

UN Committee on the Rights of the Child

Communication No. 193/2022

Third-party intervention

The present third-party intervention addresses, in particular, the prohibition of immigration detention of children, including when accompanied by family members (CRC Articles 3 and 37), and the international legal obligations with regard to age assessment in the context of migration.

1. Prohibition of immigration detention of children, including when accompanied by family members

Prohibition of immigration detention of children

1.1 The Committee on the Rights of the Child (CRC Committee) and the Committee on the Protection of the Rights of All Migrant Workers and Their Families (CMW Committee) have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status, and States should expeditiously and completely cease or eradicate the immigration detention of children.¹ Any kind of child immigration detention should be forbidden by law, and such prohibition should be fully implemented in practice.²

1.2 Both Committees, taking note of the harmful consequences of immigration detention or any deprivation of liberty for children pursuant to immigration control, even if they are detained with their parents,³ have recognized the fundamental right that every child has to liberty and have repeatedly affirmed that detaining children for immigration purposes contravenes the fundamental principle of the best interests of the child and constitutes a violation of the rights of the child.⁴

1.3 In its Views adopted in recent cases, the CRC Committee has confirmed this position and the prohibition of immigration detention, including with respect to the immigration detention of children with members of their families. In *E.H. et al. v. Belgium* and in *R.H. v. Belgium*, where migrant families were detained in a detention centre near Brussels, the CRC Committee found a violation of Article 37 read alone and in conjunction with Article 3 of the CRC.⁵

1.4 Article 37 (b) of the Convention of the Rights of the Child (CRC Convention) allows the deprivation of liberty of children only as a measure of last resort, for the shortest appropriate duration. As the the CRC and the CMW Committees have clarified in their Joint General Comment No. 4, “the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.”⁶ The CRC Committee has specifically affirmed that immigration detention constitutes a violation of Article 37(b) and does not fall under what it defines as lawful child detention in cases it has examined.⁷

¹ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, para 5.

² Ibid.

³ Ibid, para. 9.

⁴ Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, para 5.

⁵ Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 55/2018, CRC/C/89/D/55/2018, para. 13.9, 13.12, 13.14 & Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 73/2019, CRC/C/89/D/73/2019, para 10.9, 10.12, 10.13, 10.14.

⁶ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, para. 10.

⁷ Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 55/2018, CRC/C/89/D/55/2018, para. 13.12.

1.5 The prohibition of immigration detention of children has been reiterated by numerous UN bodies, such as the UN Working Group on Arbitrary Detention,⁸ the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,⁹ and the UN Special Rapporteur on the human rights of migrants.¹⁰

Best interests of the child

1.6 The principle of the best interests of the child is a primary consideration in all actions concerning children, a fundamental principle, a substantive right and a rule of procedure under international law concerning the rights of the child. It is established in Article 3(1) of the CRC Convention; it aims to ensure the child's full, equal and effective enjoyment of human rights, and it imposes an obligation to identify and evaluate in each specific factual context the relevant elements of a best interests assessment.¹¹

1.7 The CRC Committee has stated that, in the case of a displaced child, the "best interests" principle must be respected during all stages of displacement. At any of these stages, a "best interests" determination must be documented in preparation of any decision fundamentally affecting the unaccompanied or separated child's situation. A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including their nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.¹²

1.8 According to UNICEF, the detrimental effects of detention on children are well documented and indisputable and, regardless of its specific conditions and duration, studies show that detention always has a negative impact on children's health and development.¹³ These effects also include psychological harm, as children held in detention are at risk of

⁸ UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, 6 July 2015, para. 46 & UN Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention, A/HRC/39/45, 2 July 2018, para 11.

⁹ "Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children. Following the advisory opinion of the Inter-American Court of Human Rights on the rights and guarantees of children in the context of migration and/or in need of international protection in 2014, the Special Rapporteur recalls the different procedural purposes between immigration and criminal proceedings, and that, in the words of the Court, "the offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime." The Special Rapporteur therefore concludes that the principle of *ultima ratio* that applies to juvenile criminal justice is not applicable to immigration proceedings. The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity because the measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order. Deprivation of liberty in this context can never be construed as a measure that complies with the child's best interests." "Immigration detention practices across the globe, whether *de jure* or *de facto*, put children at risk of cruel, inhuman or degrading treatment or punishment. Furthermore, the detention of children who migrate to escape exploitation and abuse contravenes the duty of the State to promote the physical and psychological recovery of child victims in an appropriate environment. Therefore, States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status. States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and other administrative considerations. (...) When children are accompanied, the need to keep the family together is a not sufficient reason to legitimize or justify the deprivation of liberty of a child, given the prejudicial effects that such measures have on the emotional development and physical well-being of children. The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family."

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/28/68, 5 March 2015 &

"27. The longer a situation of arbitrary detention and inadequate conditions lasts, and the less affected detainees can do to influence their own situation, the more intense their mental and emotional suffering will become — and the higher the likelihood that the prohibition of ill-treatment has been breached. Depending on the circumstances, this threshold can be reached very quickly, if not immediately, for migrants in a situation of increased vulnerability, such as children, women, older persons, persons with disabilities, medical conditions or torture trauma, or members of ethnic or social minorities, such as lesbian, gay, bisexual, transgender or intersex persons. In particular, the deprivation of liberty of migrant children based solely on their own or their parents' migration status is never in the best interests of the child, exceeds the requirements of necessity and proportionality and, even in case of short-term detention, may amount to ill-treatment (A/HRC/28/68, para. 80)."

"28. Detention based solely on migration status, as such, can even amount to torture, particularly where it is intentionally imposed or perpetuated for such purposes as deterring, intimidating or punishing irregular migrants or their families, coercing them into withdrawing their requests for asylum, subsidiary protection or other stay, agreeing to voluntary repatriation, providing information or fingerprints, or with a view to extorting money or sexual acts, or for reasons based on discrimination of any kind, including discrimination based on immigration status."

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/37/50, 23 November 2018.

¹⁰ UN Special Rapporteur on human rights of migrants, Ending immigration detention of children and providing adequate care and reception for them, A/75/183, 20 July 2020.

Similarly, the UN High Commissioner for Refugees' *Detention Guidelines* affirm that children, in principle, should not be detained at all (Guideline 9.2). In addition, the Council of Europe Twenty Guidelines on Forced Return (Guideline 6) and in PACE Resolution 1707 (2010) on Detention of Asylum Seekers and Irregular Migrants, that alternative measures should be given priority over detention of asylum seekers. PACE Resolution 1637 (2008) also recalls that vulnerable persons, including pregnant women, families with minors, persons with medical needs or victims of torture and sexual violence, shall not be detained (*See*: UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012., Council of Europe PACE, Resolution 1637 (2008) on Europe's boat people: mixed migration flows by sea into south Europe, § 9.6.)

¹¹ UN CRC General Comment No. 14, para. 46 & N.Ts .v. Georgia (No. 71776/12), 2 February 2016.

¹² UN CRC General Comment No. 6, para. 19-20.

¹³ UNICEF Working Paper, *Alternatives to immigration Detention of Children*, First published in September 2018, updated in February 2019, p. 2; look also at *Safety and Dignity for Refugee and Migrant Children: Recommendations for alternatives to detention and appropriate care arrangements in Europe*, IOM, UNHCR, UNICEF, May 2022, p.4.

depression, anxiety and often exhibit post-traumatic stress disorder (PTSD) symptoms.¹⁴ The United Nations Global Study on Children Deprived of Liberty (2019) also highlights the negative health outcomes and long-term impacts immigration detention has on children,¹⁵ and the negative impact that deprivation of liberty generally has on children, as it is “an inherently distressing, potentially traumatic experience and, as such, may have adverse impacts on mental health” as well as physical health.¹⁶ Therefore, as mentioned above, given the detrimental mental and physical impact that immigration detention of children, based on their own or their parents’ immigration status, has on them, it will always be against their best interests.¹⁷

1.9 Moreover, in determining a child’s best interests, prominence is to be given to the maintenance of family unity.¹⁸ In light of this, when the child’s best interests require keeping the family together, the imperative requirement not to deprive the child of liberty for immigration purposes, in turn, compels the authorities to choose non-custodial alternatives for children and their family members.¹⁹ **In light of this, the interveners submit that children, including where accompanied by members of their family, must never be detained solely based on their own or their family members’ immigration status.**

States’ obligations to implement alternatives to detention

1.10 States must ensure that all children be treated first and foremost as children, and they have the duty to comply with their obligations under international human rights law to respect, protect and fulfil the rights of children, regardless of their own or their families’ migration status.²⁰

1.11 As mentioned above, detention of children solely based on their own or their family members’ immigration status constitutes a violation of the rights of the child. As a result, States are obliged to find alternatives for children and their family members to such detention. Such alternatives should take place in non-custodial and community-based settings.²¹ In the case of accompanied children, the need to keep the family together under no circumstances justifies immigration detention; on the contrary, whenever the child’s best interests require keeping the family together, States must guarantee alternatives to such detention for the child and those family members who are present.²²

1.12 Thus, States have the obligation to ensure the abolishment of child and family immigration detention through legislation and effective policies in law and in practice.²³ As the CRC Committee has found, States must consider alternatives to detention, and their failure to do so constitutes a violation of the best interests of the child principle and of children’s human rights.²⁴ The alternatives offered to ensure that the child’s rights be respected should in no way resemble any form of deprivation of liberty for immigration control purposes, neither for the children nor for their families. Alternatives must be attentive to the children’s rights, including their right to have their best interests be a primary consideration, provide all necessary resources for material, social and emotion support that allows children’s holistic development and generally ensure the protection of all the rights of the child.²⁵

¹⁴ UNICEF Working Paper, Alternatives to immigration Detention of Children, First published in September 2018, updated in February 2019, p. 2

¹⁵ The United Nations Global Study on Children Deprived of Liberty, November 2019, Manfred Nowak (Independent Expert and Lead Author), p. 170.

¹⁶ *Ibid.*, p. 119-120.

¹⁷ Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, para 5; Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 55/2018, CRC/C/89/D/55/2018, para. 13.9; CRC Committee, Report of the 2012 Day of General Discussions, The Rights of all Children in the context of migration, para. 78-80.

¹⁸ Articles 9 and 10 of the CRC and UN CRC, General Comment No. 14, para. 66 “When the child’s relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.”

¹⁹ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23 Para 11

²⁰ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, para. 11.

²¹ *Ibid.*

²² *Ibid.*

²³ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, para. 11-12.

²⁴ Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 55/2018, CRC/C/89/D/55/2018, para. 13.12.

²⁵ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, para. 12.

1.13 Furthermore, to make this possible, independent public bodies and civil society organisations must be enabled and allowed to monitor the alternative measures to immigration detention offered by the authorities and the facilities where these measures are implemented.²⁶

The prohibition of immigration detention under the European Convention for Human Rights (ECHR)

1.14 The Council of Europe has also recognized the severe negative short- and long-term impact immigration detention has on children's physical and mental health.²⁷ The European Court of Human Rights (ECtHR) has consistently held that children, due to their age and personal situation, are among the most vulnerable persons in society.²⁸ Where children are seeking asylum their extreme vulnerability is compounded,²⁹ given that asylum seekers themselves form part of a vulnerable group.³⁰ Respect for the double vulnerability of child asylum seekers, qua child and qua asylum seeker, as opposed to their often irregular status, must be a primary consideration.³¹ This is particularly so since the effects of immigration detention on children and the conditions in which they are held often amount to a breach of Article 3 ECHR,³² which absolutely prohibits torture and inhuman or degrading treatment or punishments. In its assessment of whether the Article 3 threshold has been reached, the ECtHR has considered: the age of the children detained; their detention conditions; and the length of detention.³³ Furthermore, the Court has found that:

“[T]he child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (...) Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The [European] Court [of Human Rights] would, moreover, observe that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (...)”³⁴

1.15 In recognition of the CRC Convention and the best interests of the child principle, the ECtHR has ruled that in all decisions concerning children their best interests must be the primary consideration and that, in the context of immigration detention, the principle requires keeping the family together and considering alternatives to immigration detention, which should exclusively be pursued as a measure of last resort:

“A measure of confinement must (...) be proportionate to the aim pursued by the authorities, namely the enforcement of a removal decision (...) It can be seen from the Court’s case-law that, where families are concerned, the authorities must, in assessing proportionality, take account of the child’s best interests. In this connection ... there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (...). The protection of the child’s best interests involves both keeping the family together, as far as possible, and considering alternatives so that the detention of minors is only a measure of last resort (...)”³⁵

1.16 Furthermore, the fact that a child may be accompanied by a parent has been recognized by the Court as not relieving national authorities of the obligation to take appropriate measures to protect children against treatment in breach of Article 3.³⁶ The Court found an Article 3 violation in *M.D. and A.D. v. France*, where, after concluding that the detention of a 4-month-old baby amounted to proscribed ill-treatment, the Court also found a breach of Article 3 with regard to the mother due to, *inter alia*, the inseparable bond between the mother and her baby.³⁷ The Court highlighted that “*the*

²⁶ Ibid.

²⁷ A study of immigration detention practices and the use of alternatives to immigration detention of children, Parliamentary Campaign to End Immigration Detention of Children & Parliamentary Assembly of the Council of Europe Committee on Migration, Refugees and Displaced Persons, October 2017, p. 9.

²⁸ *Rahimi v. Greece* (No. 8687/080), European Court of Human Rights, 5 July 2011, para. 87

²⁹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (No. 13178/03), European Court of Human Rights, 12 October 2006, para. 55; *Popov v. France* (No. 39472/07 and 39474/07), European Court of Human Rights, 19 April 2012, para. 91; *Tarakhel v. Switzerland* [GC] (No. 29217/12), European Court of Human Rights, 4 November 2014, para. 99

³⁰ *M.S.S. v. Belgium and Greece* [GC] (No. 30696/09), European Court of Human Rights, 21 January 2011, para. 232

³¹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (No. 13178/03), European Court of Human Rights, 12 October 2006, para. 55.

³² *Muskhadzhiyeva and others v. Belgium* (No. 41442/07), European Court of Human Rights, 19 January 2010; *S.F. and Others v. Bulgaria* (No. 8138/16), European Court of Human Rights, 7 December 2017; *Mahmundi and Others v. Greece*, European Court of Human Rights, 31 July 2012; *A.B. and Others v. France* (No. 11593/12), European Court of Human Rights, 12 July 2016; *M.D. and A.D. v. France* (No. 57035/18), European Court of Human Rights, 22 July 2021; *N.B. and Others v. France* (No. 49775/20), European Court of Human Rights, 31 March 2022; see more at Factsheet-Accompanied migrant minors in detention, Press Unit - European Court of Human Rights, June 2022, p. 2-6.

³³ *A.M. and others v. France* (No. 7534/20), European Court of Human Rights, 4 May 2023, para 16.

³⁴ *Popov v. France* of 19 January 2012, European Court of Human Rights, para. 91.

³⁵ Ibid, para 140-141.

³⁶ *A.M. and others v. France*, (No. 7534/20), 4 May 2023, para 9.

³⁷ *M.D. and A.D. v. France*, (No. 57035/18), 22 October 2021, para 71.

particularly vulnerable situation of the minor child is decisive and takes precedence over the parent's status as an illegal resident alien.”³⁸

1.17 Moreover, Article 5 of the ECHR guarantees the individual's right to liberty and security of person. It ensures that no-one be deprived of their liberty in an arbitrary fashion.³⁹ Concerning children, the child's best interests must be taken into account as a primary consideration. Before a decision on the immigration detention of children is considered or taken, there must be an assessment of the necessity and proportionality of the detention in the circumstances of the individual case.

1.18 Due to the specific and double vulnerability of child asylum seekers, the ECtHR, applying the principle of proportionality, has paid particular attention, in the application of Article 5(1)(f) ECHR, to whether or not States have considered alternatives prior to authorizing immigration detention of children.⁴⁰ Where less coercive measures as alternatives to detention have not been considered in respect of a child, the ECtHR has found immigration detention to be arbitrary and, therefore, unlawful under 5(1)(f) ECHR.⁴¹ Furthermore, the ECtHR has made clear that, if children are detained, authorities must act with greater speed and diligence.⁴²

1.19 Additionally, the ECtHR has also found violations of Article 8 and the right to respect for private and family life of the ECHR in respect of the children and their parents in similar cases regarding the detention of migrant children. Once again referring to the broad consensus, particularly in international law, that the children's best interests are paramount in all decisions concerning them, the ECtHR has noted that, in the context of the detention of migrant children, this principle calls not only for families to be kept together, but also for the immigration detention of families with young children to be limited.⁴³

EU Law

1.20 EU Member States are obliged to provide conditions, procedures and information to children in order for them to have effective access to their rights under the Charter of Fundamental Rights of the EU (CFR), including Article 24, which guarantees their best interests as a primary consideration. Under EU law, detention constitutes a serious interference with the right to liberty enshrined in Article 6 of the Charter and, therefore, must comply with important safeguards.⁴⁴ As set out in Article 28 of the Dublin III Regulation, immigration detention solely the purpose of transfer following the Dublin procedure cannot be justified; in addition, since immigration detention will constitute “a serious interference with [the] right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness”,⁴⁵ therefore it should be pursued only when there is a significant risk of absconding on the basis of an *ad hoc* assessment, in full respect of the principle of proportionality, for the shortest period possible and having demonstrated that the inappropriateness of alternatives to detention in the particular circumstances of the case.⁴⁶

1.21 The EU Charter also requires Member States to examine alternatives to detention in order to avoid arbitrary deprivation of liberty.⁴⁷ In addition, other EU law instruments reiterate that immigration detention must be a last resort and all alternatives must first be exhausted, unless such alternatives cannot be applied effectively in the individual case.⁴⁸ Detention should therefore only take place after full consideration of all possible alternatives, or when monitoring mechanisms have not achieved the lawful and legitimate purpose. For example, Article 8 (4) of the revised Reception Conditions Directive obliges States to lay down rules for alternatives to detention in national law. Specifically regarding children, both Article 21 of the revised Receptions Directive and Article 3 (9) of the Return Directive include children in the list of persons considered to be vulnerable, emphasizing that their detention should only be a measure of last

³⁸ M.D. and A.D. v. France, (No. 57035/18), 22 October 2021, para 65.

³⁹ Ilias and Ahmed v. Hungary (No. 47287/15), European Court of Human Rights, 14 March 2017, para 61; Bouamar v. Belgium (No. 9106/80), European Court of Human Rights, 29 February 1988, para. 47; Steel and Others v. the United Kingdom (No. 24838/94), European Court of Human Rights, 23 September 1998, para. 54.

⁴⁰ On vulnerable groups see Yoh-Ekale Mwanje v. Belgium (No. 10486/10), European Court of Human Rights, para. 124 &

⁴¹ Rahimi v. Greece (No.8687/080), European Court of Human Rights, 5 July 2011, para 109.

⁴² Nikoghosyan and others v. Poland, (No. 14743/17), European Court of Human Rights, 3 June 2022, paras 86 and 88

⁴³ Popov v. France, European Court of Human Rights, Rahimi v. Greece, European Court of Human Rights, A.B. and Others v. France (no. 11593/12) and R.K. and Others v. France (no. 68264/14) of 12 July 2016, European Court of Human Rights; judgment in the case of Bistieva and Others v. Poland, 10 April 2018, European Court of Human Rights.

⁴⁴ CJEU, C-72/22, M.A., 30 June 2022, para. 79 onwards & CJEU, Joined Cases C-924/19 PPU and C-925/19 PPU, 14 May 2022, para. 265 onwards.

⁴⁵ Judgment of 15 March 2017, Al Chodor, C-528/15, EU:C:2017:213, paragraph 40. For more information on EU Member State practices regarding deprivation of liberty of persons in return procedures, see FRA (2010), *Detention of Third-Country Nationals in Return Procedures*, Publications Office, Luxembourg.

⁴⁶ CJEU, Joint Cases C-704/20 and C-39/21, 8 November 2022, para. 71 onwards.

⁴⁷ EU Charter, Art. 6 read in conjunction with Arts. 52 and 53. See also CJEU, C-61/11 PPU, Hassen El Dridi, alias Soufi Karim, 28 April 2011, paras. 39–41; CJEU, C-146/14 PPU, Bashir Mohamed Ali Mahdi, 5 June 2014, para. 64.

⁴⁸ Article 15 (1) of the Return Directive (2008/115/EC), “[u]nless other sufficient but less coercive measures can be applied effectively”; see also Article 8 (2) of the revised Reception Conditions Directive (2013/33/EU), Article 18 (2) of the Dublin Regulation (Regulation (EU) No. 604/2013).

resort, exclusively when less coercive measures cannot be applied effectively, and only after all efforts are made to release them and place them in suitable accommodation.

1.22 Alternatives to detention include reporting obligations, such as reporting to the police or immigration authorities at regular intervals; the obligation to surrender a passport or travel document; residence requirements, such as living and sleeping at a particular address; release on bail with or without sureties; guarantor requirements; release to care worker support or under a care plan with community care or mental health teams; and electronic monitoring, such as tagging.⁴⁹

1.23 In light of the above, the interveners submit that EU law specifies that immigration detention of children can only be imposed following the best interests assessment and subject to principles of necessity and proportionality. Detention should comply with the human rights safeguards, namely, a legal basis, clarity, predictability, accessibility and protection against arbitrariness. Immigration detention should only be imposed for the shortest time possible and respect all the relevant safeguards and only following a determination that non-coercive alternatives short of detention are insufficient in the specific circumstances of the individual case.

The right to be heard: access to information and legal representation

1.24 The right of the child to be heard (Article 12 CRC) is a substantive right in itself, as well as a necessary right for the interpretation and implementation of all other rights of the child. The CRC General Comment No. 12 (2009) provides that States shall presume that children have the capacity to form their own views. This right must be applied in any procedure determining status in a country or rights or otherwise affecting the child,⁵⁰ and it includes granting children the right to counsel (access to a lawyer), to information, to interpretation when needed, and other procedural rights.⁵¹

1.25 The realization of the right to be heard requires and entails the right of the child to be informed about the matters, options, decisions and their consequences and, as such, it is a precondition for the child's clarified decisions.⁵² Children's right to be heard requires that information be delivered to them in a child-friendly manner, ensuring that all proceedings be fully accessible and not intimidating, hostile, insensitive or inappropriate for their age.⁵³

1.26 It is important to ensure that the child's views be transmitted correctly and appropriately, which entails either directly hearing from the child or from another person, often a lawyer, who has sufficient knowledge and understanding of the decision-making process and who takes into account the interests of the child exclusively.⁵⁴

1.27 These substantive procedural rights also apply in the context of best interests assessments where children should be guaranteed the right to be heard and take part in all stages of the proceedings, to be assisted free of charge by a translation/ interpreter, to receive free legal aid and representation and to have full access to all necessary documentation and information throughout the entire procedure together with their guardian and legal adviser.⁵⁵

1.28 EU law also requires the provision of free specialist legal information and representation.⁵⁶ For the information to be accessible, it must be presented in a form that takes account of the individual's level of education, and legal advice may be required for the individual to fully understand their circumstances.⁵⁷

1.29 In light of the above, the interveners submit that the procedural rights of (a) access to understandable information throughout the procedure and (b) access to legal aid and representation must always be respected to ensure full implementation of the rights in the CRC Convention and international law.

⁴⁹ For more information, see FRA (2015), Alternatives to detention for asylum seekers and people in return procedures, Publications Office, Luxembourg.

⁵⁰ CRC General Comment No. 12 (2009) on the Right of the Child to be Heard, CRC/C/GC/12, para. 20 & Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, para. 35.

⁵¹ CRC General Comment No. 12 (2009) on the Right of the Child to be Heard, CRC/C/GC/12, para. 25, 34, 41.

⁵² Ibid, para. 25.

⁵³ Ibid, para. 34.

⁵⁴ Ibid, para. 35-37.

⁵⁵ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, para 17 & General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, para. 96.

⁵⁶ Recast Asylum Procedures Directive, Articles 12(1)a, 24, 25(1)(a) and (4), Recast Reception Conditions Directive, Article 9(6)

⁵⁷ Vakhitov and Others v. Russia (Nos. 18232/11, 42945/11, 31596/14), 31 January 2017, para 60; Nasrulloev v. Russia (No. 656/06), 11 October 2007, para. 77; Chahal v. United Kingdom [GC] (No. 22414/93), 15 November 1996, para. 118;

2. Age assessment in the context of migration

2.1 It is paramount that age assessment procedures be fair and effective so as to prevent children from being treated as adults, to guarantee the protection of their rights, and to ensure adequate reception suitable for their specific needs. Age assessment should never be undertaken as a routine practice. It may only be carried out when: (i) age is in fact contested; and (ii) when, notwithstanding the right to the benefit of the doubt, serious doubts as to whether the individual concerned is a child persist.

2.2 Where the individual circumstances of a particular case require an age assessment, a holistic, safe and dignified procedure should be carried out by qualified experts. The CRC Committee has affirmed that comprehensive assessments of age, which are carried out in a child-friendly and culturally appropriate manner, are needed as opposed to medical assessments, which may be inaccurate, have wide margins of error, and may also be traumatic for the person concerned.⁵⁸

2.3 In their Joint General Comment, the CMW and the CRC set out a number of principles to be applied to the age assessment process.⁵⁹ The general principles of the CRC, such as the best interests of the child, free and informed consent and non-discrimination are applicable, as well as any other relevant CRC provision. States have the duty to conduct age assessments through a holistic and multidisciplinary approach ensuring that all the necessary safeguards and principles be respected, that the rights of the person concerned be protected, and that they make an “informed” estimate of the age of the person concerned.⁶⁰

2.4 It is fundamental that identification measures, such as age assessment, do not only examine or consider the physical appearance of the individual, but also their psychological maturity.⁶¹ Psychological maturity may vary significantly from one person to another, particularly when considering the lived traumas and experiences often present among asylum-seekers. Operating under this understanding allows the authorities and professionals to make an “informed” estimate of a person’s age.⁶²

2.5 Age assessment should only be carried out when there is reasonable doubt as to whether or not an individual is a child. In case of doubt, when an individual claims to be a child, and this fact cannot be easily verified, a presumption of minority should be applied and the person concerned must be treated as a child and be able to enjoy the rights and protection to which they are entitled by reason of their childhood, consistent with international standards, including the CRC.⁶³

2.6 If there is no proof of age by birth certificate, the responsible authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent documents or school reports. Documents should be considered genuine unless there is proof to the contrary.⁶⁴ Authorities should allow

⁵⁸ Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para 4.

⁵⁹ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/ GC/4-CRC/C/GC/23, 16 November 2017.

⁶⁰ Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/ GC/4-CRC/C/GC/23, 16 November 2017, para. 4.

⁶¹ Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/ GC/4-CRC/C/GC/23, 16 November 2017, para. 4; CRC recommendations in *N.B.F. v. Spain*, CRC/C/79/D/11/2017, Adoption of views, 27 September 2018, para. 12.4; *A.L. v. Spain*, CRC/C/81/D/16/2017, Adoption of views, 31 May 2019, para. 12.7; *J.A.B. v. Spain*, CRC/C/81/D/22/2017, Adoption of views, 31 May 2019, para. 13.6; *R.K. v. Spain*, CRC/C/82/D/27/2017, Adoption of views, 18 September 2019, para. 9.7.

⁶² Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child (CRC) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/ GC/4-CRC/C/GC/23, 16 November 2017, para. 4.

⁶³ UN Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22; Council of Europe, *A guide for policy makers: Age assessment for children in migration*, December 2019.

⁶⁴ See *CRC, N.B.F. v. Spain*, CRC/C/79/D/11/2017, Adoption of views, 27 September 2018, para. 12.4. See CRC General Comment No. 24 on children’s rights in the child justice system, CRC/C/GC/24, paras. 44-45. See also *CRC, R.K. v. Spain*.

interviews with or testimony by the children and parents regarding age, or affirmations to be filed by teachers or religious or community leaders, who know the age of the child. Only if these measures prove unsuccessful may there be an assessment of the child's development to determine age.

2.7 In *Darboe and Camara v. Italy*, the ECtHR also held that the principle of presumption of minority is an inherent element of the protection of the right to respect for private life of a foreign individual declaring to be a minor.⁶⁵ The case concerned an applicant for international protection who, despite claiming that he was a minor, was kept in an adult reception centre for over four months before being transferred to accommodation for children once his minority was recognized. In such cases the principle of presumption of minority must be accompanied by sufficient procedural guarantees.⁶⁶ These include access to a lawyer, informed participation in the age assessment procedure of the person whose age is in doubt and other safeguards necessary to ensure a holistic and multidisciplinary age assessment procedure.

2.8 Consistent with CRC General Comment No. 6 and the EU Asylum Procedures Directive, if uncertainty remains after an age assessment, the individual should be given the benefit of the doubt. If there is a possibility that the individual is a child, they should be treated as such.

2.9 Age assessment should not be a routine practice. The need for age assessment should be duly justified based on the substantiated doubts on the stated age; it should be resorted to only in cases where there is an absence of evidence and/or in cases where several elements of evidence gathered contradict the applicant's claimed age. If the available evidence does not contradict the age or it confirms the claimed age, then it should be accepted.⁶⁷

2.10 In addition, the Council of Europe subscribes to the same principles regarding the age assessment procedure, including the presumption of minority and the benefit of the doubt.⁶⁸ According to a Recommendation adopted in 2022:

“Principle 2 – Presumption of minority

States should ensure that a person who undergoes an age assessment is presumed to be a child unless and until determined otherwise through an age assessment procedure

22. In application of the presumption of minority, States should treat a person as a child and uphold their rights from the moment of referral and throughout the procedure of age assessment, and ensure that the person is referred to and has effective access to appropriate child-protection services without discrimination or delay.

23. Where there are doubts about the age of a person claiming to be an adult, such as in the absence of an identifying document considered to be valid, and there are reasons to believe that the person may be a child, the protection and assistance measures provided to children should apply.

Benefit of the doubt

24. If reasonable doubts remain after completion of the age assessment procedure, the person should be considered to be a child.

25. The margin of error applicable to each element of the age assessment procedure should be recorded and each element given due weight according to the scientific validity of the results. The margin of error should be applied in favour of the child.”⁶⁹

The Recommendation also affirms the following:

“65. The age assessment decision should be given in writing and include details of the reasons for the referral and for the decision, the methods used, the specific margin of error applicable to the method used, the

⁶⁵ As noted in the intervention of AIRE, DCR and ECRE in the *Darboe v. Italy* case of the European Court of Human Rights: “*The EU asylum acquis envisages specific identification and tailored procedural and reception guarantees to children as a category of particularly vulnerable persons in accordance with their special needs. Children’s special protection and reception needs must be promptly recognised and adequately addressed by Member States. While Article 25(5) of the recast Asylum Procedures Directive 2013/32 foresees that Member States may use medical examinations to assess the age of unaccompanied minors, this provision is far from giving them a blanket permission to do so. Conversely, the provision must necessarily be interpreted and applied in light of Member States’ obligations under Charter of Fundamental Rights of the European Union, in primis to respect human dignity and the best interests of the child. Central to Article 25(5) rAPD is the principle of the benefit of the doubt, which shall be applied first and foremost ‘following general statements or other relevant indications’ on the applicant’s age. If and once this principle is correctly applied, the possibility to use medical examinations is rendered unnecessary.*” See: Written submissions on behalf of the AIRE Centre, The Dutch Council for Refugees and ECRE in *Darboe v. Italy* (No. 5797/17) European Court of Human Rights, 5 July 2017, para 35.

⁶⁶ *Darboe and Camara v. Italy* (No. 5797/17), European Court of Human Rights, 21 July 2022, para. 153-154.

⁶⁷ European Asylum Support Office, EASO Practical Guide on age assessment, 2nd edition, 2018, p 23.

⁶⁸ Recommendation CM/Rec(2022)22 of the Committee of Ministers to member States on human rights principles and guidelines on age assessment in the context of migration and its Explanatory Memorandum.

⁶⁹ *Ibid*, para. 22-25.

application of the “benefit of the doubt” principle and the scientific reliability of any medical examination used.”⁷⁰

2.11 In light of the above, the interveners submit that State Parties should ensure that the age assessment procedure as a whole guarantees respect for the child’s rights under the Convention, particularly under Articles 3 and 37. In addition, in light of the best interests of the child and benefit of the doubt principles, the interveners submit that age assessment procedures concerning asylum-seeking children should not be contemplated as routine measures and should satisfy the necessity and proportionality test. The CRC standards cannot be fulfilled where non-holistic and intrusive medical age assessment methods are used. Moreover, such methods have and a low evidential value and detrimental effects on children and their CRC rights, including respect for their moral and physical integrity. Therefore, the interveners submit that:

(a) age assessment procedures must only be ordered where absolutely necessary – if, notwithstanding the principle of the benefit of doubt, a serious doubt persists regarding age;

(b) an age assessment procedure may only be carried out in accordance with the child’s best interests;

(c) the methods of age assessment must be proportionate to the legitimate aim pursued, bearing in mind no assessment can ever lead with absolute exactitude to identifying the child’s age;

(d) to be proportionate, age assessment methods must not detrimentally interfere with the child’s moral and physical integrity, and the competent expert or authority undertaking the age assessment procedure must be in a position to ensure the special needs, welfare and well-being of the child during the procedure;

(e) in order for children’s CRC rights to be practical and effective, rather than theoretical or illusory, State Parties must ensure all relevant safeguards, including access to an effective remedy against an age assessment decision.

In conclusion, the interveners submit that the negative consequences of an incorrect age assessment may constitute a violation of Article 3 of the CRC. An erroneous age assessment denies children of the substantive and procedural rights to which they are entitled under international and European human rights law throughout the asylum procedure, and may lead to a violation of Article 37 of the CRC.

⁷⁰ Ibid, para. 65.