Committee, [General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)
- ❖ Fair Project, “I. Access to fair procedures for migrant children including the right to be heard and to participate in proceedings”
- ❖ UNHCR, [“Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum February”](#) 1997

6. TIME-LIMITS IN THE ASYLUM PROCEDURES AND THE URGENCY PRINCIPLE IN ALL PROCEEDINGS INVOLVING CHILDREN

The recast Asylum Procedures Directive sets out the principle that the examination of an asylum application must be concluded within six months from the time of lodging. However, Member States may extend this time limit for another nine months or even 12 months, which is not in the best interests of an unaccompanied child. Very lengthy procedures may result in a long period of uncertainty for applicants in relation to their legal position and could violate the EU principle of good administration and the right to a hearing within a reasonable time as guaranteed by Article 47 of the Charter.

In addition, the passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children. Procedures regarding or impacting children should be therefore prioritized and completed in the shortest time possible.

The principle of the best interests of the child and the right to development as well as the right to be heard and fair proceedings are closely connected to the reasonable time requirement. The reasonable time is being considered in the light of the complexity of the case and the impact lengthy proceedings might have on the rights of the child (ICJ [FAIR Project Module 1](#), at pp. 42-43)

Fast-track procedures can jeopardize procedural and substantive rights. Particular attention must be paid to respect asylum seekers and all the more unaccompanied asylum-seeking children who are in fast-track procedures. The [Council of Europe Guidelines on human rights protection in the context of accelerated asylum procedures](#) stipulate that throughout the proceedings, decisions must be taken with due diligence (Guideline VIII) and provide that even in accelerated procedures, asylum seekers must have a reasonable time to lodge their

application, and there must be sufficient time to allow for a full and fair examination of the case (Guideline IX).

EU Law

Art 31 - Recast Asylum Procedures Directive – Examination procedure

[...] 3. Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.

[...] Member States may extend the time limit of six months set out in this paragraph for a period not exceeding a further nine months, where:

- a) complex issues of fact and/or law are involved;
- b) a large number of third-country nationals or stateless persons simultaneously apply for international protection, making it very difficult in practice to conclude the procedure within the six-month time limit;
- c) where the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13.

By way of exception, Member States may, in duly justified circumstances, exceed the time limits laid down in this paragraph by a maximum of three months where necessary in order to ensure an adequate and complete examination of the application for international protection.

International key comments and guidelines

Council of Europe Guidelines on human rights protection in the context of accelerated asylum procedures

VIII. Quality of the decision-making process

1. Throughout the proceedings, decisions should be taken with **due diligence**.
2. Officials responsible for examining and taking decisions on asylum applications should receive appropriate training, including on applicable international standards. They should also have access to the requisite information and research sources to carry out their task, taking into account the cultural background, ethnicity, gender and age of the persons concerned and the situation of vulnerable persons.
3. Where the assistance of an interpreter is necessary, states should ensure that interpretation is provided to the standards necessary to guarantee the quality of the decision making.

IX. Time for submitting and considering asylum applications

1. Asylum seekers shall have **a reasonable time to lodge their application**.
2. The time taken for considering an application shall be sufficient to allow a full and fair examination, with due respect to the minimum procedural guarantees to be afforded to the applicant.
3. The time should not however be so lengthy as to undermine the expediency of the accelerated procedure, in particular when an asylum seeker is detained.

The Committee, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration

93. The passing of time is not perceived in the same way by children and adults. **Delays in or prolonged decision-making have particularly adverse effects on children as they evolve.** It is

therefore advisable that procedures or processes regarding or impacting children be **prioritized and completed in the shortest time possible**.

Guidelines of the Committee of Ministers of the CoE on child-friendly justice

50. In all proceedings involving children, **the urgency principle should be applied to provide a speedy response** and protect the best interests of the child, while respecting the rule of law.

UNHCR, “Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum” (1997)

5.4 When the child is classified as “unaccompanied” according to the criteria mentioned in Annex II, then the next course of action should be to establish whether the child is indeed seeking asylum in the country. If it is confirmed that the child is an asylum seeker, every effort should be made to **process the examination of his/her claim as expeditiously and as child-appropriate as possible**.

8.1 **Considering their vulnerability and special needs, it is essential that children’s refugee status applications be given priority and that every effort be made to reach a decision promptly and fairly.** All appeals should be processed fairly and as expeditiously as possible.

8.5 An asylum seeker or his/her legal representative should be able to seek a review of the decision. Appropriate deadlines should be set out for a child to appeal a negative decision. Every effort should be made to reach a decision in an efficient manner in order not to keep children in limbo for a long period of time regarding their status and their future. All appeals should be processed fairly and as expeditiously as possible. This may require children’s appeals to be prioritized over other outstanding appeals.

Jurisprudence

Paulsen-Medalen and Svensson v. Sweden, ECtHR, 19 February 1998

39. According to the Court’s case-law, **the reasonableness of the length of proceedings is to be assessed, in particular, in the light of the complexity of the case and the conduct of the applicant and that of the relevant authorities**. In cases concerning restrictions on access between a parent and a child taken into public care, the nature of the interests at stake for the applicant and the serious and irreversible consequences which the taking into care may have on his or her enjoyment of the right to respect for family life require the authorities to act with exceptional diligence in ensuring progress of the proceedings (...).

I.M. v France, ECtHR, 2nd February 2012

In this case, the ECtHR held that resort to an accelerated asylum procedure to examine the first application of an asylum seeker resulted in excessively short time limits for the asylum seeker to present his arguments, lack of access to legal and linguistic assistance, and a series of material and procedural difficulties, exacerbated by the asylum seeker’s detention, which rendered the legal guarantees afforded to him merely theoretical, in breach of Article 13 ECHR. While this case referred to an accelerated asylum procedure, the ECtHR considered it in terms of the effectiveness of the remedy against the risk of arbitrary refoulement, an issue central to Dublin procedures cases (see *MSS v Belgium and Greece*). (ICJ FAIR Project, Module “Asylum Procedural Law”)

BACKGROUND DOCUMENTS

Key international reports, guidelines and comment

- ❖ ICJ, Fair Project, “I. [Access to fair procedures for migrant children including the right to be heard and to participate in proceedings](#)”
- ❖ ICJ FAIR Project, Module “Asylum Procedural Law”
- ❖ UNHCR, “[Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum February](#)” 1997
- ❖ [Guidelines of the Committee of Ministers of the CoE on child-friendly justice](#)
- ❖ The Committee, [General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration](#) (2013)

Jurisprudence

- ❖ Paulsen-Medalen and Svensson v. Sweden, ECtHR, 19 February 1998
- ❖ [I.M. v France, ECtHR, 2nd February 2012](#)