

# Appropriate Procedures to Guarantee Access to Effective Remedies for Migrant Children in Detention and when Subject to Alternatives to Detention

## Training Materials on Alternatives to Detention for Migrant Children



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# **Appropriate Procedures to Guarantee Access to Effective Remedies for Migrant Children in Detention and when Subject to Alternatives to Detention**

Training Materials on Alternatives to Detention for Migrant Children

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CADRE project - April 2022

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This training module is the second in a series of training materials relevant to alternatives to detention for migrant children developed as part of the CADRE (Children's Alternatives to Detention protecting their Rights in Europe) project. The series includes the following training modules:

- I. Care of migrant children: the need for alternatives to detention
- II. Alternatives to detention: practical example of care of migrant children
- III. Appropriate procedures to guarantee access to effective remedies for migrant children in detention and when subject to alternatives to detention
- IV. How to communicate and work with children subject to alternatives to detention

## I. Introduction

Many migrant and refugee children, and in particular asylum-seeking and other third country national unaccompanied minors, find themselves in an especially vulnerable situation, owing to their uncertain immigration status and disrupted attachment to primary caregivers. Their human rights can best be guaranteed with a tailored, interdisciplinary approach, which requires that professionals working with them cooperate to make sure that a durable solution is identified and applied.

Children, just as everybody else, should have a say in the decisions affecting them. Children are not just subjects of protection – they are holders of human rights. Owing to their age, however, they need an enhanced level of protection in order to be able to effectively enjoy their rights. That is why the right to be heard must be subject to a careful analysis and the exact manner of its application must be assessed on a case-by-case basis.

This module will look at the key legal requirements to uphold the procedural and substantive rights of children, through a child-sensitive procedure.

## II. The inherently detrimental effects of detention

It must be stressed on the outset that detention for purposes of immigration control is never in the best interests of the child. Detention has inherently detrimental effects on the mental health and cognitive development of children, and therefore will generally be in violation of Articles 3 and 5 of the European Convention on Human Rights (ECHR) and articles 7 and 9 of the International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup>

According to the [International Detention Coalition](#) (IDC),

*"While a range of factors may impact on a detained child's psychosocial and developmental well-being, detention itself causes or reinforces children's mental and emotional health problems. Some children suffer from diagnosable mental illnesses, such as depression or PTSD. Others can experience more general problems affecting their wellbeing."<sup>2</sup>*

The situation is especially difficult for unaccompanied children. They may experience disrupted emotional and cognitive development,<sup>3</sup> which, when further induced by the trauma of being detained, makes it hard for them to effectively enjoy their procedural rights – which ought to prevent them being detained in the first place.

## III. The right to liberty

The right to liberty is protected under international law, including in general human rights treaties, including the European Convention (article 5) on Human Rights (ECHR) and of the International Covenant on Civil and Political Rights (ICCPR) (article 9). Under these provisions, detention is only lawful when it is not arbitrary, and under very specific circumstances.

### Article 9 ICCPR

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*  
(...)

<sup>1</sup> Please see the CADRE Training module I. for more details.

<sup>2</sup> International Detention Coalition (IDC), *Captured Childhood. Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention*, June 2012, p. 49.

<sup>3</sup> Hungarian Helsinki Committee, *Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual*, Volume 2, 2015, available at: <https://www.refworld.org/docid/5582addb4.html> [accessed 20 January 2022].

4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

#### **Article 5 ECHR**

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

(...)

- f. *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*

(...)

4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

The EU Reception Conditions Directive<sup>4</sup> also provides an important guarantee when it lays down in Article 8.3 the circumstances under which an asylum-seeker can be detained.

#### **Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on standards for the reception of applicants for international protection (recast) (EU Reception Conditions Directive), Doc. no. 32013L0033**

##### **Article 8**

##### **Detention**

(...) 3. An applicant may be detained only:

- a. in order to determine or verify his or her identity or nationality;
- b. in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
- c. in order to decide, in the context of a procedure, on the applicant's right to enter the territory;
- d. when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
- e. when protection of national security or public order so requires;
- f. in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

The grounds for detention shall be laid down in national law

Detention for other purposes in the asylum regime will not be lawful under the Directive.<sup>5</sup>

The European Court of Human Rights (ECtHR) held that the main purpose of Article 5 of the Convention is to protect the individual from arbitrariness.<sup>6</sup>

<sup>4</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), EU, Official Journal L180/96 ("[EU Reception Conditions Directive](#)").

<sup>5</sup> See also CADRE Training module I. section 1.4 on deprivation of liberty.

<sup>6</sup> *Amuur v. France*, ECtHR, Application No. 19776/92, Judgment of 25 June 1996, para.42.

In the case of *Saadi v. the United Kingdom*,<sup>7</sup> the Court held that:

*"To avoid being branded as arbitrary (...) detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (...); and the length of the detention should not exceed that reasonably required for the purpose pursued."*

Bearing in mind the above-described inherently negative impacts, the detention of children for purposes of immigration control is presumptively unlawful. The Joint General Comment<sup>8</sup> of the UN Committee on the Rights of the Child and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families states that: "any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice."

It is therefore essential that children who are in detention have access to an effective remedy in order to ensure their release from arbitrary detention. Under Article 5(4) of the ECHR and articles 2(3) and 9(4) of the ICCPR, States must ensure this effective remedy and oversight over the legality of detention.

The Court has held that in the case of minors, the judicial review of detention must be expeditious and must be carried out with diligence at all levels. Where the children are very young, such a review is "urgent."<sup>9</sup>

In order to be effective, the judicial review must be accessible. In the case of *Rahimi v. Greece*, the Court found that the Greek authorities violated the right of an unaccompanied minor by "informing" them of the possibility of a judicial review in Arabic, which was not a language he could understand. In the very same case, the Court held that the child's inability to contact a lawyer was an important factor in the violation of Article 5(4).<sup>10</sup>

## IV. The right to be heard

### 4.1 Legal principles

The UN Convention on the Rights of the Child (CRC) also provides for the right to be heard as a human right of all children in Article 12 – not just in proceedings in relation to detention, but in all procedures concerning children.

Article 12 CRC:

*"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

When assessing the best interests of the child under Article 3 of the CRC, the UN Committee on the Rights of the Child (CRC Committee) explained in its General Comment No. 14 that: "assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. (...) The evolving capacities of the child must be taken into consideration when the child's best interests and right to be heard are at stake. The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests."<sup>11</sup>

<sup>7</sup> *Saadi v. the United Kingdom*, ECtHR, Application No. 13229/03, Judgment of 29 January 2008, para.74.

<sup>8</sup> Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and 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, 16 November 2017, para. 5.

<sup>9</sup> *G.B. and Others v. Turkey*, Application no. 4633/15. paras. 167, 186.

<sup>10</sup> *Rahimi v. Greece*, ECtHR, Application No. 8687/08, Judgment of 5 April 2011, para. 120.

<sup>11</sup> General Comment No. 14 (2013) of the Committee on the Rights of the Child on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1 of the CRC), [CRC/C/GC/14](#), 29 May 2013, para. 44.



Therefore the child's views on their situation are central to the assessment on the best interests of the child. It is a cornerstone of a child-friendly procedure.

The CRC recommends the child is heard directly wherever possible. If the child's views are transmitted through a representative these must be transmitted correctly. The representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.

**UN Committee on the Rights of the Child (CRC), General Comment No. 12 (2009) on the Right of the Child to be Heard, [CRC/C/GC/12](#)**

**Article 8**

Detention

35. After the child has decided to be heard, he or she will have to decide how to be heard: "either directly, or through a representative or appropriate body". The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.
36. The representative can be the parent(s), a lawyer, or another person (inter alia, a social worker). However, it must be stressed that in many cases (civil, penal or administrative), there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative. The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation. Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.
37. The representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society). Codes of conduct should be developed for representatives who are appointed to represent the child's views.

In the case of *Sahin v. Germany*,<sup>12</sup> the European Court of Human Rights also interpreted the right to be heard. The child who was concerned in the case was four years old at the material time. The child was heard several times by an expert who then produced their opinion on the child, and was then heard by the competent national court. The child was therefore not heard directly, but through a third party.

The ECtHR held the following:

*"As regards the issue of hearing the child in court, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts [...]. It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned."*

When a detained child is given access to a court, they also must be heard. The ECtHR held that the opportunity of a detainee to be heard is among the fundamental guarantees of procedure applied in matters of deprivation of liberty.<sup>13</sup> In administrative proceedings relevant for children, including in juvenile detention centers, a child should have the right to be heard and enjoy the other rights "consistent with the procedural rules of national law."<sup>14</sup>

The right to be heard is not just a legal standard under international law, but it is a clear legal provision under the law of the European Union too. Since the scope of the Reception Conditions Directive covers asylum-seekers, the provisions of the Procedures Directive<sup>15</sup> regarding personal interviews shall apply, together with the provisions of both directives on the special guarantees for unaccompanied minors. While the reasons for fleeing are not always directly relevant in identifying the best type of accommodation, based on the above, the individual circumstances of the child are highly relevant.

Similarly to Article 3 CRC, Article 24 of the Charter of Fundamental Rights of the European Union (Charter) also guarantees that the best interests of the child shall be taken into account as a primary con-

<sup>12</sup> *Sahin v. Germany*, ECtHR, Application No. 30943/96, Judgment of 20 November 2002.

<sup>13</sup> *Kampanis v. Greece*, ECtHR, Application No. 17977/91, Judgment of 13 July 1995, para. 47.

<sup>14</sup> CRC, GC 12, para 67.

<sup>15</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), EU, Official Journal L180/60-95, ("[EU Procedures Directive](#)").

sideration in all actions concerning children. In the case of *Aguirre Zarraga*,<sup>16</sup> the Court of Justice of the European Union (CJEU) held that the child's right to be heard, must be interpreted in the light of Article 24 of the Charter, which requires that a child should be able to express their views in legal proceedings.

The CJEU said that "(W)hile remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter of Fundamental Rights." (para 64).

The fact that hearing the child might be harmful to their psychological health should also be taken into account.<sup>17</sup> Additionally, the right to be heard is a general principle of EU law.<sup>18</sup>

Unaccompanied children may not always be in a position where they are able to directly make their views known to the authorities themselves, or at least not fully. This can be attributed to many factors, including, but not limited to

- their age – younger children do not always have the necessary maturity to make their views known verbally in an articulate manner
- their traumatisation – the effects of persecution and / or serious harm, together with the traumatic events suffered along the way to Europe, paired with the inherently detrimental impacts of detention can lead to children not being able to express fully and freely their thoughts on their situation, let alone reflect on it.

These factors must always be assessed on a case-by-case basis. There should never be an automatic default position. From this, it logically follows that national laws stating that children can only be heard in courts above a certain age will be in breach of Article 12 CRC.

In such situations, Article 12 (2) of the CRC can be called upon, which sets forth that in order for the right to be heard to be effective,

*"(...) the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

Thus where children are not, for any reason, in a position to address the authorities directly, professionals working with them / on the field of child protection have a heightened responsibility to understand their needs, vulnerabilities and individual circumstances. Social workers, teachers and psychologists have a key role in analysing and understanding the hopes and fears of children in such situations (e.g. through their drawings).<sup>19</sup>

## 4.2 Enabling children to be heard through a cooperative approach

Children can only effectively exercise their right to be heard and make their views known if the professionals helping them actively create such an environment where it is possible.

The UN Committee on the Rights of the Child has set out in detail the scope of the obligation regarding the right of the child to be heard in its General Comment 12.

### **CRC, General Comment No. 12 (2009) on the Right of the Child to be Heard, CRC/C/GC/12**

25. The realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child's clarified decisions.
34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly

<sup>16</sup> *PPU Josega Andoni Aguirre Zarraga v. Simone Pelz*, Court of Justice of the European Union (CJEU), case C-491/10, Judgment of 22 December 2010 (First Chamber), para. 63.

<sup>17</sup> *Ibid.*, para. 64.

<sup>18</sup> *M.M. v. Minister for Justice, Equality and Law Reform*, CJEU, case C-277/11, Judgment of 22 November 2012 (First Chamber), para. 31.

<sup>19</sup> Masoumeh Farokhi, *Masoud Hashemi: The Analysis of Children's Drawings: Social, Emotional, Physical and Psychological aspects*, December 2011, <https://www.sciencedirect.com/science/article/pii/S1877042811022580>

information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

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

The **first** necessary prerequisite is therefore that children should be aware of the relevant information concerning all of the main issues in their case, including their rights and the range of potential outcomes. Such information must always be presented in an understandable manner, in a language children will understand.<sup>20</sup> Legalistic, technical terms and expressions should be avoided.<sup>21</sup>

The **second** is the establishment of mutual trust to the highest possible extent. It may be a time consuming effort and feel a bit alien to legal practitioners, but forming a human connection is key in gaining trust. Children will be very reluctant (or simply just unable) to share deep, often hurtful, re-traumatising memories or experiences with adults in positions of power who for them can very easily be one of the same. The process of trust building is elaborated below.

The **third** necessary prerequisite is to understand the psychological and social needs of the child. This is among the initial steps of the best interests determination which ought to be conducted in every single case.

Unaccompanied minors in most cases have gone through several traumatic events, starting from the original trauma of persecution / serious harm, to the loss of primary connections (parents) and being uprooted without close family. Attachment disruption leads to mistrust.<sup>22</sup> Previous harm, including the harm suffered on the way to Europe – for example, police violence or unlawful detention can also have a severely detrimental effect on children’s psychological well-being and ability or willingness to trust persons of authority.

All of the above must be assessed and dealt with in a manner which is adequate to the age and maturity of the child, taking into account the cognitive abilities and skills of children in different ages.

As explained by the [Hungarian Helsinki Committee](#):

*"Children are not simply "adults in miniature"; they are undergoing rapid development which does not finish until as late as early twenties. Some changes are very obvious, such as when a baby learns to walk, or the bodily changes in an adolescent entering puberty. But other changes cannot be detected by our eyes, such as development of parts of the brain in adolescence which influence how that person thinks."<sup>23</sup>*

The CREDO training manual *Credibility assessment in asylum procedures, Volume 2* explains in detail the bodily and cognitive changes which influence the maturity of children, and therefore has a direct influence on the effective enjoyment on the right to be heard.<sup>24</sup>

Therefore, the best way to enable children to effectively make their views known has to be assessed on a case-by-case basis. As referred to above, the right to be heard can be understood under the best interests of the child principle, and in fact constitutes an important element of it.

Professionals working with children in different capacities therefore should meet on a regular basis to discuss their views on the child and to inform each other of the recent stages of their work. Together they will be able to identify key necessities of the child and effectively work towards creating a physically and psychologically safe environment for the child where they can effectively make their views known.

An interdisciplinary cooperation between various actors – legal guardians, lawyers, accommodation facility workers, social workers, psychologists, teachers and the asylum authority staff – is important. All assessment must consider the opinion of the child, who should be presented with the facts of their case in an age appropriate manner.

In this, involving the child and hearing the views of the child is key. In order to enable effective participation and to gain the trust of children in their various activities, these professionals should always

<sup>20</sup> CRC, GC 12, paras 21 and 124.

<sup>21</sup> See the Hungarian Helsinki Committee’s e-learning site on accessible, plain language can help professionals improve their plain language skills: <https://elearning.helsinki.hu/?lang=en>.

<sup>22</sup> Hungarian Helsinki Committee, *Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual*, op. cit., p. 104.

<sup>23</sup> Hungarian Helsinki Committee, *Credibility Assessment in Asylum Procedures - A Multidisciplinary Training Manual*, op. cit., p. 94.

<sup>24</sup> Ibid, p. 94 – 95.

inform the child of their roles, professional boundaries and the possible consequences of their actions. According to the [Council of Europe](#):

*"Where professionals involved in decision making are doctors, nurses, teachers, social workers, early years workers or managers who already know the child or children involved, children will use past experiences of those individuals as the basis for decisions about whether to trust them."*

Openness, transparency and availability help build trust and will lead to the child feeling safe around various professionals working on their case. Feeling safe is a cornerstone of an environment where children can express their views freely.

Professionals must also be aware that, according to the [Council of Europe](#):

*"Prior to arriving in the host country and/or during the journey, smugglers were the main source of information for most children. However, the information received during this time was found to be flawed and inaccurate. Upon arrival in the host country, information was made accessible by public servants in different capacities (police officers, social workers, guardians, educators) and private actors (aid workers and NGO workers). Children expressed frustration over the disparity of information they had received at different stages of their journey. Children also reported receiving information through interpreters who did not speak their native language or a common language but only a similar language; this was identified as a barrier to good communication."<sup>26</sup>*

### 4.3 Individual approach

All adults working with children should remember the following, as highlighted by the [Council of Europe](#):

*When investigating children's views, professionals are required to take them seriously and to recognise the diverse and evolving capacities of each individual child. Children can form and express views from the earliest age, but the nature of their participation, and the range of decisions in which they are involved, will necessarily increase in accordance with their age and evolving capacities. This requires professionals to recognise the diverse capacities of each individual child and tailor their interactions with them in a way that neither overestimates nor underestimates their capacity. For some this may be a fundamental shift from the way they view children, by not seeing age as a barrier. Clearly, very young children and some children with disabilities cannot do certain things just as some adults have limited capabilities. This should not bring into question their capacities."<sup>27</sup>*

When adopting to the above-mentioned legal principles to the individual case, professionals must be aware that all children are different, and that their maturity and previous experiences are crucial in adopting the best approach. As highlighted by [UNHCR](#):

*"Childhood is a period of a person's development. As they grow, children's brains mature, and their language and social skills evolve. Each child grows and develops differently, both physically and emotionally, and this is influenced by family, social and economic factors. Persecution, conflict, flight, and family separation have a significant impact on children's development. That said, children are resilient, and their capacities continue to evolve. A "one size fits all" approach in protection procedures does not adequately and appropriately advance children's protection; these procedures need to consider and adapt to each child's specific developmental needs and capacities."<sup>28</sup>*

In summary, children need active and dedicated help in being able to fully participate in the procedures affecting them and make their views heard. This creates a legal responsibility for all adult professionals working with children.

### 4.4 Legal Guardians and Legal Representatives

In relation to children facing legal proceedings, two critical actors are the guardian, charged with the statutory representation of the child by law, and the legal representative (lawyer), who represents the child based on a mandate from the guardian, with the agreement of the child.

Procedures Directive, Article 25 (1)

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

<sup>25</sup> Council of Europe, *Listen – Act – Change. Council of Europe Handbook on children's participation*, October 2020, p. 35.

<sup>26</sup> Council of Europe, *Child-friendly information for children in migration: What do children think?*, May 2018, para. 22.

<sup>27</sup> Council of Europe, *Listen – Act – Change*, op. cit., p. 38.

<sup>28</sup> UNHCR, *Technical Guidance: Child-friendly Procedures*, 2021, p. 4.

- (a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of a representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. The representative may also be the representative referred to in Directive 2013/33/EU;
- (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview.

While a guardian and a legal representative are two different actors, [UNHCR](#) notes that these terms "are often used in context of asylum procedures, durable solutions, and alternative care. However, the meaning of these terms as used in international legal and policy framework remains inconsistent."<sup>29</sup>

The discussion below describes how both actors have a clearly defined, complimentary and important role in upholding the fundamental rights of children.

#### 4.4.1 Legal guardian

The appointment of a guardian is inherent to effectively protect the rights of unaccompanied minors. According to the definition of [EASO](#), the guardian "is an independent person who safeguards a child's best interests and general well-being, and to this effect complements the limited legal capacity of the child. The guardian acts as a statutory representative of the child in all proceedings in the same way that a parent represents his or her child."<sup>30</sup>

Based on the role of the representative mentioned above, they could very well be a lawyer too. However, the best interests of the child principle indicates that the guardian should be a person who has a strong background in child protection, and not solely in the legal standards applicable.

The CRC Committee's General Comment No. 6. Makes this clear when it states the following:

21. Subsequent steps such as the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.
- (...)
33. States are required to create the underlying legal framework and take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of child care, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are -12- appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role."

<sup>29</sup> UNHCR, Technical Guidance, p. 22.

<sup>30</sup> EASO, Practical guide on the best interests of the child in asylum procedures, 2019, p. 11.



The Fundamental Rights Agency of the European Union also holds that the appointment of a guardian shall be immediate upon identification of an unaccompanied or separated child. In its handbook "[Guardianship for children deprived of parental care](#)" the Agency highlights the following:

*"The guardian plays a central role in ensuring access to legal assistance for unaccompanied children or in supporting the child in finding an adviser. The guardian is considered to be an independent person who safeguards the child's best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way that parents do. [...] The guardian should be the person with the most comprehensive view of the child's situation and individual needs. A guardian is in a unique position to connect the various authorities and the child. The guardian can also help to ensure continuity in the protection of the child and to enable the child to participate effectively in all decisions affecting him or her, in line with the provisions of Article 12 of the CRC."*

These sources indicate that the guardian should be a child protection professional. Ideally, they should be part of the child protection system, and not under the supervision of the same authority which handles the child's asylum or immigration procedure, in order to ensure professional and procedural independence.

Defence of Children International (DCI) compiled a 10 point [summary](#) standard for guardians.<sup>31</sup> According to this, the roles and responsibilities of a guardian are:

- to advocate for all decision to be taken in the best interest of the child, aimed at the protection and development of the child
- to ensure the child's participation in every decision which affects the child, and provides information in a child friendly way
- to protect the safety of the child
- to act as an advocate for the rights of the child
- to act as a bridge and focal point for the child and other actors involved
- to ensure the timely identification and implementation of a durable solution
- to treat the child with respect and dignity
- to form a relationship with the child built on mutual trust, openness and confidentiality
- to be accessible
- to be equipped with relevant professional knowledge and competences.

The appointment and active presence of a guardian who is a child protection professional is a minimum standard.

General Comment No.6 of the CRC state that: "States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State (...)."<sup>32</sup>

In order to establish basic trust with the child and to start mapping the needs and vulnerabilities of the child, a guardian should be given a chance to consult with the child before the child is heard by an authority or court.

A guardian is ideally placed to serve as a bridge between various actors and identify not only the needs and vulnerabilities of children, but also their own professional barriers. Guardians should ideally be in the centre of a network of professionals who cooperate and complement each other's competences. As mentioned above, the empowerment of children is a key to enable them to make their views known, and that can be achieved through a multidisciplinary cooperation between various professionals under the coordination of the guardian.

The expectations towards guardians are high, just like the responsibilities on their shoulders. Unfortunately, this is not always matched with adequate funding, professional support and supervision and an attractive career path. It is therefore important that guardians rely on other professionals, such as lawyers, psychologists and social workers.

### **The significance of a guardian for a child in detention**

When an unaccompanied minor is detained, the guardian's role is even more important. In such cases, guardians' tools are very wide and can be used to make sure that the best interests of the child are upheld. Bearing in mind the importance of cooperation between guardians and other professionals, the key possible actions are:

- initiating meetings with a psychologist to provide immediate intervention against the inherently detrimental effects of trauma
- requesting access to all documents and evidence based on which the child is detained

<sup>31</sup> See, Core Standards for guardians of separated children in Europe, <https://resourcecentre.savethechildren.net/pdf/7001.pdf/>

<sup>32</sup> General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin, CRC, Un Doc. CRC/GC/2005/6, 1 September 2005, para 33.

- maintaining regular contact with the child, possibly in person
- mandate a lawyer with the task of ending the detention of the child
- consult with alternative care providers on possible offers of a place
- consult with psychologist and social workers and issue, when possible, together, an expert opinion on the detrimental impact of detention in the case of the child to be used in legal proceedings aimed at ending detention
- help the child in making their voice heard in any realistic way, taking into account the vulnerability of the child.

These actions are necessary to empower the child and to discover their views and feelings on their situation and channel them into the procedure aimed at ending the detention.

#### 4.4.2 Legal representatives, legal assistance and legal aid

Guardians should be child protection specialists, and specialists in this area will often not have the qualifications or expertise alone to they provide effective legal assistance and representation to children, especially where their liberty or immigration status is at stake. With increasingly difficult and exceptional procedures relating to asylum and migration, it is in the best interest of the child that they have a lawyer familiar with this area of the law.

A lawyer representing a child should explain the child their rights and the procedures in a manner intelligible to the child, and ensure that their views are heard and taken due account of. Therefore, lawyers need to be specifically trained on childrens' rights and on working with children.

Children should have access to legal aid so that they can access legal assistance at no cost. The best interests of the child must be a primary consideration in all legal aid decisions affecting children. Children who are detained should be given legal aid. The legal assistance afforded to children should be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.

The UN Committee on the Rights of the Child, in its General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, stresses that *"the child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. The Committee states that in particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision."*<sup>33</sup>

The UN High Commissioner for Human Rights, in a report on Access to justice for children, notes that *"as children are usually at a disadvantage in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized **legal and other appropriate assistance** to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty."*<sup>34</sup>

According to the definition of EASO, the legal representative is a *"person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied [child] in [international protection] procedures ... with a view to ensuring the best interests of the child and exercising legal capacity for the [child] where necessary."*<sup>35</sup>

According to EASO, it is *"good practice to ensure that the child has access to legal aid services free of charge at all stages of the asylum procedure. The child's legal advisor should also be given the opportunity to attend any interview of the child. Overall, the child should be accompanied in the interviews, unless the child prefers otherwise and it is possible to accommodate such a request."*<sup>36</sup>

Legal representatives should always work in cooperation with other supporting professionals and they should be aware of their heightened role and importance in upholding the fundamental rights of children. As professionals who have experience and expertise in procedures before immigration

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<sup>33</sup> UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, 2013, para 96. See also ICJ, Access to Justice for Migrant Children Training Materials on Access to Justice for Migrants, <https://www.icj.org/wp-content/uploads/2021/09/Module-5-Access-to-Justice-for-Migrant-Children-1.pdf>, p. 37.

<sup>34</sup> Report of the UN High Commissioner for Human Rights on Access to justice for children, (A/HRC/25/35), 16 December 2013, para 40.

<sup>35</sup> EASO, *Practical guide*, p. 12.

<sup>36</sup> *Ibid.*, p. 21.

authorities, they are in a position to signal effectively when a given conduct is not in the best interest of the child.

They also should conduct their activity in a child friendly manner, and use language which the child will understand. For example, instead of insisting on the exact, legally correct terminology of a given appeal procedure, they can just say "appeal" where this term is likely to be most intelligible to the child.

## 4.5 Hearing children in a formal setting

### 4.5.1 General remarks

A formal hearing will be child friendly if it allows for the active participation of the child. States have a positive obligation to actively facilitate the effective enjoyment of the right to be heard. That means that it is not enough to not prevent children from speaking their mind, States have to create an environment where they feel empowered and safe enough to do so.

The CRC Committee underscored in General Comment No. 12 that

19. "Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children. (...)

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

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

The following key elements can be identified from the above:

- the setting
- the preparedness of the staff present
- the language of the hearing
- the child's helpers.

### 4.5.2 The setting of a hearing

The [Council of Europe's Handbook on children's participation working for and with children](#)<sup>37</sup> emphasizes that:

"Children cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate so it is important to create child-rights friendly environments (...). It helps if physical spaces are made as informal as possible, and if children feel ownership of these, for example by being in the room before adults enter and by showing adults where they should sit. If children are being heard in court or other official settings only the concerned people should be present. The guidelines on child-friendly justice cite the example of judges omitting certain formalities, such as wearing a wig or a gown, to help the child feel at ease. Thinking about the time when meetings will be held is also important – children are more likely to participate in their own meetings if they do not have to miss school activities in order to be there. So, professionals should prepare for children's participation by thinking through how they can provide the space and time to build comfortable relationships in which communication is possible."<sup>38</sup>

Traumatised children might find it hard or even numbing to go into what may be seen as an unfriendly environment at an authority and talk about deep, personal stories in to an unknown person. Where possible, hearings should be held at familiar places, where children already had positive experiences and found some peace and sense of safety.

<sup>37</sup> Council of Europe, *Listen – Act – Change*, 2020.

<sup>38</sup> Council of Europe, *Listen – Act – Change*, p. 34.



Needless to say, such an environment is difficult if not impossible in a place of detention, as has been pointed out by the [Hungarian Helsinki Committee](#):

*"Detention, especially when paired with substandard conditions, may easily render the enjoyment of [the] rights [of the child] illusory. No child can make use of her or his rights guaranteed by the CRC as elements of their best interest in an environment that is a constant source of anxiety, psychological disturbance (...) Being confined in a guarded institution, where the level of surveillance is high and the elements of everyday life are strictly controlled can be perceived by children as a never-ending state of despair, which may in itself reach the severity necessary to constitute a breach of Article 3 [of the ECHR]."*<sup>39</sup>

Where it can be assumed that the child had previous contact and preferably also the possibility to establish some level of trust with the guardian and the other helpers present at the hearing, the following should be taken into account when setting up the room of the hearing:

- adequate time to explore the space
- proper ventilation and lighting
- any sign of retraumatising effect has to be identified and removed
- no police or security presence, or as little as possible
- informal special arrangements – e.g. no desk between the child and the person leading the hearing, sitting in a circle, etc.
- pen, pencils and paper should always be readily available – younger children especially will find comfort in drawing while at the hearing.

Children have the right to signal, at any time, if they are not comfortable with the setting of a hearing, or if they feel unsafe. The adults present are under a duty to constantly monitor the child's well-being and remind the child that it is within their right to request a break at any time,<sup>40</sup> or even the postponement of the hearing.<sup>41</sup>

This is important for keeping trust, without which there can be no effective child participation in a hearing. Where children feel that they need to share even if they don't feel safe doing so will lead to an ineffective procedure, where the child's right to be heard will also not be adequately respected. Where children feel safe to share and understand why it is necessary, they will be in a position to effectively practice their right to be heard and to make their views known.<sup>43</sup>

#### 4.5.3 The preparedness of the staff present

Article 4 (3) of the Procedures Directive sets forth the following:

*"Member States shall ensure that the personnel of the determining authority referred to in paragraph 1 are properly trained. (...) Persons interviewing applicants pursuant to this Directive shall also have acquired general knowledge of problems which could adversely affect the applicants' ability to be interviewed, such as indications that the applicant may have been tortured in the past."*

The Procedures Directive is applicable in status determination procedures. Based on the connection explained above between the Procedures and the Reception Conditions Directives, Article 4(3) should be applied to case officers hearing the child in all procedures related to their immigration status, including those where the liberty of the child is at stake.

Case officers and other staff hearing the child should therefore be adequately prepared and knowledgeable about the rights of children and the indications when a child does not feel safe and able to make their views known to the authority.

Where staff are not prepared and are not able to create an environment which fosters safety and enables children to make their views known, the guardian and / or the lawyer present can end the hearing and request a change in staff.

In most cases, the hearing will be the first time that the case officer and the child meet. The Council of Europe handbook suggests the following for building trust:

<sup>39</sup> Hungarian Helsinki Committee third party intervention in *M.H. and Others v. Croatia*, ECtHR, Application No. 15670/18, 8 October 2018, p. 2.

<sup>40</sup> EASO Report on asylum procedures for children, <https://euaa.europa.eu/sites/default/files/EASO-Report-asylum-procedures-for-children-EN.pdf>, p. 54

<sup>41</sup> UNICEF ECARO, [Guidelines on Child-friendly legal aid](#), October 2018, p. 27.

<sup>42</sup> CRC General Comment No. 12 (2009) on the Right of the Child to be Heard, [CRC/C/GC/12](#), para. 34.

<sup>43</sup> UNICEF ECARO, [Guidelines on Child-friendly legal aid](#), p. 19.

"Professionals should provide information about themselves, their role, the limits of confidentiality that will apply and the length of time they are likely to be involved in a child's life. This can be done with the support of accessible information (e.g. leaflets or videos) prepared as described in the subsection above. But it is also important that this is provided to children in a personalised way. Sometimes known professionals will need to provide this kind of information because the decision-making process is new to the child. When the meeting is with a new person, and is not an emergency, children should be given information beforehand about what will happen. Where possible, professionals meeting children for the first time should be introduced by someone a child knows."<sup>44</sup>

#### 4.5.4 The language and atmosphere of the hearing

The CRC General Comment No 12 is clear about the necessity to use the language that the child understands. It states:

"21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following: (...) Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language.

124. The Committee emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings. (...)

66. (...) The proceedings have to be child-friendly and accessible. (...)"

Article 12 (1) a) of the Procedures Directive stipulates the following:

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

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

The formulation sometimes used in EU law (Art 12.1.a APD) 'reasonably suppose to understand' is not in line with international law. In the European Court of Human Rights case of *Rahimi v. Greece*, where an unaccompanied child was given an information sheet in Arabic when all he spoke was Farsi, the Court found a violation of the child's right to habeas corpus and an effective remedy (Articles 5.4 and 13 ECHR) because of this lack of information. As the European Court highlighted in *M.S.S. v. Belgium and Greece*, "the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures".<sup>46</sup>

Article 15 (3) c) of the Procedures Directive sets forth the following:

"Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication shall take place in the language preferred by the applicant unless there is another language which he or she understands and in which he or she is able to communicate clearly. Wherever possible, Member States shall provide an interpreter of the same sex if the applicant so requests, unless the determining authority has reasons to believe that such a request is based on grounds which are not related to difficulties on the part of the applicant to present the grounds of his or her application in a comprehensive manner."

<sup>44</sup> Council of Europe, *Listen – Act – Change*, p. 35.

<sup>45</sup> CRC, General Comment No. 12, paras 21 and 124.

<sup>46</sup> *Rahimi v. Greece*, ECtHR, Application No. 8687/08, Judgement of 5 July 2011, para. 120; *M.S.S. v. Belgium*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, para. 304.

According to Article 25 (3) of the Procedures Directive, "Member States shall ensure that:

- (a) *if an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, that interview is conducted by a person who has the necessary knowledge of the special needs of minors;*
- (b) *an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor."*

The above EU legal sources clearly indicate for personal hearings which are

- conducted in a language the applicant understands.

For children, it has to be understood to cover not only the spoken language of a hearing, but also that they should be able to comprehend the meaning of the words used. Legalistic, technical terms must be avoided, and instead easy-to-access, plain language has to be used. In other words: children will understand the procedure if it is explained to them in a language they understand.

- translated to the language of the child by an interpreter.

The interpreter is key to hearings held in an immigration / asylum context. While there are some instances where an interpreter *might* be unnecessary, for example where there is a Latin American asylum seeker child in Spain, most of the time this is not the case. Although this again needs to be assessed on a case-by-case basis, not everyone from Latin America will speak Spanish, and children may have difficulty with different accents or dialect. To pick the right interpreter, the individual circumstances of the child should be considered.

For example where a child belongs to a persecuted ethnic minority in a country, the interpreter should not be from the ethnic majority. Children who had been victims of sexual abuse should be interviewed with a translator from the same sex, if that is their preference. Interpreters should never intend to "help" children by suggesting or even hinting at how they could better express themselves. Because of the inherent power imbalance of this situation, children are not in a position to effectively argue and therefore their views will not be heard.

Case officers also need to avoid using formal language and instead should remain informal. It usually helps children feel secure and ease into the spirit of the hearing if the first section is about a general introduction and feels more personal. The [Council of Europe](#) summarised these suggestions as follows:

*"Participation depends on both adults and children believing in each other and in the process. Children need to know that professionals are interested in their opinion and want to find a solution which takes their views into account. (...)*

*Even in the shortest encounter and in difficult circumstances, research evidence shows that effective communication can be established when professionals, such as immigration workers, share a little of themselves. With one question, about for example hobbies, doctors can create an atmosphere in which it is easier for a child to speak. One of the goals of this interaction is to ensure that children feel comfortable in stating or showing their preferences, and that they feel their wishes will be taken into account. Professionals should consider how they can build at least one moment of human connection into their first encounters with children."<sup>47</sup>*

In summary, the language of the hearing shall be accessible, plain and easy to understand, tailored to the maturity and cognitive abilities of the child, and where questions can always be asked when something is not clear. If these criteria are not met, the child will not be able to fully comprehend what is happening, which is a major obstacle in effectively exercising her or his right to make their views known. The atmosphere should be relaxed and as informal as possible – see also the above chapter on setting.

#### **4.5.5 Information provided outside of a formal setting**

In practice it can happen that even with the highest level of trust and most well-functioning setting at the hearing, children will not say all they have to say. It is absolutely normal and does not mean that children are not credible.<sup>48</sup>

<sup>47</sup> Council of Europe, *Listen – Act – Change*, p. 35.

<sup>48</sup> See the barriers to sharing in the Hungarian Helsinki Committee's [manual](#) in Chapter XII.

According to the Council of Europe:

*"When children share their views outside of formal processes, there are a variety of ways these can be taken forward, such as in conversations with peers or professionals, in meetings, in case notes or emails. All professionals, not just those involved in investigating children's views, should follow children's preferences, wherever possible, regarding how their views are expressed in decision making. Professionals then have a responsibility to take action in response to hearing children's views."*<sup>49</sup>

## V. Alternatives to detention schemes that protect these rights

As referred to above, the right to be heard cannot be effectively exercised when children are held in detention.

According to [UNICEF](#):

*"For unaccompanied and separated children, once identified, the key mechanisms that states can put in place to prevent detention are referral to national child protection authorities, and provision of a guardian. An unaccompanied and separated child should be accorded the same protection, support and care that any national child deprived of parental care would be offered. No State would wish to deprive a child citizen of their liberty simply because they are without parental care. If the obligation of the CRC to treat all children on a territory in a non-discriminatory manner is to be met, then migrant and refugee children must receive the same treatment.*

*To avoid the risk of detention for children, states need to address shortages and lack of capacity in child protection and social services and inadequate supplies of qualified guardians and foster care. These are investments which yield benefits to national populations as well as migrant and refugee children: a strong, well-resourced and trained network of guardians can respond to the needs of national and non-national children alike, preventing unnecessary institutional placement for national children, and providing a vital resource to prevent the immigration detention of unaccompanied refugee and migrant children."*<sup>50</sup>

When children feel safe and relaxed, and their right to a safe and secure environment, their right to survival, play and leisure is met, they have access to counselling and psychosocial support, it will be easier for them to make their views known.

That principle is reinforced by the CRC Committee in General Comment No. 14:

*The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child. (...) [The committee] recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests.*

As explained above, the child's right to make their views known and be heard is not a 'stand alone' right and for it to be effective and not just illusory, a range of other factors have to be guaranteed. Accommodation and adequate reception facilities are critical to those guarantees.

[UNHCR](#) summarises what it considers to be the best practices for an adequate reception facility as follows:<sup>51</sup>

- Instead of enforcing strict migration rules, in the cases of children, an ethic of care should be the guiding principle, including the decision on accommodation
- children should be integrated into the mainstream child protection system
- family based care arrangements should be prioritised
- institutional care should be used only very limited circumstances
- every child's right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development should be respected when deciding on placement (CRC Article 27)
- alternative care arrangements need to be identified which can cater for the child's physical and mental development while longer term solutions are being considered (CRC Article 3(2))
- due regard must be paid to the desirability of continuity of a child's upbringing and to their ethnic, religious, cultural and linguistic background (CRC Article 20)

<sup>50</sup> UNICEF, *UNICEF Working Paper. Alternatives to Immigration Detention of Children*, first published in September 2018, updated in February 2019, p. 5.

<sup>51</sup> UNHCR, *Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families*, 2015, p. 2.

- the particular needs of the most vulnerable children (LGBTI, victims of trauma or torture, victims or potential victims of trafficking) (CRC Article 2)
- the right to rest, leisure and play and cultural life need to be respected (CRC Article 30-31)

[UNHCR](#) further recommends that:

*"Priority should be given to family-and community-based solutions, in accordance with the national child protection system. Alternative care should be viewed as an interim measure whilst family tracing is carried out and until the time when children can be reunited with family members, if applicable and appropriate. Family-based arrangements are to be considered first, with residential care only considered when family-based care arrangements are not possible or they are not in the child's best interests, and then only for the shortest time possible."<sup>52</sup>*

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<sup>52</sup> *Ibid.*, p. 10.



## Commission Members

April 2022 (for an updated list, please visit [www.icj.org/commission](http://www.icj.org/commission))

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