

Third party intervention in SRHP Aoch v Lithuania, 235/2023

To the UN Committee on the Rights of the Child

Intervenors: The AIRE Centre (Advice on Individual Rights in Europe),
ECRE (European Council on Refugees and Exiles), DCR (Dutch Council for
Refugees)

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1. The Republic of Lithuania is a party to the UN Convention on the Rights of the Child (CRC), to the European Convention on Human Rights (ECHR), and is bound by European Union (EU) law as a member of the EU. This intervention analyses the provisions of the CRC relevant to the context of family reunification and the associated General Comments (GC) made by this Committee. **In addition to those specific Articles of the CRC, the intervenors maintain that the Convention is to be read and interpreted as a whole and in conjunction with the interpretative and authoritative GC's.** In light of Article 41(b) of the UNCRC, this intervention also offers comparisons with the jurisprudence on family reunification under the ECHR, the applicable norms of EU law, and the caselaw of the Court of Justice of the European Union (CJEU).
2. Firstly, the intervenors recall that all State Parties to the CRC have an obligation to implement the Convention to the maximum extent of their available resources. **Article 4 CRC** addresses the implementation of CRC rights and is further clarified by GC No.5. This obligation extends to contributing to the global implementation of children's rights and may require State Parties to seek international cooperation to ensure children's rights are fully realised. **It is the responsibility of the State which has ratified the Convention to ensure its full implementation.**¹
3. The Committee, together with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, have affirmed the need to address international migration through international, regional or bilateral cooperation.² Such international cooperation is to ensure "*safe, orderly and regular migration*" and to avoid "*approaches that might aggravate [migrants'] vulnerability*".³ Joint GC No.4 and 23 specifically emphasises the need to establish cross-border case management "*in an expeditious manner*".⁴ Bilateral, regional and global cooperation is the inevitable consequence of a comprehensive interpretation of the two Conventions.⁵ In particular, the coordination of efforts between the countries of origin, transit, destination and return is of vital importance for the protection of children's rights.⁶ Coordination efforts should include the mutual assistance between countries in connection with diplomatic or consular representations, especially where these representations function to facilitate family reunification, or to the issuing of laissez-passer where entry for the purpose of family reunification would otherwise be excessively difficult.

¹ UNCRC, General comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), § 60.

² 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, § 64.

³ Ibid.

⁴ Ibid.

⁵ 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, § 48.

⁶ Ibid., § 49.

4. The intervenors note that the Committee provided concluding observations on Lithuania as recently as March 2024. In its observations, the Committee emphasised, among other things, the need for urgent action in respect of asylum seeking, refugee, and migrant children.⁷ The Committee also observed the need for Lithuania to introduce a child-sensitive and multidisciplinary procedure in respect of the human rights of children in international migration contexts.⁸ In respect of the family environment and alternative care, the Committee has recommended that Lithuania ensures the supervision of measures to restore and maintain family ties and facilitate the reunification of children with their families whenever possible.⁹ The intervenors note the Committee's concerns regarding the "*lack of concrete measures to enforce [the revised Law on the Fundamentals of Protection of the Rights of the Child], in particular for children in **marginalized and disadvantaged** situations*".¹⁰ The children of parents who have obtained refugee status in Lithuania and remain separated from their parents *prima facie* fall within this category. There should be no gaps in legislation or policy which prevent the best interests of the child being integrated as a primary consideration in all legislative, administrative, and judicial proceedings and decisions.¹¹

5. If suspicion arises that a State Party's conduct is incompatible with the Convention, the Committee will seek to ensure, while generally refraining from re-assessing facts, that any available remedy was not used in a way that was "*arbitrary or tantamount to a denial of justice*".¹² In doing so, it attaches great weight to the **four overarching principles of the Convention**: non-discrimination (**Article 2**), the best interests of the child (**Article 3**), the right to life, survival and development (**Article 6**) and the right of the child to express his or her views in all matters affecting him or her and to have those views taken into account (**Article 12**).¹³ The Committee already applied these principles to "*proceedings conducted to determine whether [the child] should be issued a residence permit*" in *Y.B. and N.S. v. Belgium*.¹⁴ They give rise to a number of procedural and substantive obligations that State Parties must fulfil in all actions concerning children, including in the design and implementation of family reunification schemes. Article 3 CRC, in particular, being a "threefold concept" entails both substantive and procedural obligations, while further serving as a "fundamental interpretative principle of law".¹⁵

Procedural Obligations

⁷ UNCRC Concluding observations on Lithuania (2024), CRC/C/LTU/CO/5-6, § 4. Available at: <https://tinyurl.com/2dy6cd35>

⁸ *Ibid.*, § 44.

⁹ *Ibid.*, § 34.

¹⁰ *Ibid.*, § 6.

¹¹ *Ibid.*, § 6. See also §§ 3-4.

¹² *Y.B. and N.S. v Belgium* (CRC/C/79/D/12/2017), 27 September 2018, § 8.4.

¹³ These four principles are highlighted in Joint general comment No. 3 and No. 22 (2017), § 19.

¹⁴ *Y.B. and N.S. v Belgium* (CRC/C/79/D/12/2017), 27 September 2018, § 8.8.

¹⁵ UNCRC, 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), § 6(a, b, c).

6. **Procedures for facilitating family reunification – and any decisions affecting the life or development of the child – must be made with the best interests of the child as a primary consideration.** This principle is enshrined in **Article 3 CRC**.¹⁶ GC No.14 states that “*inaction or failure to take action and omissions are also ‘actions’*” for the purposes of Article 3.¹⁷ The Committee has elaborated in its views on *Y.B. and N.S. v Belgium* that this concept must be adjusted and defined on an individual basis, and in consideration of the child’s personal context, situation, and needs.¹⁸ Relevant factors are *inter alia* the child’s view, identity, family relations, safety, vulnerability, and right to health and education.¹⁹ When making decisions, greater weight must be attached to what serves the child best,²⁰ and any decisions **must be justified and explained**, meaning that such factors and outcomes of individual considerations are transparent.²¹ Decision-making processes must have procedural guarantees for assessing and determining a child’s best interests and there must be an explicit evaluation of the impact of the decision on the children concerned.²² The Committee has previously found a violation of the procedural safeguards where the authorities failed to mention or make references to considerations of the best interests of the child.²³
7. Joint GC No.3 and No.22 also sets out in some detail requirements of the best interests assessment and determination in migration-related decisions concerning children: “A ‘*best interests assessment*’ involves evaluating and balancing all the elements necessary to make a decision in the specific situation for a specific individual child or group of children. A ‘*best interests determination*’ is a formal process **with strict procedural safeguards** designed to determine the child’s best interests on the basis of the best interests assessment. In addition, assessing the child’s best interests is a unique activity that should be undertaken in each individual case and in the light of the specific circumstances of each child or group of children, including age, sex, level of maturity, whether the child or children belong to a minority group and the social and cultural context in which the child or children find themselves.”²⁴
8. Where a child’s relationship with his or her parents is interrupted by migration, the assessment of the child’s best interests in decisions on family reunification **must consider the possibility of preserving the family unit.**²⁵ Joint GC No.3 and 22 provides that State Parties should ensure that the best interests of the child are a primary consideration in immigration law, **the planning,**

¹⁶ UN General Assembly, Convention on the Rights of the Child (1989) *Treaty Series*, vol. 1577, p.3, Article 3.

¹⁷ UNCRC, General comment No. 14 (2013), § 18.

¹⁸ *Y.B. and N.S. v Belgium* (CRC/C/79/D/12/2017), 27 September 2018, § 8.3; recalling UNCRC, General comment No. 14 (2013), § 32.

¹⁹ Joint general comment No. 3 and No. 22 (2017), § 31; See further *L.S. v. Switzerland* (CRC/C/85/D/81/2019), 30 September 2020, § 3.2.

²⁰ Joint general comment No. 3 and No. 22 (2017), § 28.

²¹ UNCRC, General comment No. 14 (2013), § 97.

²² *Ibid.*, § 99.

²³ *J.M. v Chile* (CRC/C/90/D/121/2020), 1 June 2022, § 8.

²⁴ Joint general comment No. 3 and No. 22 (2017), § 29.

²⁵ UNCRC, General comment No. 14 (2013), § 66.

implementation and assessment of migration policies, and decision-making in individual cases.²⁶ Additionally, as per the Committee's view in *O.M. v Denmark*, the assessment of best interests should be determined at different stages of migration and asylum procedures.²⁷

9. Not only must children's interests be a primary consideration, but they must also be given the opportunity to be heard and for their views to be given due weight, as per **Article 12 CRC**. GC No.14 makes clear that the best interests principle is not properly observed unless the requirements of Article 12 are also met.²⁸ Article 12 requires State Parties to "*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.***"²⁹
10. In practice, this means that simply 'hearing' the child is insufficient: Article 12 requires that children must be listened to and their views seriously taken into consideration.³⁰ When dealing with requests for family reunification for minor children, the procedure must include some process which enables **the views of the affected children to be ascertained in the context of their best interests assessment and prior to their best interests determination.**³¹ In the context of migration, a child must be provided with all relevant information in his or her own language.³² **All these matters should then be recorded in the decision.**³³
11. **Article 10 CRC** is the *lex specialis* on **family reunification** but expressly states that it must be read in conjunction with Article 9(1). Article 10(1) requires States not only to permit applications for family reunification but expressly requires that such applications should be dealt with "*in a **positive, humane and expeditious manner***".³⁴ The word "*positive*" does not require all applications to be approved, but the manner in which they are dealt with should be positive and, in particular, consistent with the Convention as a whole.³⁵ Its meaning is stronger than a purely objective treatment, as the drafters of the Convention concluded.³⁶ The next requirement is that the process should be "*humane and expeditious*". As GC No.14 notes "*the passage of time is not perceived in the same way by children and adults [and] delays in or prolonged decision-making have*

²⁶ Joint general comment No. 3 and No 22 (2017), § 31.

²⁷ *O.M. v. Denmark* (CRC/C/94/D/145/2021), 19 September 2023, § 8.5.

²⁸ UNCRC, General comment No. 14 (2013), § 43.

²⁹ Convention on the Rights of the Child (1989), United Nations, *Treaty Series*, vol. 1577, p. 3, Article 12.

³⁰ UNCRC, General comment No. 12 (2009), § 28.

³¹ *Ibid.*, §§ 70 and 74.

³² *Ibid.*, §124.

³³ *Ibid.*, §45.

³⁴ CRC, Article 10(1).

³⁵ In particular CRC, Articles 2, 3, 7, 9(1), 12, 16.

³⁶ See the drafting process as regards the term 'positive' in UN Economic and Social Council, Question of a Convention on the rights of the child, Report of the working group on a draft convention on the rights of the child, E/CN.4/1989/48, p. 39. Available at: <https://documents.un.org/doc/undoc/gen/g89/112/38/pdf/g8911238.pdf?token=5nQXrLGhGSIRPP8Rg0&fe=true>

particularly adverse effects on children as they evolve".³⁷ The Committee has previously noted that, in connection with the term 'expeditious' in Article 10, it expects State Parties to take "every feasible measure [...] to facilitate and speed up the reunification of the family in cases where one or more members of the family have been considered eligible for refugee status".³⁸ In the Committee's view, not only administrative decisions but also subsequent court procedures have to be expeditious.³⁹ **Joint GC No. 4 and No. 23** elaborates further: "where a country of destination refuses family reunification to the child and/or his/her family it should provide detailed information to the child, in a child-friendly and age appropriate manner on the reasons for the refusal and on the child's right to appeal".⁴⁰ Given the different perception of time for a child, a justifiable (and a *fortiori* unjustifiable) delay in decision making should be similarly explained to the child together with information on the child's right to appeal.⁴¹

12. **In summary, the procedural obligations consist of the need for an individualised assessment with particular attention to the best interests of the child, a consideration of the child's views, and a positive, humane, and expeditious handling of the application. The obligation to ensure the child's best interests procedurally prohibits the States Parties to base decisions concerning the rights of a child on general considerations. The outcome of the assessment needs to be made transparent.** These procedural imperatives were confirmed by the Committee in its decision *Y.B. and N.S. v Belgium*, where it stressed in particular that the child's "personal context, situation and needs" must be considered by the authorities.⁴²

Substantive Obligations

13. In the context of children separated from their parents due to the enforcement of immigration laws, States should make efforts to find sustainable, rights-based solutions for them, **including the possibility of family reunification**.⁴³ States should develop family reunification procedures that allow migrants to be accompanied by their families and avoid separation.⁴⁴ These procedures should seek to facilitate family life, and any restrictions should be "*legitimate, necessary and proportionate*".⁴⁵ Refusing to allow a family member to enter or remain in the territory can, on a substantive level, amount to arbitrary or unlawful interference with family life.⁴⁶ The Committee has been critical in its

³⁷ UNCRC, General comment No. 14 (2013), § 93.

³⁸ UNCRC, Concluding observations on Canada (1995), CRC/C/15/Add.37, §§ 13 and 24. Available at: <https://documents.un.org/doc/undoc/gen/g95/170/93/pdf/g9517093.pdf?token=gEEoCkYIBtdXLchkg6&fe=true>

³⁹ *N.R. v Paraguay* (CRC/C/83/D/30/2017), 3 February 2020, § 8.7.

⁴⁰ Joint general comment No. 4 and No. 23 (2017), § 36.

⁴¹ UNCRC, General comment No. 14 (2013), § 98.

⁴² *Y.B. and N.S. v Belgium* (CRC/C/79/D/12/2017), 27 September 2018, § 8.3; recalling UNCRC, General comment No. 14 (2013), § 32.

⁴³ UNCRC, General comment No. 14 (2013), § 34.

⁴⁴ Joint general comment No. 3 and No. 22 (2017), § 37.

⁴⁵ *Ibid.*

⁴⁶ Joint general comment No. 4 and No. 23 (2017), § 28; further citing Human Rights Committee, communications No. 2009/2010, *Ilyasov v. Kazakhstan*, Views adopted on 23 July 2014; No. 2243/2013, *Husseini v. Denmark*, Views adopted on 24 October 2014; No. 1875/2009, *M.G.C. v.*

concluding observations where State Parties had obstacles in place such as application fees,⁴⁷ time-limits,⁴⁸ income barriers or legal obstacles,⁴⁹ and has urged them to ease procedures where they were complex and too long⁵⁰ in order to create a real possibility for all refugees and asylum-seeking children to access family reunification without discrimination.⁵¹

14. According to this Committee, “states should develop effective and accessible family reunification procedures” and “take measures to facilitate family reunification”.⁵² Where a State Party has no diplomatic representation in the country of origin, family reunification may require family members to travel to other countries. These journeys, which often need to be repeated in order to cover the full length of the process, are difficult, costly and dangerous.⁵³ This is especially the case for children separated from their families, for whom such travel is often strictly impossible.⁵⁴

15. The obligations under **Article 6 CRC** include the child’s protection and the reduction, to the greatest extent possible, of migration-related risks faced by children, which may jeopardise a child’s right to life, survival, and development.⁵⁵ Children, especially those unaccompanied or separated from their family, are particularly vulnerable to many forms of violence when travelling or residing in an irregular manner.⁵⁶ Compliance with Article 6 may also require mitigating these vulnerabilities by not compelling children who wish to join their parents abroad to travel to embassies in other countries. This would comply with the Committee’s request that “states should ensure that children in

Australia, Views adopted on 26 March 2015; No. 1937/2010, *Leghaei and others v. Australia*, Views adopted on 26 March 2015; and No. 2081/2011, *D.T. v. Canada*, Views adopted on 15 July 2006.

⁴⁷ UNCRC, Concluding observations on Andorra (2023), CRC/C/AND/CO/3-5, § 40(b) <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhshimZtVml%2BMdFYAiUxEtEZMMNR1EXviPX7i4IbJAT11uors9vHvsBV%2FZYKbndr56ORCFzLzmk8va9VY3DM%2B1ksVZ7Hvb6FWZTBhI%2BzqoNHQu>

⁴⁸ UNCRC, Concluding observations on Bolivia (2023), CRC/C/BOL/CO/5-6, § 42(d). <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsvJSC.KYRqRleusSdkajUSQE%2BVREliSh5Abo8QXuz9e462LrmLDMHTmS6PYoEXL%2FoUlicD3Am7ymw7K2v79XdcatLBUO%2BvF7TiiMR1IP7hp9y>

⁴⁹ UNCRC, Concluding observations on Finland (2023), CRC/C/FIN/CO/5-6, § 39(c) <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsvVBUbTYzJAKnGyrgcWDKEEjVMPBVcAoCgvc0IPYdpqsZG3BhVn5%2FLtdR%2BuF%2FhVe8Ei6tMxuNATGxVx55q%2FOYnnyTeaJxm3Gtf3144GBxd%2Bi>

⁵⁰ UNCRC Concluding Observations on Germany (2004), CRC/C/15/Add. 226, §§ 54-55. Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CRC/C/15/Add.226&Lang=En

⁵¹ UNCRC, Concluding observations on Finland (2023), § 39(c).

⁵² Joint general comment No. 4 and No. 23 (2017), §37.

⁵³ ECRE and Red Cross EU Office, “Disrupted Flight – The Realities of Separated Refugee Families in the EU”, 2014, p. 21. Available at:

https://redcross.eu/uploads/files/Positions/Migration/Legal%20avenues/RCEU%20ECRE%20-%20Family%20Reunification%20Report%20Final_HR.pdf

⁵⁴ Frances Nicholson, “The “Essential Right” to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification”, United Nations High Commissioner for Refugees, 2nd edition, 2018, p. 132. Available at: https://www.unhcr.org/dach/wp-content/uploads/sites/27/2018/03/CH_Essential-right-to-family-unity_Frances-Nicholson_2018_Long-version.pdf

⁵⁵ Joint general comment No. 3 and No. 22 (2017), § 42.

⁵⁶ Joint general comment No. 4 and No. 23 (2017), § 39.

the context of international migration are treated first and foremost as children".⁵⁷ The intervenors note that solutions to this problem have been considered. For example, one solution would be to allow the procedures for family reunification that cannot be fulfilled to be carried out by the Embassy of another State, as is the case for consular rights procedures for EU citizens.⁵⁸ Of course, this requires an international cooperation that is a duty of both receiving States and States of origin.⁵⁹

16. **Article 7 CRC** provides that children have the right from birth to know and be cared for by their parents. In relation to the child's development, the Committee has also urged State Parties to take the necessary steps to ensure parents are able to take primary responsibility for their children.

17. **Article 18 CRC** pertains to the right to shared parental responsibilities for a child's upbringing and development. As highlighted by **GC No.7**, States should respect the primary responsibility of parents, which involves the obligation to not separate children from their parents, unless it is in the child's best interests.⁶⁰ As such, States should take all necessary steps to ensure parents can take primary responsibility for their children, and support parents in fulfilling their responsibilities, such as by reducing harmful deprivations, disruptions and distortions in a child's care, or remedying it when it has occurred due to other circumstances.⁶¹

18. Article 10 is closely related to **Article 9(1) and (3) CRC** which explicitly concern children's right not to be separated from their parents unless it is in their best interests. GC No.14 emphasises the importance of the family as "*the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children*".⁶² Preventing family separation and preserving family unity is thus essential for the protection of children.⁶³ In the context of migration, while the Committee acknowledges the legitimate interest of States in enforcing migration laws, these must be balanced against a child's right not to be separated from his or her parents.⁶⁴ GC No.14 further states that due to the grave impact of a child's separation from his or her parents, separation should only occur as a measure of last resort, such as when the

⁵⁷ Joint general comment No. 3 and No. 22 (2017), § 11.

⁵⁸ Charter of fundamental rights of the European union (2000/c 364/01), Article 46; Consolidated version of the treaty on the functioning of the European union (2012/C 326/49), Articles 20 and 23.

⁵⁹ Joint general comment No. 4 and No. 23 (2017), §37: "*States should develop effective and accessible family reunification procedures that allow children to migrate in a regular manner, including children remaining in countries of origin [...]. While this duty is primarily for receiving and transit countries, States of origin should also take measures to facilitate family reunification.*"; Human Rights Council, Eleventh session, Report of the Special Rapporteur on the human rights of migrants, 15 May 2009, A/HRC/11/7, §51. Available at:

<https://documents.un.org/doc/undoc/gen/q09/132/23/pdf/q0913223.pdf?token=b3Fp2Y0rw0ZdzBN8TQ&fe=true> : "*it is important that States of origin develop policies and strengthen bilateral, regional and international cooperation to reduce the number of unaccompanied children seeking to join their parents or other family members in host countries through regular channels.*"

⁶⁰ UNCRC, General comment No. 7 (2005) Implementing child rights in early childhood, § 18.

⁶¹ Ibid.

⁶² UNCRC, General comment No. 14 (2013), § 59.

⁶³ Ibid., § 60.

⁶⁴ *O.M. v. Denmark* (CRC/C/94/D/145/2021), 19 September 2023, § 8.7.

child is in danger of experiencing imminent harm or when such separation is necessary.⁶⁵ States should support parents in assuming their parental responsibilities, and restore or enhance the family's capacity to care for the child.⁶⁶ In *N.R. v. Paraguay*, the Committee has taken into consideration and assessed whether the State Parties' authorities had adopted effective measures to ensure the preservation of personal relations where child and parent were separated, and concluded that the State Party had failed to take effective steps to guarantee the right of the applicants daughter to maintain personal relations and direct contact with her father.⁶⁷

19. Joint GC No.3 and No.22 also states that any differential treatment of migrants must be lawful and proportionate, in pursuit of a legitimate aim and in line with the child's best interests and international human rights norms and standards.⁶⁸ Indeed, the principle of non-discrimination should be at the centre of all migration policies and procedures, regardless of the migration status of the children or their parents.⁶⁹ **This also applies in the consideration of requests for family reunification, where children must not be denied access to reunification with their parents by virtue of their country of origin or by virtue of the (lack of) diplomatic relations between the country of origin and destination country.**

20. **The intervenors submit that State Parties should ensure access to family reunification in order to respect the right to parental care, parental responsibility, and the right to family unity as a fundamental unit. This is subject to exceptions only where they are legitimate, necessary, and proportionate. In striking such a balance, the best interests of the child must be given paramount importance and the risks posed to the child must be minimised in the reunification process.**

Relevant comparative regional legal standards

21. **With regard to Article 41(b) CRC**, the intervenors invite the Committee to consider the other international and regional obligations of the State Party to respect the rights of the child when deciding on the outcome of a request for family reunification. The intervenors note that the respondent State is a Party to the ECHR and is also bound by EU law. The intervenors further note that the Committee has previously applied EU law to a case submitted to it,⁷⁰ has taken into consideration judgments by the European Court of Human Rights (ECtHR) to inform the scope of, and obligations entailed under provisions of the CRC,⁷¹ and has referred to judgments of the ECtHR to illustrate the broad consensus

⁶⁵ UNCRC, General comment No. 14 (2013), § 61.

⁶⁶ *Ibid.*

⁶⁷ *N.R. v Paraguay* (CRC/C/83/D/30/2017), 3 February 2020, § 8.4.

⁶⁸ Joint general comment No. 3 and No. 22 (2017), § 22.

⁶⁹ *Ibid.*

⁷⁰ The Committee refers to and applies the Dublin III Regulation in *Z.M. v Switzerland* (CRC/C/92/D/101/2019), 25 January 2023, § 9.6.

⁷¹ The Committee adopts considerations from the ECtHR in *Z.M. v Switzerland* (CRC/C/92/D/101/2019), 25 January 2023, § 9.8; and in *J.M. v Chile* (CRC/C/90/D/121/2020), 1 June 2022, § 8.8. In *N.B. v Georgia* (CRC/C/90/D/84/2019), 1 June 2022, §§ 7.5-7.6, the Committee notes the requirements for an effective criminal investigation into allegations of violence against children as laid out by the ECtHR.

in international law regarding the paramount importance of the child's best interests.⁷²

Relevant provisions of the ECHR and the comparative approach of the ECtHR

22. The intervenors have frequently drawn the attention of the ECtHR to Article 53 ECHR which prohibits any construction of rights of the ECHR in a way that would limit rights under other international agreements, **including in particular the CRC and the Committee's views and comments**.⁷³ The intervenors similarly invite the Committee to consider, in the context of Article 41(b) CRC, the relevant provisions of the ECHR and the approach of the ECtHR to cases of family reunification concerning children.
23. The ECHR does not contain a specific children's rights provision nor a specific right to family reunification. Article 8 ECHR mirrors Article 16 UNCRC and protects the right to respect for private and family life and has been invoked in numerous ECtHR cases concerning family reunification.⁷⁴
24. The ECtHR has made clear that refugees **are not responsible for the separation of their family or the discontinuation of family life**.⁷⁵ It has therefore clearly stated that family unity and the right to family life is "*an essential right of refugees and that family reunion is an essential element in enabling persons who had fled persecution to resume a normal life*".⁷⁶
25. The **Grand Chamber of the European Court of Human Rights** (the GC-ECtHR) has set out examples of where it has found that States had a positive obligation to grant family reunification under Article 8 ECHR.⁷⁷ This includes cases where a) children are involved in the application and b) where "*there were insurmountable obstacles in the way of the family living in the country of origin of the person requesting reunification*".⁷⁸ The ECtHR has also recognised the ties between parent and child as a "*fundamental element*" of family life and stated that measures which prevent the development of this relationship may constitute an interference with rights under Article 8 ECHR.⁷⁹ The ECtHR will also take certain factors into account when deciding whether Article 8 has been violated, including for example, the **age of the children concerned and the extent to which said children are dependent on their parents**.⁸⁰

⁷² The Committee notes the broad consensus in connection with the best interests of the child referencing ECtHR judgment *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019 in its view *B.J. and P.J. v. Czechia* (CRC/C/93/D/139/2021), 15 May 2023, § 8.4.

⁷³ See European Convention on Human Rights (1950), article 53.

⁷⁴ See *M.A. v. Denmark* [GC], no. 6697/18, §§ (i)-(v), 9 July 2021; *Tanda-Muzinga v. France*, no. 2260/10, 10 July 2014; *El Ghatet v. Switzerland*, no. 56971/10, 8 November 2016.

⁷⁵ *Tanda-Muzinga v. France*, no. 2260/10, § 75, 10 July 2014; UN Convention Relating to the Status of Refugees (1951).

⁷⁶ *Tanda-Muzinga v. France*, no. 2260/10, § 75, 10 July 2014; *M.A. v. Denmark* [GC], no. 6697/18, § 138, 9 July 2021.

⁷⁷ *M.A. v. Denmark* [GC], no. 6697/18, § 135 (i)-(v), 9 July 2021.

⁷⁸ See various other examples in *M.A. v. Denmark* [GC], no. 6697/18, §135 (iv) and (v), 9 July 2021.

⁷⁹ *Santos Nunes v. Portugal*, no. 61173/08, § 66, 22 May 2012.

⁸⁰ See *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005.

26. In such cases concerning the right to respect for family life, the ECtHR will consider whether interferences with individual's rights strike a fair balance between their protection under the ECHR and the interests of the State. The ECtHR makes it clear that this should consist of an "*individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned*" and "*the situation in the country of origin*".⁸¹ The principle of the best interests of children must always be applied when considering a decision concerning family reunification in relation to ECHR rights.⁸² In this respect, **the intervenors highlight the broad consensus in regional and international human rights mechanisms – including the ECtHR - that a child's best interests must thus be considered in such a balancing exercise.**⁸³ **If a solution chosen is not in the best interests of the child, the grounds for the decision must show that their best interests were in practice treated as a primary consideration.**
27. The ECtHR has held that the "*national decision-making process [must] offer the guarantees of flexibility, promptness and effectiveness required in order to secure the right to respect for family life under Article 8*".⁸⁴ The Court also emphasised that authorities should examine applications "*attentively and with particular diligence*",⁸⁵ and that they should "*give due consideration to the applicant's specific situation.*"⁸⁶
28. The ECtHR has addressed cases where **domestic procedures or policies were overly rigid or presented objective impossibilities for applicants to fulfil certain criteria, therefore amounting to an interference with the right to respect for family life.** In *B.F. and others v Switzerland*, the ECtHR held that the object and purpose of the ECHR calls for an understanding of its provisions which make the requirements practical and effective, rather than theoretical and illusory, in their application to the individual case. Vulnerabilities

⁸¹ *M.A. v. Denmark* [GC], no. 6697/18, §§ 192-193, 9 July 2021.

⁸² *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, 6 July 2010; *Tarakhel v. Switzerland* [GC], no. 29217/12, § 99, ECHR 2014 (extracts); *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005.

⁸³ For regional decisions see *El Ghatet v Switzerland*, no. 56971/10, § 46, 8 November 2016; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 135, 6 July 2010; *Tarakhel v. Switzerland* [GC], no. 29217/12, § 99, ECHR 2014 (extracts); *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 44, 1 December 2005; Internationally, the Human Rights Committee found an unjustified interference with the right to family life since a States Party "*failed to adequately take into consideration the authors' [...] personal situation [and] context in their country of origin*" in Human Rights Committee, Communication No. 2531/2015, *Aden et al v Denmark* CCPR/C/126/D/2531/2015, Views adopted on 25 July 2019, §§ 10.7 and 10.8; The UNHCR Executive Committee says that in application of the principle of the unity of the family and for obvious humanitarian reasons, every effort should be made to ensure the reunification of separated refugee families. This should further be done with the least possible delay. Lastly, such efforts require sufficient flexibility, for example, any "*absence of documentary proof of the formal validity of a marriage or of the filiation of children [should] not per se be considered as an impediment*". See UNHCR Executive Committee Meetings, On Family Reunification No. 24 (XXXII) No. 12A A/36/12/Add.1 (32nd Session, 21 October 1981), §§ 1, 2 and 6.

⁸⁴ *M.A. v. Denmark* [GC], no. 6697/18, §§ 137-139 and 163, 9 July 2021; *Tanda-Muzinga v. France*, no. 2260/10, 10 July 2014; *Mugenzi v. France*, no. 52701/09, 10 July 2014; *Senigo Longue and Others v. France*, no. 19113/09, 10 July 2014.

⁸⁵ *Tanda-Muzinga v. France*, no. 2260/10, § 73, 10 July 2014.

⁸⁶ *Ibid.*, §§ 79 and 82.

and particular situations need to be adequately taken into account.⁸⁷ Requirements, such as those relating to social assistance, or waiting periods, need to be applied with sufficient flexibility. The Court has further stressed that evidentiary requirements must not be enforced in a manner that results in complex and lengthy reunification procedures.⁸⁸ This necessitates adaptability and flexibility in their application to individual cases, ensuring that the rights remain practically accessible, despite the obstacles to family reunification faced by recognised refugees. **The intervenors invite the Committee to consider this view when assessing whether the available standard procedures, routes, or mechanisms for obtaining family reunification were adaptable or offered flexibility. States must be careful not to exclude genuine family members entitled to reunification as a result of the overzealous application of procedural rules or the absence of procedures or mechanisms facilitating reunification. This principle applies a fortiori to the inflexible enforcement of procedural requirements where the genuineness of the family relationships is not in question.**

29. Delays in reunification contexts were addressed by the GC-ECtHR in *M.A. v. Denmark*.⁸⁹ The longer the length of separation, the more likely it is to lead to **“irreparable consequences for the relationship”** and, where children are concerned, to the **“deterioration in the child’s relationship with his or her parent”**.⁹⁰ In *Senigo Longue and Others v. France*, **visas enabling family members to be reunited were granted almost four years after an application for family reunification was issued**.⁹¹ The ECtHR held that the **“prolongation of the difficulties [the applicant] encountered in the course of the proceedings prevented her from asserting her right to live with her children”**.⁹² It held that the **“decision making process did not offer the guarantees of flexibility, promptness, and effectiveness required to ensure respect for the applicants’ right”** under Article 8.⁹³
30. **The intervenors submit that the undue length of proceedings results in the prolonged separation of family members. This is particularly harmful for parent and child relationships and the prospect of establishing a normal family life.**
31. The GC-ECtHR has held that applicants must **be afforded a real possibility** of having an individualised assessment of the interests of family unity.⁹⁴ The intervenors **emphasise the international and European consensus that refugees need to have the benefit of a reunification procedure that is more**

⁸⁷ *B.F. and Others v. Switzerland*, nos. 13258/18 and 3 others, § 105, 4 July 2023.

⁸⁸ *Tanda-Muzinga v. France*, no. 2260/10, § 76, 10 July 2014.

⁸⁹ *M.A. v. Denmark* [GC], no. 6697/18, § 139, 9 July 2021.

⁹⁰ *Santos Nunes v. Portugal*, no. 61173/08, § 69, 22 May 2012; *T.C. v. Italy*, no. 54032/18, § 58, 19 May 2022.

⁹¹ *Senigo Longue and Others v. France*, no. 19113/09, § 52, 10 July 2014.

⁹² *Ibid.*, § 74.

⁹³ *Ibid.*, §§ 74 and 75.

⁹⁴ *M.A. v. Denmark* [GC], no. 6697/18, § 193, 9 July 2021; *M.T. and Others v. Sweden*, no. 22105/18, 20 October 2022, dissenting opinion of Judge Ktistakis, § 3.

favourable than that available to other foreigners.⁹⁵ The ECtHR has also attached considerable weight to international standards in the area of reunification, including the CRC requirement that applications for family reunification should be examined in a **flexible and humane manner**.⁹⁶

32. Maintaining family unity and protecting the ties between children and their parents is an essential element of the right to a family life as protected by Article 8 of the ECHR. Therefore, **States should avoid prolonged separation caused by lengthy national procedures**. Similarly, **States should always ensure that family reunification procedures are not applied in such a way as to undermine the right to family life**. In such assessments, the concrete situation of the persons concerned should always be considered, and the principle of the best interests of the child should be applied effectively.

Relevant provisions of European Union law

33. **Article 41(b) CRC** applies equally to EU law.⁹⁷ The intervenors invite the Committee to consider relevant EU law, by which the respondent State is bound. The two key EU legal instruments governing family reunification for refugees are the EU **Family Reunification Directive (the FRD)**⁹⁸ and the EU **Qualification Directive (the QD)**.⁹⁹ States must not take steps or measures that will exclude precisely those parents and children who were intended to benefit from them.

34. The **FRD re-affirms that the rights of children must be a primary consideration**, with Article 5(5) FRD emphasising that when Contracting States examine an application, they must have due regard (as a primary consideration) **to the best interests of any minor children involved**.¹⁰⁰ This is in line with the obligation contained in Article 24 of the Charter of Fundamental Rights of the European Union (CFREU) that "*in all actions concerning children [taken by public authorities], the child's best interests must be a primary consideration*".¹⁰¹ Article 24 is intended to bring the provisions of the UNCRC with EU law as established in the explanation on Article 24 CRC.¹⁰²

⁹⁵ *B.F. and others v. Switzerland*, no. 13258/18, § 97, 4 July 2023; UNHCR ExCom, Conclusion No. 24 Family Reunification, § 2.

⁹⁶ *Tanda-Muzinga v. France*, no. 2260/10, § 76, 10 July 2014.

⁹⁷ See § 21 *supra*.

⁹⁸ Council of the EU, Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification.

⁹⁹ European Parliament and Council of the EU, Directive 2011/95/EU 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 (recast).

¹⁰⁰ Council of the EU, Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Article 5(5).

¹⁰¹ Charter of fundamental rights of the European Union, 2012/c 326/02, Article 24(2).

¹⁰² Explanations relating to the Charter of Fundamental Rights of the European Union (Version 2007). Available at:

https://www.cvce.eu/en/obj/explanations_relating_to_the_charter_of_fundamental_rights_of_the_european_union_version_2007-en-11b81cf7-22fc-4463-873f-1db65a733a8c.html

35. In addition, under the same article of the CFREU, public authorities are obliged to ensure that the views of the child are given due weight in matters which concern them.¹⁰³
36. The FRD provides for derogations from procedural requirements for refugees,¹⁰⁴ emphasising that they require special assistance given their circumstances, **particularly when it comes to the family reunification process.**¹⁰⁵
37. The Court of Justice of the European Union (CJEU) has considered how the FRD and the QD are to be interpreted in a number of cases¹⁰⁶ including cases involving recognised refugees. The Committee is invited to refer to the significant recent judgement of *X, Y, A and B v État Belge*.¹⁰⁷ The case concerned the mandatory requirement in Belgian law that an application for family reunion be made in person by the family members of a recognised refugee in Belgium, at a Belgian diplomatic post, notwithstanding any practical obstacles. The CJEU judgement and the Advocate General's opinion emphasised that due regard must be paid to the special situation of refugees and that procedural requirements of national law which were impossible or excessively difficult to meet have **"the effect of rendering the exercise of the right to family reunification impossible in practice"**¹⁰⁸ and thus **deprive the Directive of its effectiveness.** It falls to the Member State to provide for the possibility of carrying out the verifications of family ties and identity at the end of the procedure and at the same time as when the documents authorising entry are issued.¹⁰⁹ The intervenors suggest that this approach applies *mutatis mutandis* to a situation where no diplomatic post exists.
38. The CJEU stressed the importance of giving "*special attention*" to third-country nationals who have been granted refugee status, particularly taking into account the reasons for them leaving their home countries and the obstacles they face in leading a normal family life.¹¹⁰
39. CJEU jurisprudence has also indicated the need to take the general situation in the country of origin into consideration **when assessing the possibility to submit documents required for family reunification.**¹¹¹ Explanations for the inability to provide such evidence cannot be deemed implausible by the competent authorities solely on the basis of the general information available concerning the situation in the country of origin, without taking into

¹⁰³ Charter of fundamental rights of the European Union, 2012/c 326/02, Article 24(1).

¹⁰⁴ Council of the EU, Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Article 12.

¹⁰⁵ *Tanda-Muzinga v. France*, no. 2260/10, § 75, 10 July 2014.

¹⁰⁶ For example; CJEU, *G.S. and V.G. v. Staatssecretaris van Justitie en Veiligheid*, C-381/18 and C-382/18, 12 December 2019, §§ 60-61; or *Minister van Buitenlandse Zaken v. K and A*, C-153/14, 9 July 2015, §§ 5 and 46.

¹⁰⁷ CJEU, *X, Y, A, and B v État Belge*, Case C-1/23 PPU, 18 April 2023.

¹⁰⁸ *Ibid*, § 54.

¹⁰⁹ *Ibid*, § 90.

¹¹⁰ *Ibid*, § 43.

¹¹¹ CJEU, *E. v. Staatssecretaris van Veiligheid en Justitie*, C-635/17, 13 March 2019.

consideration the specific circumstances of the family concerned as well as the particular difficulties they have encountered.¹¹²

40. Finally, Article 13 of the FRD implies that the family reunification application and procedure must precede the application for a visa to come to the country of destination and that the latter needs to be connected and expeditious.¹¹³ Any disjointedness in procedure is particularly problematic in the case of children trying to reunite with their parents, for whom, according to this Committee, “states should develop effective and accessible family reunification procedures” and “take measures to facilitate family reunification”.¹¹⁴
41. In summary, to comply with EU standards, these procedures and mechanisms should be applied effectively in a flexible manner and respecting the best interests of the child. Disproportionate procedural requirements are incompatible with the essence of the right to respect for his private and family life.
42. **The intervenors invite the Committee to refer to the other regional and international standards, including the ECHR and EU law, concerning the right to respect for family life and family reunification when interpreting the relevant Articles of the CRC. The procedures and mechanisms for guaranteeing respect for children’s rights – and protecting their relationships with their parents – should not fall below the standard of any Convention to which the State is a party, including relevant EU and ECHR law detailed above.**

¹¹² Ibid.

¹¹³ Council of the EU, Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, Article 13.

¹¹⁴ Joint general comment No. 4 and No. 23 (2017), § 37.