

Children in migration: fundamental rights at European borders



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Chapter 1

Selected general safeguards for children

Who is a child?

Council of Europe (CoE) and European Union (EU) law follow, in principle, the definition of “child” (in EU law sometimes referred to as “minor”) included in Article 1 of the United Nations (UN) Convention on the Rights of the Child (CRC): children are individuals who are less than 18 years of age.¹ For certain issues – for example, the minimum age to submit an asylum application – EU law leaves some flexibility to Member States.²

Duty to provide protection and care

Under the European Convention on Human Rights (ECHR),³ children in the context of migration, and especially those who are separated or unaccompanied, are considered extremely vulnerable.⁴ They are entitled to special protection.⁵ The

1 See European Commission of Human Rights, Decision on admissibility, *X v. Switzerland*, No. 8500/79, (14 December 1979). For examples in EU law, see Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (*Qualification Directive*), Article 2 (k); 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) (*Asylum Procedures Directive*), Article 2 (l); Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (*Reception Conditions Directive*), Article 2 (d); and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 5 April 2011, pp. 1-11 (*Anti-Trafficking Directive*), Article 2 (6).

2 For more on this, see European Union Agency for Fundamental Rights (FRA) and European Court of Human Rights (ECtHR), *Handbook on European law relating to the rights of the child. 2022 Edition*. Publications Office of the EU, Luxembourg, 2022, pp. 19-20.

3 *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No.005, 4 November 1950.

4 ECtHR, *S.F. and Others v. Bulgaria*, No. 8138/16, 7 December 2017, para. 79.

5 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 91; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 55; *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, para. 58; *Khan v. France*, No. 12267/16, 28 February 2019, para. 74.

extreme vulnerability of children to violence, abuse or exploitation takes precedence over considerations relating to the child's migratory status.⁶

Under EU law, Article 24 of the Charter of Fundamental Rights of the EU ('the Charter')⁷ states that children have the right to such protection and care as is necessary for their well-being. Children are regarded as "vulnerable persons" in the context of asylum and return procedures. EU Member States are required to take into account their specific situation and needs when implementing EU law.⁸

Best interests of the child – an overarching principle

The 1989 UN CRC lays down the cornerstone principle of the "best interests of the child." According to the UN Committee on the Rights of the Child, whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must evaluate the possible impact of the decision on the child or children concerned.⁹

Under the ECHR, the best interests of the child must be a primary consideration for states in all matters that regard children, including refugee, asylum-seeking and migrant children.¹⁰

Under EU law, Article 24 of the Charter provides that "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration." This principle is mirrored in secondary EU legislation regulating asylum, return and immigration detention.¹¹

Right to be heard

In accordance with Article 12 (2) of the CRC, a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child and must be heard – either directly or through a representative or an appropriate body – in any judicial and administrative proceeding affecting the child. This is an integral part of the best interests assessment.

6 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 55; *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, paras. 56-58; *S.F. and Others v. Bulgaria*, No. 8138/16, 7 December 2017, para. 79; *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 91; *G.B. and Others v. Turkey*, No. 4633/15, 17 October 2019, para. 101; *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014, para. 99; *M.H. and Others v. Croatia*, Nos. 15670/18 & 43115/18, 18 November 2021, para. 184.

7 Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, pp. 391-407.

8 See specifically [Reception Conditions Directive](#), Article 21, and Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ([Return Directive](#)), Article 3 (9).

9 UN, Committee on the Rights of the Child, [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), 29 May 2013, CRC/C/GC/14.

10 ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011, para. 108; *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 140; ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, para. 70.

11 [Asylum Procedures Directive](#), Article 25; [Reception Conditions Directive](#), Articles 23-24; [Qualification Directive](#), Articles 20 (5) and 31; and [Return Directive](#), Articles 5 (a), 10 (1) and 17 (5).

Under **CoE standards**, in order to be able to exercise their right to be heard and for their views to be given due weight in accordance with their age and maturity, children in migration have the right to benefit from accurate, child-friendly information in a language they understand.¹²

Under **EU law**, children's right to be heard is a well-established general principle of EU law binding all EU Member States¹³ and is enshrined in Article 24 of the Charter. Article 23 (2) (d) of the [Reception Conditions Directive](#) requires Member States to consider the views of the child in accordance with his or her age and maturity when assessing the best interests of the child. Children are also entitled to receive information, as any other asylum applicant or returnee, in a language that they understand or may reasonable be presumed to understand ([Reception Conditions Directive](#), Article 5; and [Return Directive](#), Article 12).

Family unity

Under the ECHR, asylum-seeking families need to be kept together in reception facilities.¹⁴ The authorities are under a positive obligation under Article 8 (right to respect for private and family life) of the Convention to ensure regular contact between refugee siblings who are placed in reception facilities in different cities and to act with a view to maintaining and developing their family ties and to successfully reuniting them.¹⁵ At the same time, not only under Article 8 but also under Article 5 (1) (right to liberty and security) the child's best interests cannot be confined to keeping the family together; the authorities have to take all necessary steps to limit, as far as possible, the detention of families accompanied by children and effectively preserve the right to family life.¹⁶

Under EU law, Article 7 of the Charter guarantees the right to respect for private and family life. This right also entails a duty to respect family unity when accommodating asylum-seeking children (see [Reception Conditions Directive](#), Article 12 and Recital (9)) or children in return procedures ([Return Directive](#), Article 14). Article 24 of the [Reception Conditions Directive](#) requires Member States to trace the family members of unaccompanied children as soon as possible with due regard for their safety.

12 [European Convention on the Legal Status of Migrant Workers](#), CETS No. 93, Article 6; [European Social Charter \(revised\)](#), CETS No. 163, Article 19 (1). See also [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#) Principle III. A.; [CM/Rec\(2019\)11](#) on effective guardianship for unaccompanied and separated children in migration, Principle 5; [CM/Rec\(2022\)17](#) on protecting the rights of migrant, refugee and asylum-seeking women and girls, Appendix (12).

13 Court of Justice of the EU (CJEU), C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform*, 22 November 2012, paras. 85-89. In the return context, see CJEU, C-383/13 PPU, *G. and R.*, 10 September 2013 and C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014.

14 ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014, paras. 119-120.

15 ECtHR, *A.J. v. Greece* (dec.), No. 34298/18, 26 April 2022, paras. 82-85.

16 ECtHR, *Nikoghosyan and Others v. Poland*, No. 14743/17, 3 March 2022, para. 84; ECtHR, *Bistieva and Others v. Poland*, No. 75157/14, 10 April 2018, para. 85.

Chapter 2

Specific safeguards for unaccompanied children

Identification and registration

Under the ECHR, states need to protect and take charge of unaccompanied and separated children.¹⁷ National authorities should identify such children as soon as possible and take measures to ensure they are placed in suitable accommodation where they are offered support. This is required even if the children do not apply for **asylum, but intend to do so elsewhere, or to join family members there.**¹⁸

Under EU law, the need to identify and register unaccompanied children flows from the duty of border management authorities to take into account the special needs of children and to pay particular attention to children's rights and ensure that the best interests of the child are duly taken into consideration. This duty is embedded in the [European Border and Coast Guard Regulation](#).¹⁹

Age assessment

Under CoE standards, if there are reasons to assume that a person whose age is unknown is a child, or if a person claims to be a child, the person must be given the benefit of the doubt and presumed to be a child unless and until determined otherwise through an age assessment procedure.²⁰ States must conduct age assessment procedures in good faith and must avoid unreasonable delays, especially where there is a risk that the individual would reach majority pending the official determination

¹⁷ ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011, para. 87.

¹⁸ ECtHR, *Khan v. France*, No. 12267/16, 28 February 2019, paras. 91-94; *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, No. 14165/16, 13 June 2019, paras. 59-61.

¹⁹ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14 November 2019, pp. 1-13, ([European Border and Coast Guard Regulation](#)), Article 80 (3).

²⁰ ECtHR, *Darboe and Camara v. Italy*, No. 5797/17, 21 July 2022, paras. 131 and 153; [Convention on Action against Trafficking in Human Beings](#), CETS No. 197, Article 10 (6); [CM/Rec\(2022\)22](#) on human rights principles and guidelines on age assessment in the context of migration, Principle 2.

proceeding.²¹ States should obtain the informed consent of the person before proceeding with an age assessment.²² Persons undergoing age assessment procedures have a right to information, in particular regarding the type of procedure and its possible consequences.²³ Children in the hands of state authorities cannot be expected to object to medical examinations when they are in a vulnerable position and they are not provided with adequate guarantees in order to give their informed consent on all type of medical examinations on minors, regardless of their status.²⁴

Under EU law, Article 25 (5) of the [Asylum Procedures Directive](#) allows EU Member States to resort to medical examinations but requires that these be performed “with full respect for the individual’s dignity,” as well as being “the least invasive examination,” and “be carried out by qualified medical professionals”. Individuals must be informed in a language they can understand that such an assessment may be carried out and their consent to the examination, or that of the legal representative, should be obtained. The refusal to undergo age assessment cannot result in a rejection of the asylum application. If the authorities are still in doubt about the applicant’s age, they must assume that the applicant is a child.

Guardianship

Guardians safeguard the child’s best interests, ensure their overall well-being and exercise legal representation, complementing the child’s limited legal capacity.²⁵

Under CoE standards, unaccompanied and separated children should be appointed a guardian or legal representative without undue delay, regardless of their immigration status, in order to ensure that their rights and best interests are adequately safeguarded and duly considered in all processes and decisions concerning them.²⁶ According to the European Committee for the Prevention of Torture, every unaccompanied or separated child should be able, in specific cases, to request a change in guardian.²⁷ There should be mechanisms to monitor the quality of the guardianship.²⁸

Under EU law, unaccompanied children seeking asylum must be provided with a representative (guardian) as soon as they have applied for asylum, pursuant to Article 24 of the [Reception Conditions Directive](#) and Article 25 (1) of the [Asylum Procedures Directive](#). EU law does not, however, explicitly provide for the appointment

21 ECtHR, *Mahamed Jama v. Malta*, No. 10290/13, 26 November 2015, para. 147; *Abdullahi Elmi and Aweys Abubakar v. Malta*, Nos. 25794/13 and 28151/13, 22 November 2016, paras. 143-148.

22 [CM/Rec\(2022\)22](#) on human rights principles and guidelines on age assessment in the context of migration Principle, appendix (7).

23 ECtHR, *Darboe and Camara v. Italy*, No. 5797/17, 21 July 2022, para. 145.

24 ECtHR, *Yazgül Yılmaz v. Turkey*, No. 36369/06, 1 February 2011, para. 45.

25 FRA (2022), *Guardianship systems for unaccompanied children in the European Union-Developments since 2014*, Luxembourg: Publications Office of the European Union, 2022, p. 15.

26 ECtHR, *Darboe and Camara v. Italy*, No. 5797/17, 21 July 2022, paras. 142-150; See also Recommendation [CM/Rec\(2019\)11](#) of the Committee of Ministers to member States on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019, Principle 3.

27 Compare [CM/Rec\(2019\)11](#), Principle 3.6.

28 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), [19th General Report on the CPT’s activities \(2008-2009\)](#), paras. 97-98.

of a representative from the moment an unaccompanied child is detected by the authorities. If an organisation is in charge of providing legal representation for children, an individual person needs to be appointed for the specific child (Reception Conditions Directive, Article 2 (j)). Under Article 24 of the same directive, organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied child are not eligible to become representatives. Under Article 25 of the Asylum Procedures Directive, a representative must be given an opportunity to discuss matters with the child before the asylum interview and accompany him or her to it.

Chapter 3

Visas

Under EU law, nationals of 105 countries require a visa to come to the EU.²⁹ A visa must normally be obtained before travelling. Each visa applicant must submit a completed and signed application form pursuant to the EU Visa Code.³⁰ Children must submit an application form signed by a person exercising permanent or temporary parental authority or legal guardianship. ([Visa Code](#), Article 11). The Visa Code applies to the so-called Schengen visas issued for intended stays in the Schengen area of up to 90 days in any 180-day period.

²⁹ Data refers to July 2023. The list is subject to regular changes. [Visa List Regulation](#) (EU) 2018/1806, Annex 1.

³⁰ Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas ([Visa Code](#)), as amended.

Chapter 4

Border control

Checks at border crossing points

Under EU law, the [Schengen Borders Code](#)³¹ requires that border guards pay particular attention to children travelling, whether or not they are accompanied (Annex VII). Border guards must check that the persons accompanying children have parental care over them, especially where children are accompanied by only one adult and there are serious grounds for suspecting that the children may have been unlawfully removed from the custody of their legal guardian(s). In this case, border guards must investigate further to detect any inconsistencies or contradictions in the information given. If children are travelling unaccompanied, border guards must ensure, by means of thorough checks on travel and supporting documents, that the children are not leaving the territory against the wishes of the person(s) responsible for their parental care.

The [Anti-Trafficking Directive](#) 2011/36/EU requires Member States to establish appropriate mechanisms for the early identification of, assistance to and support for victims of trafficking in human beings (Article 11). Border guards should be trained to identify and deal with victims or potential victims of trafficking (Recital 25). There are specific guarantees for child victims of trafficking in Articles 13-16 of the directive.

The CoE Anti-Trafficking Convention (CETS No. 197) requires states to take measures to identify victims of human trafficking, in collaboration with relevant support organisations, taking into account the special situation of child victims (Article 10). Pursuant to Article 7 of the Convention, “without prejudice to international commitments in relation to the free movement of persons, Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings”. Specific guarantees for child victims in trafficking are set out in Articles 10-12, 14 and 16 of the Convention.

³¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders ([Schengen Borders Code](#)).

Children encountered in the context of border management

Border management authorities may encounter children trying to cross or after having crossed the state border in an unauthorised manner. If children are found, stopped or apprehended, they are entitled to the same human rights protection as adults, including treatment with dignity and to the right to seek asylum. In addition, they should benefit from further child-specific safeguards.

Under the ECHR, the threshold of severity required to fall within the scope of Article 3 (prohibition of torture and other forms of ill-treatment) of the ECHR takes into account the specific needs of children (including those apprehended in the context of crossing the border in an irregular manner), in particular those related to their age, their lack of independence and, where it is the case, their status of asylum applicant.³² States are required to respect Article 2 (right to life) and Article 5 (right to liberty), and are not absolved from their obligations under Article 3 on account of considerable difficulties in coping with increasing numbers of refugees, asylum seekers and migrants, including children.³³

Under EU law, border guards must treat every person, including children, with dignity and in a professional manner and must be adequately trained.³⁴

³² ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, para. 55.

³³ ECtHR, *G.B. and Others v. Turkey*, No. 4633/15, 17 October 2019, para. 112; *S.F. and Others v. Bulgaria*, No. 8138/16, 7 December 2017, para. 92.

³⁴ Schengen Borders Code, Recital (7), Articles 4 and 16; European Border and Coast Guard Regulation, Recital (103) and Article 3 (1) (a).

Chapter 5

Right to seek asylum

The ECHR does not regulate the right to seek asylum. However, the European Court of Human Rights (ECtHR) can examine whether or not the removal of a protection seeker subjects him/her to a real risk of treatment contrary to Article 3 of the ECHR or other ECHR provisions. This includes the need to providing all asylum seekers with effective access to the proper procedure by which their claims for international protection may be reviewed and which assess such risk.³⁵

Under EU law, Article 18 of the EU Charter explicitly guarantees the right to asylum. According to Article 18, '[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention [...] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'.

Access to asylum procedures

The CoE Anti-Trafficking Convention (CETS No. 197) creates an obligation for states to ensure that trafficked children or children at risk of trafficking have effective access to asylum or other forms of protection.

Under EU law, border control activities must be carried out without prejudice to the rights of refugees and persons requesting international protection and must respect the obligations relating to access to international protection.³⁶ The same rule applies to adults and children.

Under Article 7 (3) of the [Asylum Procedures Directive](#), children have the right to make an application for international protection on their own behalf, provided that they have legal capacity under national law. However, in most EU Member States accompanied children do not have such legal capacity.³⁷

According to Article 15 (3) (e) of the [Asylum Procedures Directive](#), interviews with children must be conducted in a child-appropriate manner. Under Article 24 of the same directive, authorities must assess whether an applicant is in need of special procedural guarantees. If this is the case, for example because of their age or other vulnerabilities, they must be provided with adequate support during the asylum

³⁵ ECtHR, *Sharifi and Others v. Italy and Greece*, No. 16643/09, 21 October 2014, para. 169. See also CPT, [32nd General Report of the CPT](#), para. 89.

³⁶ [Schengen Borders Code](#), Articles 3-4; [European Border and Coast Guard Regulation](#), Article 3 (1) (a).

³⁷ See FRA (2018), [Mapping minimum age requirements concerning the rights of the child in the EU – Country data on asylum and migration; Digital world](#), 24 April 2018.

procedure. Their asylum applications may only be examined through accelerated or border procedures, if these procedures allow for adequate support to applicants in need of special procedural guarantees (Asylum Procedures Directive, Article 24 (3)).

Asylum procedures at borders

Under EU law, Article 43 of the [Asylum Procedures Directive](#) permits the processing of asylum applications at the border or in transit zones. During border procedures, decisions can be taken on the admissibility (for example, if another Member State or a third country should examine the application) as well as on the substance in circumstances in which accelerated procedures may be used in accordance with Article 31 (8) of the directive.

As regards unaccompanied children, there are restrictions on the processing of their applications at the border, in transit zones or through accelerated procedures, which is allowed only in the cases listed in Article 25 (6) of the [Asylum Procedures Directive](#). In such cases, the directive allows Member States not to grant an automatic right to stay to unaccompanied children during the review of a negative decision, but only when the conditions listed in Article 46 (7) of the directive are met. These include, for example, the necessary language and legal assistance and at least one week to ask a court for the right to remain in the territory pending the outcome of the appeal.

Chapter 6

Reception conditions for asylum applicants

European law established certain standards for the reception of asylum-seeking children. Such standards apply, in most cases, also to initial reception facilities which Member States may have created at or near the border.

Standards applying to all children

Under the ECHR, in general, reception conditions for children seeking asylum, also when they are accompanied by their parents, must be adapted to their age to ensure that the conditions do not create a situation of stress and anxiety with particularly traumatic consequences. The family must be kept together.³⁸

The CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)³⁹ requires states to develop gender-sensitive reception procedures and support services for asylum applicants (Article 60).

Under EU law, Article 21 of the [Reception Conditions Directive](#) requires Member States to take into account the specific situation of vulnerable people seeking asylum. Asylum applicant children are entitled to an individual assessment of their best interests, which takes into account their views in accordance with their age and maturity (Article 23 (2) of the directive).

EU Member States must ensure to children applying for asylum a standard of living adequate for their physical, mental, spiritual, moral and social development (Article 23 (1) of the directive). This includes access to rehabilitation services for victims of any form of abuse, neglect, exploitation and, pursuant to Article 19 of the directive, access to necessary healthcare.

Article 24 (2) of the same directive specifies that, as far as possible, siblings must be kept together, taking into account the best interests of the child concerned.

Material reception conditions, including housing, cannot be withdrawn as a sanction, in so far as it would have the effect of depriving asylum applicants of the possibility

³⁸ ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014, paras. 119-120; ECtHR, *Darboe and Camara v. Italy*, No. 5797/17, 21 July 2022, para. 167.

³⁹ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ([Istanbul Convention](#)), CETS No. 210.

of meeting their most basic needs. For unaccompanied children, sanctions must take particular account of the best interests of the child.⁴⁰

Article 14 (2) of the Charter guarantees the right to education. Under Article 14 of the Reception Conditions Directive, Member States should provide education under similar conditions as for their own nationals, although schooling may be provided in reception centres. Access to education must not be postponed for more than three months from the date of application for asylum.

Standards for unaccompanied children

Under the ECHR, unaccompanied and separated children are to be placed in adequate accommodation. Failure or inaction to provide assistance and accommodation may amount to degrading treatment under Article 3 of the ECHR.⁴¹ To mitigate risks of abuse and exploitation, they must be accommodated separately from adults.⁴²

Under EU law, Article 24 of the [Reception Conditions Directive](#) provides that unaccompanied children seeking asylum must be placed with adult relatives, foster families or in centres suitable for children. Changes of residence of unaccompanied children must be kept to a minimum. Unaccompanied children who are at least 16 years old can be placed in accommodation centres for adults, if suitable with their best interests. Individuals working with unaccompanied children must receive appropriate training.

40 CJEU, C-233/18, *Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, 12 November 2019, paras. 55-56.

41 ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011, paras. 90-95; *Khan v. France*, No. 12267/16, 28 February 2019, paras. 92-95.

42 ECtHR, *Darboe and Camara v. Italy*, No. 5797/17, 21 July 2022, paras. 156, 158; UN Convention on the Rights of the Child, Article 37 (c).

Chapter 7

Deprivation of liberty

Presumption against child detention

Under the ECHR, foreigners can be detained to prevent unauthorised entry into the country or to carry out a deportation or extradition (Article 5 (1) (f)), if all pre-conditions are met. For children, states must duly consider alternatives to detention.⁴³

Under the CoE standards, unaccompanied or separated children should not, as a general rule, be detained.⁴⁴ If, exceptionally, they are held there with their family, the national authorities must establish that this is a measure of last resort that has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be put in place.⁴⁵ Deprivation of liberty should be for the shortest possible period of time.⁴⁶ Detention of children, even if lawful and non-arbitrary under Article 5 of the ECHR, may entail a violation of Article 3 of the ECHR depending on the age of the children, on whether the premises are adapted to their specific needs and on the duration of their detention.⁴⁷

The European Committee for the Prevention of Torture considers that children should not be deprived of their liberty, in the context of forced removals at borders. Families with children, unaccompanied and separated children, and other persons with vulnerabilities should be offered suitable accommodation and support.⁴⁸

EU law regulates immigration detention in the context of return and or asylum procedures, but not in the context of border controls.

Deprivation of liberty of asylum applicants (Article 8 (2) of the [Reception Conditions Directive](#)) and people in return procedures (Article 15 (1) of the [Return Directive](#)) must be necessary and proportionate, which requires a thorough individual assessment of each case.⁴⁹

43 ECtHR, *Popov v. France*, Nos. 39472/07 & 39474/07, 19 January 2012, para. 119; *Rahimi v. Greece*, No. 8687/08, 5 April 2011, para. 109; *A.B. and Others v. France*, No. 11593/12, 12 July 2016, para. 124; *R.M. and Others v. France*, No. 33201/11, 12 July 2016, paras. 82-85. See also CPT, [Factsheet, Immigration detention \(CPT/Inf\(2017\)3\)](#), point 10.

44 CPT, [Factsheet, Immigration detention \(CPT/Inf\(2017\)3\)](#), point 10; and Council of Europe Commissioner for Human Rights, [Positions on the rights of minor migrants in an irregular situation \(CommDH/PositionPaper\(2010\)1\)](#), p. 5.

45 ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016, para. 103.

46 See also CPT, [Factsheet, Immigration detention \(CPT/Inf\(2017\)3\)](#), point 10.

47 ECtHR, *R.R. and Others v. Hungary*, No. 36037/17, 2 March 2021, para. 49; *A.C. and M.C. v. France*, No. 4289/21, 4 May 2023, para. 37.

48 CPT, [32nd General Report of the CPT](#), para. 95.

49 For returnees, see also CJEU, C-61/11, *El Dridi, alias Soufi Karim*, 28 April 2011, paras. 29-62. See also European Commission (2017), [Commission Recommendation \(EU\) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks \(C\(2017\) 6505\) \[2017\] OJ L 339/83 \(Return Handbook\)](#), Annex, p. 139.

Regarding detention of children, Article 11 (2) of the [Reception Conditions Directive](#) and Article 17 (1) of the [Return Directive](#) require that they should only be detained as a last measure, for the shortest period of time and only if less coercive measures cannot be applied effectively. For asylum applicants, Article 11 (3) of the Reception Conditions Directive states that unaccompanied children must only be detained in exceptional circumstances.

Conditions of detention

Under the ECHR, states should not detain children in adult detention centres.⁵⁰ Children must not be accommodated in facilities that are ill-adapted to the presence of children.⁵¹ They must be placed in facilities that are specifically adapted for the care of children and that provide child-friendly services, care and protection.⁵² In no case should children be placed in detention with an unrelated adult who claims to be accompanying them.⁵³ During their detention, special attention should be paid to the possibility for children to receive counselling and educational assistance from qualified personnel specially mandated for that purpose.⁵⁴

Under EU law, when children are deprived of their liberty, they should have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age and depending on the length of their stay, access to education (for asylum seekers see [Reception Conditions Directive](#), Articles 11 (2) and, for education, 14 (2); for persons in return procedures, see [Return Directive](#), Article 17 (3)). Detained families must be kept together and provided with separate accommodation guaranteeing privacy (see Reception Conditions Directive, Article 11 (4) (e); similar guarantees are contained in Article 17 (2) and (3) of the Return Directive).

Additional safeguards apply to the detention of unaccompanied children. Under Article 11 (2) Reception Conditions Directive (applicable to asylum applicants) and Article 17 (1) of the Return Directive (applicable to persons in return procedures), their accommodation should be separate from adults and last for the shortest period of time. They should never be detained in prisons, but in institutions equipped with personnel and age-appropriate facilities that can respond to the needs of persons of their age.⁵⁵

50 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12 October 2006, para. 103; *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, paras. 73-74; *Güveç v. Turkey*, No. 70337/01, 20 January 2009, para. 98; UN Convention on the Rights of the Child, Article 37 (c).

51 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, paras. 95-100.; *Rahimi v. Greece*, 5 April 2011, para. 86.

52 ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016, para. 110.

53 ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020.

54 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 50.

55 See for asylum applicants, Reception Conditions Directive, Article 11 (3); and for returnees, Return Directive, Article 17 (4), which is formulated in less strict terms.

Chapter 8

Forced removals at borders

Under the ECHR, expulsion of non-nationals may give rise to an issue under Articles 2 and 3 of the ECHR, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country.

In these circumstances, Articles 2 and 3 of the ECHR imply an obligation not to deport the person in question to that country.⁵⁶ Accordingly, states must refrain from conducting removals without first assessing whether the general situation in the country of destination, associated to a practice or an increased risk of maltreatment of the group to which the foreign nationals claim to belong or other specific distinguishing characteristics that would expose them to a real risk of maltreatment, is likely to give rise to inhuman or degrading treatments.⁵⁷

Under Article 4 of Protocol No. 4 to the ECHR, collective expulsions of non-nationals are prohibited.⁵⁸ Collective expulsions can also go hand in hand with violations of Article 3 of the ECHR.⁵⁹

Children's right to respect for their private and family life has also to be considered. For an unaccompanied child, states, if informed of the family's situation, may be under an obligation to facilitate the reunion of the family.⁶⁰

The conditions in which children's removal is conducted must be assessed carefully. That assessment should take into account whether an unaccompanied child travels alone, if the child returnee would be properly looked after upon return and the

⁵⁶ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008; *F.G. v. Sweden* [GC], No. 43611/11, 23 March 2016.

⁵⁷ ECtHR, *M.A. and Others v. Lithuania*, No. 59793/17, 11 December 2018, para. 104; *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012, para. 177; *Khasanov and Rakhmanov v. Russia*, Nos. 28492/15 and 49975/15, paras. 93-101. See also ECtHR, *Guide on the case-law of the European Convention on Human Rights*, 31 August 2022, paras. 41-43.

⁵⁸ ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, para. 130.

⁵⁹ ECtHR, *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, paras. 185; see also *D.A. and Others v. Poland*, No. 51246/17, 8 July 2021, para. 69; *A.B. and Others v. Poland*, No. 42907/17, 30 June 2022, para. 42; *A.I. and Others v. Poland*, No. 39028/17, 30 June 2022, para. 45.

⁶⁰ ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 82.

general situation the child is likely to find upon return.⁶¹ Based on that assessment, authorities must take all necessary procedural and supervisory measures to ensure that the return is conducted in conditions that are compatible with their human rights obligations under the ECHR.⁶²

Under EU law, the [Return Directive](#) sets out common standards and procedures for returns. These include also safeguards for children, for example, family unity, and access to education for children pending removal (Article 14 (1)). Articles 5 and 10 of the directive specify that the best interests of the child should inform all decisions relating to the return of unaccompanied children. Before removing an unaccompanied child from a Member State, the authorities must be satisfied that the child will be returned to a member of his/her family, a nominated guardian, or adequate reception facilities in the country of return (Article 10 (2)). The CJEU reiterated the need to assess the adequacy of reception facilities in the country of return before taking a return decision on an unaccompanied child. If adequate reception facilities are found and the return decision is appropriate, return decisions must be implemented so that situations of legal limbo are avoided.⁶³

Member States may, however, decide not to apply the Return Directive to persons refused entry at borders and to those apprehended or intercepted in connection with the irregular crossing of the external border (Article 2 (2) (a)). Several Member States at the EU's external land and sea borders have decided to do so.⁶⁴ In this case, only selected provisions of the directive apply – these include, for example, respecting the principle of *non-refoulement*, taking into account the specific needs of children, and that coercive measures must be necessary and proportionate (Article 4 (4)).

61 ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011, para. 87; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 55.

62 ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, para. 68.

63 CJEU, C-441/19, *TQ v Staatssecretaris van Justitie en Veiligheid*, 14 January 2021, paras. 77 and 80.

64 See, for example, for EU Member States at the EU's external land border FRA (2020), [Migration: Fundamental rights issues at land borders](#), Luxembourg: Publications Office of the European Union, December 2020, p. 8, Table 2.

Chapter 9

Access to justice

Article 13 (right to an effective remedy) of the ECHR guarantees the existence in domestic law of a remedy allowing the exercise of the rights and freedoms enshrined in the Convention. Appeals against a removal order when the applicants allege a real risk of violation of the rights guaranteed by Articles 2 and 3 of ECHR in the country of destination should have suspensive effect.⁶⁵ When there is an arguable claim that removal risks infringing the person's right to respect for his or her private and family life, the ECHR requires the state to provide the person concerned with an effective opportunity to challenge the decision to deport or refuse a residence permit and to obtain a sufficiently thorough and procedurally safeguarded examination of the relevant issues by a competent national body providing sufficient guarantees of independence and impartiality.⁶⁶ Asylum applicants must have access to effective remedy also in order to be able to lodge complaints concerning their reception conditions.⁶⁷ These rights also apply to children.

Under EU law, children's rights to access justice in an immigration context are set out in a range of different instruments. First, the right to an effective legal remedy and to a fair trial is generally set out in Article 47 of the Charter. This includes a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, including having the possibility of advice, a defence and representation. The [Asylum Procedures Directive](#) (Article 20) and the [Return Directive](#) (Article 13) reiterate the right to an effective (judicial) remedy, respectively for asylum applicants and returnees, and regulate access for them to free legal assistance. These provisions apply to anybody falling under the scope of the two directives, including children. Children's right to legal representation is also supported by their right to access victim support services and special confidential support services under the [Victims' Rights Directive](#).⁶⁸

65 ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007, para. 66.

66 ECtHR, *Moustahi v. France*, No. 9347/14, 25 June 2020, paras. 150-151; ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, paras. 112-113.

67 ECtHR, *Darboe and Camara v. Italy*, No. 5797/17, para. 197.

68 [Directive 2012/29/EU](#) of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

Chapter 10

Further information

FRA, ECtHR and CoE (2022), *Handbook on European law relating to the rights of the child – 2022 Edition*, Luxembourg, Publications Office of the European Union

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FRA (2019), *Returning unaccompanied children: fundamental rights considerations*, Luxembourg, Publications Office of the European Union

FRA (2017), *European legal and policy framework on immigration detention of children*, Luxembourg, Publications Office of the European Union

FRA, ECtHR and CoE (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office of the European Union

Council of Europe (CoE) and European Union (EU) Member States have an undeniable sovereign right to control the entry of non-nationals into their territory. While carrying out border control, states have a duty to protect fundamental rights of all people under their jurisdiction, regardless of their nationality, status, or age. Children as a category of vulnerable persons with special needs require heightened protection.

This joint note of the Council of Europe and the European Union Agency for Fundamental Rights summarises some key safeguards of European law as they apply to children in the context of migration at the EU's external borders, bearing in mind that the relevant CoE standards apply to all borders.

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