

JUDICIAL IMPLEMENTATION OF **ARTICLE 3 OF THE CONVENTION ON THE RIGHTS OF THE CHILD IN EUROPE**

The case of migrant children including
unaccompanied children

unicef 



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

Europe
Regional Office

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Commissioner for Human Rights
Regional Office for Europe.

June 2012.

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Note

The general comments and general recommendations of United Nations treaty bodies, up to 2008, referred to throughout the present study are reprinted in "Compilation of general comments adopted by human rights treaty bodies" (HRI/GEN/1/Rev.9 (Vol. I) and (Vol. II)). Later general comments are available from the Treaty Body Database accessible from the website of OHCHR: www.ohchr.org.

ACKNOWLEDGEMENTS

The Regional Office for Europe of the United Nations High Commissioner for Human Rights and the United Nations Children’s Fund are grateful to Patrícia Jerónimo Vink, Professor, Law School of Minho University, Portugal, and Nadine Finch, Barrister, Garden Court Chambers, London, who are the primary authors of the present publication. The authors wish to thank Jan Jařab, Pablo Espiniella (OHCHR) and Margaret Wachenfeld (UNICEF) for their contributions and advice. The views expressed in this publication are the authors’ own and do not necessarily represent the views of the Regional Office for Europe of the United Nations High Commissioner for Human Rights or of UNICEF.

ABBREVIATIONS

CFR	European Union Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
EC	European Community
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EEA	European Economic Area
EMN	European Migration Network
EU	European Union
HRC	United Nations Human Rights Committee
ICRC	International Committee of the Red Cross
IOM	International Organisation for Migration
NGO	Non-governmental organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	Office of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund

SUMMARY

The United Nations Convention on the Rights of the Child (CRC) and its Optional Protocols provide the basis for establishing effective mechanisms to address the multifaceted challenges faced by States and other actors, including regional organisations, in ensuring that children are able to access and enjoy their rights. Article 3 of the CRC states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. This principle is of particular relevance to the situation of migrant children, including unaccompanied migrant children, in regular or irregular situations that are the focus of this study.

All European countries have signed and ratified the CRC but they have not all incorporated it into national law. Whether or not incorporated into national law, the CRC is a binding obligation under international law that should guide national law and its interpretation. There is a wide range of regional and national policy and legal frameworks in Europe aimed at ensuring respect for the CRC. At the same time, national migration policies and legislation do not usually adopt a child rights perspective or consider the particular vulnerabilities of children, while most public policies on children do not take into account the specific rights of children in the context of migration. This leaves a clear gap in legal and policy frameworks – a yawning gap into which many migrant children, particularly those in an irregular migration situation, are falling. It is the concern about this gap and its consequences for some of the most vulnerable children in Europe that has motivated OHCHR and UNICEF to hold a Judicial Colloquium and to commission this study. One source of good practice and the emergence of guidance on the best interest principle that warrants particular focus is the case law of regional and national courts. Given the multilayered obligations concerning child migrants originating from international obligations under the CRC, regional obligations flowing from the European Convention on Human Rights (ECHR) and EU law as well as national law, the jurisprudence on this issue is spread among national courts, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). The CJEU and the ECtHR are supranational courts, the jurisprudence of which the countries in Europe have accepted to be, at the least, authoritative insofar as the interpretations of regional and international standards are concerned. The national courts are clearly influenced by the judgements of these regional courts, judgements that are often referred to in their decisions regarding the best interests principle and migrant children.

What needs to be ascertained is how national and regional courts apply the best interests principle to concrete situations involving migrant children, in particular children with an irregular immigration status and unaccompanied or separated children. This raises two sets of interdependent questions. On the one hand, do courts actually apply the best interests principle when deciding cases that involve migrant children? Is article 3 of the CRC directly invoked by the courts as grounds for the decisions? If so, is it invoked alone or in conjunction with other international or domestic legal provisions? What is the weight accorded to best interests determination in reaching final decisions? On the other hand, when courts do apply the best interests principle, how do they go about determining its content? What are the factors that the courts consider when they have to decide what is in the best interest of an individual migrant child? When courts decide, for example, to confirm an administrative decision to return an unaccompanied child to his or her country of origin, how do they make sure that that solution is in the child’s best interest? What relevance do the courts ascribe to the more substantive provisions of the CRC in determining the best interest of an individual child? Is the best interests principle a mere procedural guarantee or is it also used as a substantive standard? Are the courts in any way influenced in their decisions by the comments and reports issued by the Committee on the Rights of the Child and other treaty bodies on the best interests principle?

To address these questions, the OHCHR Regional Office for Europe held the Judicial Colloquium on the implementation of article 3 of the CRC in procedures involving migrant children, in particular children with an irregular immigration status and unaccompanied or separated children. The

Colloquium, which was organised in cooperation with UNICEF and with the support of UNHCR, Save the Children, ECRE and the Supreme Court of Catalonia, took place in Barcelona on 8 July 2011, and brought together judges from national and regional courts in Europe. The discussions were supported by a background paper, which gathered court cases at the national level (from different jurisdictions and levels of appeal in different countries) illustrative of the key issues dealt with by the courts when deciding matters pertaining to migrant children and the safeguard of their best interests: (a) age assessment proceedings; (b) decisions about durable, long-term solutions for children; (c) access to basic social services and enjoyment of related rights; and (d) the procedural safeguards that should be in place to ensure that children's rights are respected as these important decisions are being made about their future, including the right of children to participate in proceedings.

This study builds on the background paper and discussions during the Judicial Colloquium and reviews judicial decisions from the CJEU and the ECtHR and from selected European national courts that apply the principle of the best interests of the child to cases involving migrant children in irregular situations, including unaccompanied and separated children. The selected cases are meant to be illustrative of the type of issues that are raised before national courts and of the way in which these courts interpret their obligation under article 3 of the CRC to treat the best interests of the child as a primary consideration. Finally, the study identifies a number of relevant cases which explicitly refer to the best interests of the child and which may serve as good practice in guiding future jurisprudence throughout Europe.

INTRODUCTION

A. MIGRANT CHILDREN AND THE CRC

Thousands of migrant children arrive every year in Europe. Some of them arrive with their parents while others arrive on their own as unaccompanied or separated¹ children. They may be fleeing war, generalised violence or fear of persecution in their country of origin or trying to escape extreme poverty in search of better economic opportunities.² Some are victims of trafficking for sexual exploitation or crimes related to exploitation and have been brought into Europe by illegal means.³

Whether accompanied or on their own, migrant children face serious difficulties at every stage of the migration process. When they arrive in Europe, they are often treated like adult irregular migrants⁴ with little or no consideration for their vulnerability and specific rights and needs as children. They often do not have access to asylum or migration procedures.⁵ They may be kept in detention or removal centres along with unrelated adults and exposed to difficult living conditions, including overcrowding, lack of medical care and inadequate nutrition.⁶ They may be denied access to essential services, like education and health care, because of their or their parents' irregular immigration status. They may be deported without an individual assessment of their protection needs or of the care and reception facilities that may be available to them in their country of origin on return. They are often insufficiently informed about their rights and their views are often not taken into account when reaching a decision about their future. To make matters worse, they may be denied legal assistance and access to courts in order to seek justice and remedies. Although all European countries have signed and ratified the United Nations Convention on the Rights of the Child (CRC) and are therefore bound to "ensure the protection of all children at all stages of the migration process"⁷ irrespective of their or their parents' immigration status, immigration policies still tend to override child rights and associated human rights obligations in many places in Europe.⁸ As pointed out by the Parliamentary Assembly of the Council of Europe, a number of provisions laid down in the CRC – best interests of the child; non-discrimination; facilitation of family reunification, and others – are often neglected by States in the elaboration and implementation of asylum (and immigration) measures.⁹ National migration policies and legislation do not usually adopt a child rights perspective or consider the particular vulnerabilities of children. On the other hand, most public policies on children do not take into account the specific rights of children in the context of migration – leaving a clear gap in legal and policy frameworks.¹⁰

¹ "Unaccompanied children" are children (i.e., persons below the age of 18 years) who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so, while "separated children" are children who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives; these children may, therefore, include children accompanied by other adult family members (Committee on the Rights of the Child, General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6), paras. 7-8). Throughout the present study, the combined reference to "unaccompanied and separated children" will be used as it is the common designation used in international law reports. However, the equation of unaccompanied children with separated children is not always accurate when analysing domestic legal systems, as some countries, such as Portugal and Greece, have special protection provisions only for unaccompanied children and do not treat separated children in the same manner.

² The motivations are complex and often change along the migratory route (see Study of the OHCHR on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration (A/HRC/15/29), para. 5).

³ See *Child Trafficking in Europe: A Broad Vision to Put Children First* (UNICEF, Innocenti Research Centre, 2008), p. iv.

⁴ Report submitted to the United Nations Human Rights Council by the Special Rapporteur on the human rights of migrants, Jorge Bustamante (A/HRC/11/7), para. 23.

⁵ Liv Feijen, "The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe" *Refugee Survey Quarterly*, vol. 27, No. 4, 2009, p. 63.

⁶ Study of the OHCHR on challenges and best practices (A/HRC/15/29), paras. 50-51.

⁷ Bustamante (A/HRC/11/7), p. 1.

⁸ Anthony Macdonald, "Protection Responses to Unaccompanied and Separated Refugee Children in Mixed Migration Situations", *Refugee Survey Quarterly*, vol. 27, No. 4, 2009, p. 50.

⁹ Council of Europe Parliamentary Assembly Recommendation 1703 (2005) on protection and assistance for separated children seeking asylum, para. 4.

¹⁰ Bustamante (A/HRC/11/7), para. 24.

Furthermore, the legal provisions on immigration and child protection¹¹ are sometimes applied in a confusing and even contradictory manner, which results in serious protection gaps for migrant children, in particular for unaccompanied and separated children, who are the most vulnerable.¹²

Concern for the particular vulnerability of migrant children has been expressed by the United Nations, the Council of Europe and the European Union (EU), as well as by NGOs, national human rights institutions and academia for over a decade. Considering “the situation of vulnerability in which migrant workers and members of their families frequently find themselves”, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the General Assembly of the United Nations in 1990,¹³ established a set of basic norms for their protection during the entire migration process, including the recognition to each child of a migrant worker of the right to a name, to registration of birth and to a nationality (article 29), as well as of the right of access to education on the basis of equality of treatment with nationals of the host State (article 30). Furthermore, a variety of initiatives were put in place at various levels to protect the rights of children in the context of migration. United Nations treaty bodies and specialised agencies, including the Committee on the Rights of the Child (the treaty body monitoring the Implementation of the CRC¹⁴), the Office of the United Nations High Commissioner for Human Rights (OHCHR), UNICEF and the Office of the United Nations High Commissioner for Refugees (UNHCR), have provided recommendations and guidelines to enhance the protection of migrant children.¹⁵ The same is true for the Council of Europe Parliamentary Assembly and Committee of Ministers, which, since 2003, have issued several recommendations and resolutions on the subject.¹⁶

The EU, having incorporated the rights of the child in the Treaty on European Union (article 3) and various articles of the EU Charter of Fundamental Rights (including article 24), addressed unaccompanied children within its 2010-2014 Stockholm Programme,¹⁷ followed by the European Commission’s Action Plan on Unaccompanied Minors to be implemented in that time frame.¹⁸ National policies and legal frameworks have been revised in order to ensure respect for the overarching principles enshrined in the CRC. Yet the many studies conducted on the issue in recent years¹⁹ attest to the fact that challenges remain in ensuring the effective protection of migrant children’s rights in Europe.

¹¹ “Child protection authorities or systems” refers to those authorities charged with protecting children from violence, abuse or exploitation. They may also be referred to as “child welfare”, “social welfare” or “child care” authorities.

¹² Committee on the Rights of the Child, General Comment No. 6, para. 1.

¹³ Resolution 45/158..

¹⁴ Through its general comments, and in particular General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child (CRC/GC/2003/5), General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin and General Comment No. 12 on the right of the child to be heard (CRC/GC/12) and also its concluding observations addressed to States parties, the Committee on the Rights of the Child has provided guidance on the measures needed to ensure respect for the provisions in the Convention and the principle of the best interests of the child.

¹⁵ Consider, for instance, the guiding principles on policies and procedures applicable to unaccompanied children seeking asylum, issued by the UNHCR in 1997; General Comment No. 6; the report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante; and the study on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration, concluded by OHCHR in July 2010. In 2004, an inter-agency document was adopted by the International Committee of the Red Cross (ICRC), the UNHCR, UNICEF and other organisations, entitled *Inter-agency Guiding Principles on Unaccompanied and Separated Children*.

¹⁶ Parliamentary Assembly Recommendation 1596 (2003) on the situation of young migrants in Europe, Recommendation 1703 (2005) on protection and assistance for separated children seeking asylum and Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return; and Committee of Ministers Recommendation CM/Rec(2007)9 on life projects for unaccompanied migrant minors.

¹⁷ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01, *Official Journal of the European Union*, 4 May 2010.

¹⁸ Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014), 6 May 2010, COM(2010) 213 final.

¹⁹ See, for instance, the study published in May 2010 by the European Migration Network entitled *Policies on Reception, Return, Integration Arrangements for, And Numbers of, Unaccompanied Minors – An EU Comparative Study*, and the studies published by the European Union Agency for Fundamental Rights entitled *The Protection of the Rights and Special Needs of Irregular Immigrant Minors and Asylum Seeking Children* (2008) and *Separated Asylum-Seeking Children in European Union Member States – Comparative report* (2011).

The standards established by the CRC are “at the heart”²⁰ of all the recommendations, guidelines and actions devised for the protection of children in the context of migration. The CRC, unanimously adopted by the General Assembly of the United Nations in 1989²¹ and the most widely ratified international human rights treaty, constitutes the uncontested primary normative standard in relation to children’s rights, including child protection, in the world. The CRC applies to every child, regardless of nationality or immigration status. It is widely accepted that the CRC demands that migrant children be seen and protected first and foremost as children. As the Special Rapporteur on the human rights of migrants, Jorge Bustamante, noted in his 2009 report, “[although] the Convention neither focuses on child migration nor defines the migrant child, its provisions are of the highest relevance to ensure the adequate protection of all children in all circumstances, including therefore all stages of the migration process”.²²

The CRC is grounded on four general principles, which are meant to guide the interpretation of the Convention as a whole and thereby guide national programmes of implementation. They are the principle of non-discrimination (article 2); the child’s right to life, survival and development (article 6); the respect for the views of the child (article 12); and the principle of the best interests of the child (article 3.1). Among these four principles, the principle of the best interests of the child is prominent, since it translates the spirit – the fundamental message – of the Convention and pervades all the provisions therein. As Philip Alston and Bridget Gilmour-Walsh remarked, “there is no article in the Convention, and no right recognized therein, with respect to which this principle is not relevant”.²³ By definition, the recognition of the rights enshrined in the CRC serves the child’s best interests and every decision that gives primary consideration to the best interests of the child will be one that ensures that all of the other rights of the child are respected. The principle is enunciated in article 3.1, which prescribes that “[in] all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. Further references to the best interests of the child appear throughout the CRC in a number of different contexts. For instance, under article 9.1, a child shall not be separated from his or her parents against their will, except when competent authorities determine that such separation is necessary for the best interests of the child; under article 37(c), every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest; and under article 40.2, every child alleged as or accused of having infringed the penal law has the right to have his or her parents or legal guardians present at any hearings, unless it is considered not to be in the best interest of the child.

The principle of the best interests of the child has been integrated into domestic legislation²⁴ by most EU member States – as recommended by the Committee on the Rights of the Child²⁵ – and is also enshrined in the EU Charter of Fundamental Rights, which is grounded in the CRC²⁶ and prescribes that “in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests shall be a primary consideration”.²⁷

²⁰ Communication from the Commission to the European Parliament and the Council, Action Plan on Unaccompanied Minors (2010-2014), 06.05.2010, COM(2010) 213 final, p. 2.

²¹ Resolution 44/25..

²² Bustamante (A/HRC/11/7), para. 31.

²³ Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child. Towards a Synthesis of Children’s Rights and Cultural Values*, Innocenti Studies, UNICEF, 1996, p. 1.

²⁴ As pointed out by Alston and Gilmour-Walsh (p. 3), the principle of the best interests of the child, in one form or another (for instance, the child’s welfare as “the first and paramount consideration”), was already a feature in family law at the national level in many countries by the time the CRC was adopted. According to the authors, the emergence of the best interests principle in international law is largely due to the pre-existence of the principle in domestic legal systems.

²⁵ Study of OHCHR on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration (A/HRC/15/20), para. 25.

²⁶ The influence of the CRC is expressly recognised in the explanatory document to the Charter, which states that article 24 “is based on the... Convention on the Rights of the Child” (Council of the European Union, Note from the Praesidium, ‘Explanations Relating to the Charter of Fundamental Rights of the European Union as set out in CHARTE 4487/00 CONVENT 50’, Convent 49, CHARTER 4473/00, 11 October 2008, available from www.europarl.europa.eu/charter/pdf/04473_en.pdf).

²⁷ Article 24.1.

The best interests principle also informs the discussions regarding the protection due to migrant children under international law. For instance, the United Nations Human Rights Council, in its resolution 9/5 on the human rights of migrants, called upon States to protect the human rights of migrant children, particularly unaccompanied children, ensuring that the best interests of the child are a primary consideration in their policies of integration, return and family reunification.²⁸ The Committee on the Rights of the Child has stressed, in its concluding observations on country reports, that repatriation and the process of asylum claims should be considered in the light of the best interests of the child.²⁹ The Committee against Torture has emphasised that children should be returned to their country of origin only if it is in their best interests.³⁰ The Special Rapporteur on the sale of children, child prostitution and child pornography has concluded that the best interests of the child is the primary consideration in the search for short- and long-term solutions.³¹ In addition, the European Commission Action Plan on Unaccompanied Minors is explicitly based on the principle of the best interests of the child, which should be mainstreamed throughout all actions.

However, for all its ubiquity, the best interests principle remains elusive and challenging to those who must apply it in practice. Its open-ended and indeterminate character allows for a variety of interpretations and modes of application, which means that its application in a given situation will not necessarily lead to any one particular outcome.³² To a large extent, this indeterminacy can be overcome by a holistic interpretation of the CRC. As pointed out by Alston and Gilmour-Walsh, “the best interests principle assumes much clearer and thus more determinate content when read in conjunction with the substantive rights recognized in the CRC”.³³ It is beyond doubt, for example, that the best interests of the child require that every child be protected against all forms of discrimination and from all forms of physical and mental violence, abuse, neglect or exploitation; that the views of the child must be given due weight in all matters affecting him or her; and that every child has the right to education and health care. This is not the whole answer, however, given that the appropriate safeguarding of a child’s best interests is not limited to the application of the rights listed in the CRC and that the protection of some of the rights recognized by the CRC – such as the right to family reunification (article 9) – is made expressly dependent on a concrete assessment of the child’s best interests. The principle is therefore not a mere resonance box of the more substantive provisions of the CRC.

While it is certain that the principle “can never be invoked to override the application of the various substantive rights recognized in the CRC”,³⁴ its precise implications in concrete situations will inevitably vary according to a number of factors, which makes it all the more important to identify which factors should be considered by decision makers when making a best interests determination for any individual child. In the context of migration, how is a decision maker to ascertain, for example, whether family reunification in the country of origin is in the best interest of the child? Several tools have been developed by international organisations such as UNHCR on best interest determination,³⁵ but it remains a critical issue requiring particular attention to its practical application at the national level with regard to situations involving migrant children.

B. MIGRANT CHILDREN AND REGIONAL AND NATIONAL JURISPRUDENCE

One area which has been generally overlooked by the comparative studies conducted in relation

²⁸ Human Rights Council resolution 9/5 of 24 September 2008 (see Report of the Human Rights Council on its ninth session (A/HRC/9/28)).

²⁹ See, for example, the Committee’s concluding observations on the report of Austria (CRC/C/15/Add.251) of 31 March 2005, para. 48, and on the report of France (CRC/C/FRA/CO/4) of 11 June 2009, para. 86.

³⁰ Report of the Committee against Torture (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 44* [A/65/44], p. 56).

³¹ Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit, Addendum, Mission to Albania (E/CN.4/2006/67/Add.2) of 27 March 2006, para. 121.

³² Alston and Gilmour-Walsh, , p. 2.

³³ *Ibid.*, pp. 33-34.

³⁴ *Ibid.*, p. 2.

³⁵ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008.

to the protection of migrant children in Europe but which warrants particular focus is the work of the courts, for they can be very useful sources of good practices and guidance on the implementation of the best interests principle. It is true that in most European countries many decisions that impinge on the rights of migrant children, for example, the granting of residence permits, refugee status or subsidiary protection, or the decision to remove or to reunite the child with his or her family, are initially taken at an administrative level. It is also the case that migrant children are not always able to appeal these administrative decisions to the appropriate national courts, owing to a failure to inform them of their rights or provide them with the necessary legal advice and representation. However, it is clear that when these children are able to appeal, the courts can have a very important role in securing their rights and ensuring that their best interests are protected and promoted.

While legal traditions differ across European countries, with the majority operating a system of civil or codified law and the minority following common or precedent-based law, the different courts recognise that the CRC is a binding obligation in international law that should guide national jurisprudence on children. National courts are therefore bound to make the best interests of the child a primary consideration in all cases concerning children. In this process, it is to be expected that national courts will be influenced by the case law of European regional courts – the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) – given the regional obligations concerning migrant children that flow from the European Convention on Human Rights (ECHR) and EU law. The jurisprudence of these regional courts, which is accepted by European countries to be, at the least, authoritative insofar as the interpretations of international standards that the States have committed to are concerned, is therefore also an important source of good practice in determining the best interests of the child in individual cases.

What needs to be ascertained is how national and regional courts apply the best interests principle to concrete situations involving migrant children, in particular children with an irregular immigration status and unaccompanied or separated children. This raises two sets of interdependent questions. On the one hand, do courts actually apply the best interests principle when deciding cases that involve migrant children? Is article 3 of the CRC directly invoked by the courts as grounds for the decisions? If so, is it invoked alone or in conjunction with other international or domestic legal provisions? What is the weight accorded to best interests determination in reaching final decisions? On the other hand, when courts do apply the best interests principle, how do they go about determining its content? What are the factors that the courts consider when they have to decide what is in the best interest of an individual migrant child? When courts decide, for example, to confirm an administrative decision to return an unaccompanied child to his or her country of origin, how do they make sure that that solution is in the child's best interest? What relevance do the courts ascribe to the more substantive provisions of the CRC in determining the best interest of an individual child? Is the best interests principle a mere procedural guarantee or is it also used as a substantive standard? In reaching their decisions, are the courts in any way influenced by the comments and reports issued by the Committee on the Rights of the Child and other treaty bodies on the best interests principle?

To address these questions, the OHCHR Regional Office for Europe held a Judicial Colloquium on the implementation of article 3 of the CRC in procedures involving migrant children, in particular children with an irregular immigration status and unaccompanied or separated children. The Colloquium, which was organised in cooperation with UNICEF and with the support of UNHCR, Save the Children, ECRE and the Supreme Court of Catalonia, took place in Barcelona on 8 July 2011, and brought together judges from national and regional courts in Europe. The discussions were supported by a background paper, in which were compiled court cases at the national level (from different jurisdictions and levels of appeal in different countries) illustrative of the key issues dealt with by the courts when deciding matters pertaining to migrant children and the safeguard of their best interests. The discussions were structured around the four key issues identified in the case law review conducted for the background paper: (a) age assessment proceedings; (b) decisions about the long-term solutions for children; (c) access to basic social

services and enjoyment of related rights; and (d) procedural safeguards, including the right of children to participate in proceedings.

During the discussions, for example, it was acknowledged that the recent focus on the situation of unaccompanied and separated children should not lead to an underestimation of the vulnerability of migrant children arriving with their families. As remarked by Johannes Wedening, UNICEF representative, many such children are repatriated for reasons related to their parents' immigration status or misdemeanours, without an individual assessment. Christine Martin, Senior Immigration Judge at the Immigration and Asylum Chamber of the Tribunal Service, England and Wales, commented that European countries are fairly good at looking after children who are on their own, but the same is not the case for children migrating with their families.

From the discussions, it became apparent that there are considerable differences in approach from one country to another and even within the same country, which can be detrimental to the rights of migrant children who risk falling through the legal loopholes.³⁶ Justice Catherine Sultan, Child Tribunal of Evry in France, referred in particular to the different practices in addressing age assessments and concluded that there is "a need for harmonized regulations and practice at the EU level and within each of the Member States". Justice Joseph Moyersoer, President of the International Association of Youth and Family Judges and Magistrates, noted that there was a broad consensus among the participants that most of the gaps identified in the determination of the best interest of migrant children, including unaccompanied children, were not due to different legal traditions but rather to failure to address particular concerns. It was felt that such gaps could potentially be overcome on the basis of mutual inspiration and exchange of best practices. He stressed that avenues should be found to ensure that national judges are fully aware of the concluding observations adopted by the Committee on the Rights of the Child, as well as the decisions adopted by the ECtHR and CJEU relevant to the subject matter. These are just some of the outcomes from the discussions, which reflect the relevance of the various themes being covered throughout the chapters of the present study.

C. THE OBJECTIVES OF THIS STUDY

Building upon the discussions of the Judicial Colloquium, this publication presents a comparative study of the judicial implementation of article 3 of the CRC by national and regional courts in Europe. Its aim is to identify good practices that can serve as guidance in best interest determinations. Good practices require that the courts carefully assess all the factors involved and the individual circumstances of each child before reaching a decision about his or her future. That does not necessarily mean that a child will be automatically granted the right to live on the territory of the host country,³⁷ as it will not necessarily be in every child's best interests; that must be determined on an individual basis.

The cases reviewed in the present study come from an array of different courts, at the national and regional levels. They cover such diverse issues as procedural safeguards in age assessments, termination of State guardianship, asylum applications, family reunification, access to education and assisted return to the child's country of origin. What these cases have in common is that their *ratio decidendi* is directly linked with the consideration of the best interests of the child, even if article 3 of the CRC is not directly invoked. Some of the cases are arguably not examples of good practices, since they dismiss the relevance of the CRC or they misinterpret some of its core provisions. Their inclusion in this study is necessary to understand the practical challenges that remain to judicial implementation of article 3 of the CRC and of the best interests principle in general.

³⁶ Liv Feijen, "The Challenges of Ensuring Protection to Unaccompanied and Separated Children in Composite Flows in Europe", *Refugee Survey Quarterly*, vol. 27, No. 4, 2009, p. 64.

³⁷ Throughout the present study, the terms "host country" or "country of destination" will be used, depending on whether the focus is on the situation of children who are already in the territory of an EU member State or on children who are arriving at the border of an EU member State.

The cases selected reflect the differences that exist between European countries, many of which can be explained by the different national experiences with migration and child migration in particular. Some countries already have a long history of dealing with significant immigration flows and asylum applications, as is the case with France and the United Kingdom, while other countries have only recently become countries of immigration and have very few cases of migrant children arriving at their borders unaccompanied or separated, as is the case in Hungary, Poland and Portugal. Some countries have specialized courts to decide on immigration and asylum issues (notably the case in Belgium, with the Court for Alien Law Litigation), while in other countries the cases involving migrant children are decided by common administrative courts, or by civil or family law courts. In some cases, the protection of the rights of migrant children has warranted the intervention of the constitutional courts.

Depending on whether the national immigration and asylum system is primarily administrative or judicial, the cases will show a higher or lower degree of judicial restraint. Some countries have incorporated the principles of the CRC into domestic law while others have not yet fully done so and this has affected the regularity with which the Convention is invoked in judicial proceedings. Furthermore, some issues are more heavily litigated in some countries than in others. That is the case, for instance, with age assessment, which has been heavily litigated in Spain and the United Kingdom, but entirely absent from judicial procedures in Hungary and Portugal, as reported at the Judicial Colloquium by Judge Dora Virag Dudas, of the Budapest Municipal Court, and Judge Jorge Martins Ribeiro, of the Family and Juvenile District Court in Braga, Portugal. That is also the case with respect to the protection of children placed in custody or guardianship arrangements after they reach 18, which has been heavily litigated in Italian courts.

The cases are analysed against the backdrop provided by the international standards, as set by the CRC and other international binding instruments relevant to the protection of the rights of migrant children, as well as by soft-law instruments, which include General Comments No. 6 on the treatment of unaccompanied and separated children outside their country of origin and No. 12 on the right of the child to be heard.

CHAPTER I

ARTICLE 3 OF THE CRC IN THE CASE LAW OF REGIONAL AND NATIONAL COURTS IN EUROPE

A. EU LAW AND THE BEST INTERESTS OF THE CHILD

At a supranational level, the European Union has clearly articulated its intention to apply and promote the principles contained in article 3 of the CRC. Article 3.5 of the Lisbon Treaty³⁸ states that the Union will contribute to the protection of human rights and, in particular, the rights of the child.

The European Union Charter of Fundamental Rights became legally binding³⁹ on member States when the Lisbon Treaty came into force in December 2009 and therefore the rights, freedoms and principles it contains have the same force as the treaties which created the European Union. Article 24 of the Charter states that:

- “1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her best interests.”

These commitments are binding on the European Union institutions and the EU member State authorities in implementing EU law.

In addition, the Stockholm Programme,⁴⁰ adopted on 2 December 2009, set the development of “responsibility, solidarity and partnership in immigration and asylum matters” as one of the main objectives for member States in the period 2010-2014. It also expressly stated at paragraph 2.3.2 that:

“The rights of the child, namely the principle of the best interest of the child being a child’s right to life, survival and development, non-discrimination and respect for the child’s right to express their opinion and be genuinely heard in all matters according to their age and level of development as proclaimed in the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child, concern all Union policies”.

The European Council then called upon the Commission to “identify measures, to which the Union can bring added value, in order to protect and promote the rights of the child. Children in particularly vulnerable situations should receive special attention, notably children who are victims of sexual exploitation and abuse as well as children who are victims of trafficking and unaccompanied minors in the context of Union migration policy.”

In response to the Stockholm Programme, the European Commission developed an *Action Plan*

³⁸ Consolidated Version of the Treaty of the European Union, *Official Journal of the European Union*, 30.3.2010 C 83/15.

³⁹ See article 6.1 of the Consolidated Treaty. Article 6.2 also stated that “the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

⁴⁰ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01).

on *Unaccompanied Minors (2010-2014)*.⁴¹ In the introduction to the document, the Commission stated that it placed “the standards established by the United Nations Convention on the Rights of the Child ... at the heart of any action concerning unaccompanied minors”. Although not binding on member States, it is indicative of the policies which those States have agreed to follow.

Recent Council Directives which are binding on EU member States that have not opted out have also made reference to the principle that the best interests of children should be taken into account when outlining steps which must be taken in relation to migrant families and unaccompanied migrant children. For example, Directive 2003/9/EC (Reception Directive)⁴² refers to States tracing an unaccompanied child’s family in order to protect his or her best interests.⁴³ In addition, Directive 2005/85/EC (Procedures Directive)⁴⁴ states that when member States are implementing the special measures to be applied where an unaccompanied child makes an application for refugee status, the best interests of the child shall be a primary consideration.⁴⁵ Similarly, Directive 2008/115/EC (Returns Directive)⁴⁶ states that when implementing this Directive, member States shall take due account of the best interests of the child⁴⁷ and that:

“1. Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return shall be granted with due consideration being given to the best interests of the child”.⁴⁸

Similarly, Directive 2011/36/EU (Trafficking Directive)⁴⁹ states in article 16.2 that:

“Member States shall take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the child”.

In Case C-540/03, the Grand Chamber of the Court of Justice of the European Union heard a case brought by the European Parliament against the Council of the European Union, in which it asserted that a subparagraph in Council Directive 2003/86/EC⁵⁰ did not respect fundamental rights as required by the EU Treaty. In doing so it relied on article 24 of the Charter on Fundamental Freedoms and the CRC.

In giving its judgement, the Court held that:

“Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories”.⁵¹

The Court then stated that:

⁴¹ Communication from the Commission to the European Parliament and the Council SEC (2010) 534.

⁴² Council Directive 2003/9/EC, of 27 January 2003, laying down minimum standards for the reception of asylum seekers – it does not apply to Denmark or Ireland as they have exercised their powers to opt out of this directive.

⁴³ Article 19.3.

⁴⁴ Council Directive 2005/85/EC, of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status – it does not apply to Denmark as it has exercised its power to opt out of this directive.

⁴⁵ Article 17.6.

⁴⁶ Council 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 – it does not apply to Denmark, Ireland and the United Kingdom, as they have exercised their powers to opt out of this directive.

⁴⁷ Article 5.

⁴⁸ Article 10.1.

⁴⁹ 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 – it does not apply to Denmark as it has exercised its power to opt out of this directive.

⁵⁰ Directive 2003/86/EC, of 22 September 2003, on the right to family reunification.

⁵¹ Paragraph 35.

“The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community Law. [That] is also true of the Convention on the Rights of the Child [which], like the Covenant, binds each of the Member States”.

The Court reached the same conclusion in Case-244/06.⁵²

The CRC has also been referred to in six opinions of Advocate Generals between 2003 and February 2009.⁵³

However, in practice in a number of cases where the Court considered the substantive rights held by children in migrant families, their rights were found to derive directly from the EU Treaty and its directives and regulations and not from the CRC itself.

For, example, in *Baubast*,⁵⁴ the Court confirmed that a child who entered education while his or her parent was exercising a right of free movement within the European Union has the right to remain to complete their education even if that parent is no longer in the member State in question. In doing so, it applied the rights arising from the EU Treaty and Regulation 1612/68,⁵⁵ which were already binding on member States.

There has also been another line of case law dealing with the rights of migrant children who have acquired citizenship in the European Union even though their parents have not. In the case of *Chen*⁵⁶ the Court held that a non-EU national mother derived a right to remain in the United Kingdom with her Irish child, who had moved to England and was financially self-sufficient. The Court reached this conclusion as it deemed that the only way that the child could remain and enjoy her right of free movement as a self-sufficient person was if the mother was with her to meet her day-to-day needs. Therefore, again the decision was dependent on an analysis of the rights of free movement contained in the EU Treaty and not her rights under the CRC.

However, in the recent case of *Zambrano*⁵⁷ an indirect link was drawn with article 3 of the CRC. In this case Colombian parents were liable to expulsion from Belgium while at the same time their children had acquired Belgian citizenship and therefore a right to remain there. It was argued that refusing to recognise that the non-EU national parents had acquired a derived right to reside in the EU would be a breach of both the European Treaty and among other provisions, article 24 of the Charter of Fundamental Rights, which itself makes direct reference to the best interests of the child. The Court held that “since the entry into force of the Treaty of Lisbon, the Charter has acquired the status of primary law”.⁵⁸ It also found that the “Belgian authorities’ decision to order Ruiz Zambrano to leave Belgium, followed by their continued refusal to grant him a residence permit, constitutes a potential breach of his children’s fundamental right to family life and to protection of their rights as children”.

B. CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (EUROPEAN CONVENTION ON HUMAN RIGHTS) AND THE BEST INTERESTS OF THE CHILD

All member States of the European Union have signed and ratified the ECHR and article 8 (right

⁵² *Dynamic Medien Vertiebs GmbH v Avides Media AG*.

⁵³ *Governance Fit for Children: To what extent have the general measures of implementation of the UNCRC been realised in EU institutions* (Save the Children, Sweden, 2011).

⁵⁴ *Baubast* C 413/99.

⁵⁵ Regulation (EEC) No. 1612/68 of the Council, of 15 October 1968, on freedom of movement for workers within the Community.

⁵⁶ Case C-200/02.

⁵⁷ *Gerardo Ruiz Zambrano v Office national de l’emploi* (ECJ) C-34/09.

⁵⁸ Paragraph 61.

to respect for private and family life) in particular provides any child who is within the European Union geographic area a qualified right to continue to enjoy their family and private life there.

With regard to the ECtHR, there have been a number of cases where the content of article 8 of the ECHR has been discussed in the context of the proposed expulsion or deportation of migrant children either on their own or as members of a wider family who have been living in a member State for a number of years. The presence of such children and the effect upon their lives of being deported or removed has been an important factor to be considered when deciding whether it would be proportionate to remove or deport that child or the family of which he is a member, when it would give rise to a breach of his or her right to family or private life. These cases have also taken into account the effect of article 3 of the CRC when considering whether a breach of article 8 would be proportionate for the purposes of article 8.2.

For example, in the *Case of Uner v The Netherlands*⁵⁹ the ECtHR considered the case of a Turkish national who had migrated to the Netherlands at the age of 12 and been granted a permanent residence permit. He was subsequently sentenced to seven years in prison and his residence permit was withdrawn and a 10-year exclusion order was imposed on him. By that time he had two sons who were citizens of the Netherlands. The Court held that when considering whether it would be proportionate under article 8.2 of the ECHR to expel him from the Netherlands, it was appropriate to adopt the criteria referred to in the earlier case of *Boultif*.⁶⁰ Those criteria included whether there were any children in the family and what their ages were. In *Uner* the Court also made explicit reference to two other criteria, which may have been implicit in *Boultif*. One of these was “the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled”.⁶¹

In the *Case of Maslov v Austria*⁶² the Court also relied on article 3 of the CRC,⁶³ in which the individual who was to be expelled was himself a child at the time of the relevant offences. In particular it held that “where offences committed by a minor underlie an exclusion order regard must be had to the best interests of the child”.⁶⁴

In these cases the Court used the CRC to construe the proper application of article 8 and in the *Case of Neulinger and Shuruk v Switzerland* it explained that:

“The [ECHR] cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken, as indicated in Article 31.3 (c) of the Vienna Convention on the Law of Treaties of 1969, of “any relevant rules of international law applicable in the relations between the parties”, and in particular the rules concerning the international protection of human rights”.⁶⁵

The content of the concept of “the best interests of the child” was also discussed in that case, where the Court noted that:

“Neither the working group during the drafting of the convention nor the Committee on the Rights of the Child has developed the concept of the child’s best interests or proposed criteria for their assessment, in general or in relation to specific circumstances. They have both confined themselves to stating that all values and principles

⁵⁹ Application No. 4641/99 Strasbourg 18 October 2006.

⁶⁰ Application No. 54273/00 Strasbourg 2 August 2001.

⁶¹ This analysis was also adopted by the Court in the *Case of Neulinger & Shuruk v Switzerland* Application No. 41615/07 Strasbourg 6 July 2010.

⁶² Application No. 1638/03 Strasbourg 23 June 2008.

⁶³ Paragraph 36.

⁶⁴ Paragraph 82.

⁶⁵ *Case of Neulinger and Shuruk v Switzerland* (Application No. 41615.07, paragraph 131).

of the convention should be applied to each particular case (see Rachel Hodgkin and Peter Newell (eds.), *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children's Fund 1998, p. 37). In addition, the Committee has emphasised on various occasions that the convention must be considered as a whole, with the relationship between the various articles being taken into account. Any interpretation must be consistent with the spirit of that instrument and must focus on the child as an individual having civil and political rights and its own feelings and opinions (*ibid.*, p. 40)".⁶⁶

It also stated that:

"According to the 'Guidelines on Determining the Best Interests of the Child' issued by the UN High Commissioner for Refugees: 'The term «best interests» broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences'. (*UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008)".

In paragraph 134 it again stated that "the child's best interests must be the primary consideration".

The manner in which article 3 of the CRC may impact on a decision in the ECtHR on the application of article 8 of the ECHR can be seen from the following cases.

For example, in the case of *Rodrigues da Silva, Hoogkamer v Netherlands*⁶⁷ the Court made a direct reference to a child of the family's best interests when considering article 8.2 in a situation where her care was shared between her paternal family, who were resident in the Netherlands, and her mother, who was facing expulsion. In particular, at paragraph 44 of its judgement, it held that:

"In view of the far-reaching consequences which an expulsion would have on the responsibilities which the first applicant has as a mother, as well as on her family life with her young daughter, and taking into account that it is clearly in Rachael's best interests for the [mother] to stay in the Netherlands, the Court considers that in the particular circumstances of the case the economic well-being of the country does not outweigh the applicant's rights under article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth".

The case was referred to in the more recent *Case of Nunez v Norway* (Application No. 55597/09),⁶⁸ where the Court went on to explicitly apply the CRC.

Nunez concerned the possible expulsion of a mother who was a national of the Dominican Republic from Norway and the fact that she would then be prohibited from returning to Norway for at least two years and possibly on a permanent basis. Meanwhile, sole parental responsibility for her two children had been awarded to their father, who had a settlement permit in Norway.

The ECtHR took into account article 3 of the CRC as an integral part of its reasoning exercise when considering proportionality for the purposes of article 8.2 and held in paragraph 84 that:

"Having regard to all of the above considerations, notably the children's long lasting and close bonds to their mother, the decision in the custody proceedings, the disruption and stress that the children had already experienced and the long period that elapsed

⁶⁶ Paragraph 51 of the judgement on the Case.

⁶⁷ [2007] 22 EHRR 93.

⁶⁸ Judgement, 28 June 2011, Strasbourg.

before the immigration authorities took their decision to order the applicant's expulsion with a re-entry ban, the Court is not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention. Reference is also made in this context to Article 3 of the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions taken by public authorities concerning children...The Court is therefore not satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on the one hand, and the applicant's need to be able to remain in Norway in order to maintain contact with her children in their best interests, on the other hand".

In the recent Chambers judgement in the case of *Osman v Denmark* (Application No. 38058/09), the ECtHR also reached a unanimous decision that a child's rights under article 8 had been violated when Denmark refused to renew a child's residence permit. She had been sent to Kenya for two years to assist her grandmother and in her absence the law was changed and she was not permitted to re-enter even though she had previously had a residence permit in Denmark. The Court found that the authorities had failed to take her interests into account when they refused to grant her a further residence permit.

In the case of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, a 5-year-old child from the Democratic Republic of the Congo arrived at Brussels National Airport with her maternal uncle, who was a national of the Netherlands. He wished to assist her to join her mother in Canada, where she had applied for asylum. The Belgian authorities refused her entry and detained her in Transit Centre No. 127, where she was held with adults in a secure setting. The Court decided that this had given rise to breaches of article 3 of the ECHR. It also took into account article 3 (and articles 10, 22 and 37) of the CRC and held that:

"Other measures could have been taken that would have been more conducive to the higher interests of the child guaranteed by Article 3 of the Convention on the Rights of the Child. These included her placement in a specialised centre or with foster parents".

It also held that "since the second applicant was an unaccompanied minor, the Belgian State was under an obligation to facilitate the family's reunification".

C. NATIONAL LAW AND THE BEST INTERESTS OF THE CHILD

All European States have signed and ratified the CRC and article 4 of the Convention requires them to take "all appropriate legislative, administrative and other measures" to implement the rights which it contains. The manner in which they have responded to this requirement varies greatly and some examples of this are provided in this section.

In paragraph 20 of its General Comment No. 5,⁶⁹ the Committee on the Rights of the Child states that it:

"welcomes the incorporation of the Convention into domestic law, which is the traditional approach to the implementation of international human rights instruments in some but not all States. Incorporation should mean the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice".

⁶⁹ Committee on the Rights of the Child, General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child.

This is not the route generally followed in Europe. For example, in Italy, the CRC does form part of domestic law and prevails over conflicting legislation. It has been applied by its Supreme Court and its Constitutional Court on several occasions.⁷⁰ The same is true for Portugal. In particular, article 3 of the CRC has been made a constitutional principle by the Constitutional Court.⁷¹ Sweden has not incorporated the CRC and treaties do not form part of national law unless they are incorporated by an act of parliament. However, it is a general principle of Swedish law that legislation is to be interpreted in the light of international obligations.⁷²

In paragraph 21 of General Comment No. 5, the Committee on the Rights of the Child also said that it “welcomes the inclusion of sections on the rights of the child in national constitutions, reflecting key principles in the constitution, which helps underline the key messages of the Convention – that children alongside adults are holders of human rights”. Article 22 bis of the Belgian Constitution, adopted in 2000, recognises the right “of every child to respect for his moral, physical, psychological and sexual integrity”, and article 76.3 of the Constitution of Iceland, adopted in 1995 as part of a new Bill of Rights, recognises a general programmatic obligation of the State to protect the welfare of children.⁷³ Article 69.1 of the Portuguese Constitution establishes that children are entitled to special protection from society and the State, in particular against all forms of abandonment, discrimination and oppression, as well as against the abusive exercise of authority in the family and other institutions.

In countries, such as the United Kingdom, which do not have a written constitution, incorporation and inclusion is of course not possible and it may require a specific law to be enacted, which is what occurred when the United Kingdom passed the Human Rights Act 1998 to incorporate the majority of the provisions in the ECHR. It has not chosen to do this in relation to the CRC. As with the Council of Europe Convention on Action against Trafficking in Human Beings, it has relied on the fact that it has issued policy guidance to its officials alerting them to the obligations arising from each convention.⁷⁴ This means that when this policy is not complied with, the remedy is to seek a judicial review of the actions of the appropriate department asking the High Court to quash the decision which did not take into account this policy and requiring it to make a fresh and lawful decision.

However, as the United Kingdom is also a common law jurisdiction, it is possible for its judiciary to also develop the law through decisions, which it makes in individual “courts of record”.⁷⁵ This is what happened in the Supreme Court in the case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. Lady Hale, giving judgement for the Court, noted that article 3 of the CRC was “a binding obligation in international law” and she found that “the spirit, if not the precise language [of article 3 had] also been translated into ... national law”. She reached this conclusion because section 11 of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009 had placed a duty on a range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children.⁷⁶

However, even States with a constitution have not necessarily amended their constitutions to reflect the CRC. For example, in Germany, which has a constitution, the legal tradition established by its Constitutional Court is that its Constitution is to be interpreted in the light of any obligations arising from international human rights agreements. Therefore it treats the CRC as an interpretative tool

⁷⁰ *Law Reform and the Implementation of the Convention on the Rights of the Child* (UNICEF, Innocenti Research Centre, December 2007), p. 7.

⁷¹ Committee on the Rights of the Child, concluding observations on the report of Italy (CRC/C/15/Add.198), 18 March 2006, para. 23.

⁷² *Law Reform and the Implementation of the Convention on the Rights of the Child* (UNICEF, Innocenti Research Centre, December 2007), p. 7.

⁷³ *Ibid.*, p. 15.

⁷⁴ See, for example, *Processing an Asylum Application from a Child*, Asylum Process Guidance, UK Border Agency.

⁷⁵ The Supreme Court, the Court of Appeal, the High Court and for some purposes the Upper Tribunal (Immigration and Asylum Chamber).

⁷⁶ It can be argued that the duty to have regard to the need to safeguard and promote the welfare of children is not as wide as article 3 but for the purposes of United Kingdom law it has at least incorporated this part of the CRC through case law.

through which the content and reach of fundamental rights and the rule of law established by the Constitution can be interpreted. As a result the rights codified in the CRC are not only decisive when directly applied in individual cases, they can also be expressed in the general application and interpretation of domestic law.⁷⁷ The present study does not include any examples of the application of this approach as Germany withdrew its reservation to the CRC⁷⁸ as recently as 2010 and therefore there have as yet been no reported cases or cases in its higher courts on the issues being addressed. In France, the Council of State and the Supreme Court have agreed that the self-implementing provisions of the CRC can be applied directly by the courts.⁷⁹ The case law referred to below shows that this is the case in relation to article 3 of the CRC.

In some States national immigration or child protection legislation has been amended in the light of the CRC to incorporate the best interests principle contained in article 3. For example, in Hungary this principle is explicitly referred to in its Asylum Act, where it states that “when implementing the provisions of the present Act, the best interests of the child shall be a primary consideration”. However, at the same time the Committee on the Rights of the Child has noted that although the law has consistently required this, it is not always respected in practice, especially in the case of children belonging to vulnerable groups such as refugee and asylum-seeking children.⁸⁰

There can also be a divergence in interpretation of the different articles in the CRC within a single European country. For example, Germany recognises that it is bound by article 37 of the CRC in relation to the detention of unaccompanied or separated children as it has signed and ratified the Convention. However, current law in the various *Bundeslaender* (federal states) is diverse; there are significant differences in practice between the *laender* (states). In some, children under the age of 16 are not detained but in others children between the ages of 14 and 16 are detained. On the other hand there are *laender* in which unaccompanied children are very rarely or never detained.⁸¹

CHAPTER II

APPLYING ARTICLE 3 OF THE CRC IN AGE ASSESSMENT PROCEEDINGS

The problem of determining age has come to prominence with the recent increase in the arrival in European countries of unaccompanied and undocumented children, mostly boys in their mid-teens. These children are often regarded with suspicion by officials who cast doubt on their age and initiate age assessment procedures, which can consist of the cross-checking of documentary evidence, interviews, medical examinations (including magnetic resonance tomography, bone and dental assessment and radiological testing), or a combination of the procedures.⁸²

Age assessment procedures are problematic for a number of reasons and often put the enjoyment of rights in jeopardy. Medical examinations can interfere with the child’s right to privacy and be detrimental to the child’s health, in particular when they involve radiological testing.⁸³ Furthermore,

⁷⁷ Hendrik Cremer, *Die UN-Kinderrechts-konvention: Geltung und Anwendbarkeit in Deutschland nach der Rucknahme der Vorbehalte*, Deutsches Institut für Menschenrechte (German Institute for Human Rights, June 2011).

⁷⁸ The reservation previously read that “nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens”.

⁷⁹ See footnote 70..

⁸⁰ Committee on the Rights of the Child, concluding observations on the report of Hungary (CRC/C/HUN/CO/2), 17 March 2006.

⁸¹ Hendrik Cremer, *Abschiebungshaft und Menschenrechte*, Deutsche Institute fuer Menschenrechte (German Institute for Human Rights, 2011).

⁸² European Union Agency for Fundamental Rights, *Separated Asylum-Seeking Children in European Union Member States*, Comparative report, 2011, p. 53.

⁸³ Terry Smith and Laura Brownlees, *Age Assessment Practices: A Literature Review & Annotated Bibliography*, New York, UNICEF, 2011, pp. 27-28.

medical assessment methods, such as bone and teeth analysis, are inaccurate, with a margin of error of at least two years in either direction.⁸⁴ Interviews, on the other hand, can be conducted by untrained public officials,⁸⁵ in a culturally insensitive manner and without adequate procedural safeguards. The risk of wrongly determining a child to be an adult is therefore significant. This is a matter of great concern since children wrongfully determined to be adults will be deprived of the special protection that they are entitled to as children under the CRC and other international and domestic legal instruments, including access to special protection, to education, and to consideration for residency or temporary stay as a child. A child may be detained in an adult detention centre in breach of article 37 of the CRC. A decision that an individual is an adult will also exclude consideration of any child-specific form of persecution and may significantly undermine an overall assessment of the credibility of his or her account of past events.

In its General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, the Committee on the Rights of the Child stated that the best interests of the child must be a guiding principle for determining the priority of protection needs of unaccompanied and separated children. This requires an initial assessment process which entails, among others, an age assessment that must be conducted in a “scientific, safe, child- and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child”, giving due respect to human dignity and taking into account not only the physical appearance of the individual, but also his or her psychological maturity. In the event of remaining uncertainty, the individual should be accorded the benefit of the doubt “such that if there is a possibility that the individual is a child, she or he should be treated as such”.⁸⁶

The Office of the United Nations High Commissioner for Human Rights added the requirements that age assessments should be carried out only “as a measure of last resort” when the age of the individual is disputed, that information about the process and possible consequences be provided to the individual in a child-friendly manner, that his or her informed consent be sought, and that the individual be protected from return while his or her age is being assessed. It added, furthermore, that age assessments should ideally be carried out by an independent panel of experts, and that the individual should be given an effective opportunity to appeal the decision.⁸⁷

In a similar vein, the Council of Europe Parliamentary Assembly, in its Resolution 1810 (2011), established that an

“age assessment should only be carried out if there are reasonable doubts about a person being underage. The assessment should be based on the presumption of minority, involve a multidisciplinary evaluation by an independent authority over a period of time and not be based exclusively on medical assessment. Examinations should only be carried out with the consent of the child or his or her guardian. They should not be intrusive and should comply with medical ethical standards. The margin of error of medical and other examinations should be clearly indicated and taken into account. If doubts remain that the person may be underage, he or she should be granted the benefit of the doubt. Assessment decisions should be subject to administrative or judicial appeal”.⁸⁸

A. DIFFERENT APPROACHES TO AGE ASSESSMENT IN EUROPE

There is no common approach to age assessments among European countries. Some countries

⁸⁴ Smith and Brownlees, p. 15. See also, Study of the OHCHR, July 2010, para. 42.

⁸⁵ Smith and Brownlees, pp. 34-35.

⁸⁶ Committee on the Rights of the Child, General Comment No. 6, para. 31.

⁸⁷ Study of OHCHR, para. 44.

⁸⁸ Council of Europe Parliamentary Assembly Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return, para. 5.10.

use age assessment as standard practice, even when there is no doubt,⁸⁹ while other countries conduct age assessments only when the person claiming to be a child is undocumented or presents unreliable documentation (Belgium, Spain). Some countries combine a variety of techniques to carry out the age assessment (France, Belgium), while others rely solely on the results of medical examinations (Portugal) or in the first instance on interviews conducted by social workers (United Kingdom, Ireland).⁹⁰ Most countries require the informed consent of the individual to undergo age assessment medical examinations, but in some (Finland, Germany) the refusal to undergo such tests may result in the applicant being treated as an adult, unless there is a valid reason for the refusal.⁹¹ Very few countries entrust age assessment to independent agencies, as Portugal and Latvia do, or provide a right to bring a legal challenge to an age assessment decision, as occurs in the United Kingdom, Ireland and the Netherlands.⁹² Furthermore, significant differences exist between European countries in relation to the technical requirements and the quality of the age assessment methods applied.⁹³

Inconsistencies exist even within countries, as observed by Justice Catherine Sultan during the Judicial Colloquium. In France, the child will be treated differently depending on whether he or she is brought before a civil or a criminal court. If brought before a civil court, the child will have the benefit of the doubt and his or her word will be determinant, while if brought before a criminal court, the child will not have the benefit of the doubt and his or her claim to be a child will be of no relevance if there is a medical examination or documentary evidence pointing to the contrary. This leads to legal uncertainty for the child and to the frustration of the child's best interests. Many of the differences in practices within countries result from the diverging views on age assessment methods which may be held by different national authorities with responsibility for implementing the law relating to immigration, child welfare, education or health care in respect of migrant children in any one country. Besides, as pointed out by Almodena Olaguibel, Child Rights Officer of UNICEF Spain, in the Judicial Colloquium, the differences between medical language and legal language are significant, which inevitably leads to different approaches to age assessments.

A broad consensus was reached during the discussions in the Judicial Colloquium regarding the need to harmonise regulations and practices on age assessment at the EU level and within European countries. Francisco Ortiz, representative of UNHCR Spain, argued that "it is necessary to reach recommendations on a common procedure at the European level, by a combination of systems". This position is in line with the recent recommendation of the Working Group on Unaccompanied and Separated Children of the UNHCR Bureau for Europe to draft minimum standards for safeguards in age assessment procedures and with the EU project, under the Action Plan on Unaccompanied Minors, to issue best practice guidelines in collaboration with scientific and legal experts and in cooperation with the European Asylum Support Office.⁹⁴

As for the content of such common standards, the participants in the Judicial Colloquium agreed that age assessment procedures should combine a variety of methods, including medical examinations and social and psychological examinations. As summed up by OHCHR Regional Representative Jan Jařab: "Medical and social methods of age determination should complement each other because none of them can provide absolute certainty. Whenever there are contradictions between the medical and social evaluations, the individual should always be given the benefit of the doubt".

⁸⁹ Mailis Reps, Rapporteur of the Committee on Migration, Refugees and Population, of the Council of Europe, "Explanatory memorandum on unaccompanied children in Europe: issues of arrival, stay and return", March 2011, para. 32.

⁹⁰ EMN, comparative study, May 2010, p. 76. Mailis Reps notes that some countries, while formally adopting a combination of various methods, in practice tend to predominantly use medical examinations only, para 32.

⁹¹ Mailis Reps, para 33.

⁹² EMN comparative study, May 2010, pp. 77 ff.

⁹³ Mailis Reps, para. 32.

⁹⁴ This is also the recommendation made by Mailis Reps, para. 36.

Special emphasis was placed on the need to provide a right of appeal against or judicial review of age assessment decisions. Maria Luisa Cava de Llano, Spanish Ombudsperson, expressed concern about the “lack of opportunity to challenge the results and to request additional complementary tests”. Judge Jose Luis De Castro, of the Spanish High Court, stressed that “it is critical that in cases of age assessment, the possibility to appeal a decision is in place”. It was also acknowledged that conflicts of interest are likely to arise in age assessment procedures, since in many countries the organisation which requests the age assessment and under whose supervision the assessment is conducted is the same one which will ultimately be responsible for the guardianship and care of the person if he or she is determined to be a child. That is, for example, the case in Italy, as reported by Judge Joseph Moyersoer, who argued for a need to clarify who should be competent to initiate the age assessment procedures and who should be competent to perform such procedures. Judge Marc Dallemagne, Employment Tribunal Brussels, noted that the age assessment, whether it involved medical examinations or interviews, should be entrusted to independent panels or agencies.

B. NATIONAL CASE LAW

National courts apart from the United Kingdom and Ireland are not usually asked to review the administrative decisions which determine a person’s age or which endorse the age assessments carried out by a panel of experts. Judicial review is most commonly directed at administrative decisions which, following the assessment of a person as an adult, deny or terminate State guardianship or refuse an asylum application under the common rules applied to adult asylum seekers.

A common concern expressed in the case law reviewed relates to the procedural requirements and safeguards surrounding age assessment interviews or medical examinations. In most cases, the courts dismiss assessments based purely on medical examinations as inaccurate and inconclusive. However, while in some cases the inaccuracy of the medical examinations benefits the appellant, as in Spain, in other cases the same inaccuracy may result in a detriment to the applicant, as in the United Kingdom. As also observed in the Judicial Colloquium by Jan Jařab, OHCHR Regional Representative, “in some countries, medical professionals are more likely to indicate that the person is over 18, while social services tend to argue that s/he is a child. In other countries, the opposite is the case”.

1. Austria

In Austria, age assessments are carried out by the Independent Federal Asylum Senate or by the Aliens Police, depending on whether the person whose age is disputed is applying for asylum or not. Under the Aliens Police Act, the Aliens Police can consult with a public health officer to make the age assessment, but it is not bound to do so. No provisions on age assessment procedures were included in the 2005 Asylum Act, which is currently under revision. In practice, age assessments are usually based on an expert opinion that combines at least two different methods: inspection by a doctor, dental analysis or a magnetic resonance tomography of the clavicle and the carpus.⁹⁵ Austria has recently discontinued bone X-rays, but an X-ray of a migrant’s carpal bones may be taken at his or her request and expense.⁹⁶ If the age of the person cannot be determined exactly, the benefit of the doubt is given to the individual concerned.⁹⁷

In the absence of specific provisions in relevant legislation, the criteria for assessing a person’s age have been established by the Administrative Court and the Asylum Court in recent years. The leading cases on this issue concern the level of expertise required of the persons conducting the age assessment and the degree of detail required of the expert reports in order to be considered conclusive in such a sensitive matter. Whenever the expert reports are inconclusive, the benefit

⁹⁵ Austrian report for the EMN comparative study, pp. 27-28.

⁹⁶ Smith and Brownlees, p. 18.

⁹⁷ Austrian report for the EMN comparative study, p. 77.

of the doubt is to be accorded to the person whose age is disputed. The best interests of the child are not invoked as grounds for the decisions.

**Administrative Court (*Verwaltungsgerichtshof*) decision
no. 2005/01/0463, of 16.04.2007**

The Administrative Court held that it is illegal to base the age assessment solely on the impressions of the Asylum Senate officials. It stated that the age assessment must be carried out by persons with special professional qualifications (preferably medical qualifications) and cannot be based only on the physical appearance of the applicant, but must consider also his or her demeanour during the interviews and must rely on further objective circumstances, such as, for example, blatant contradictions in the applicant's recollection of personal events. The Court therefore annulled an Asylum Senate decision which had denied asylum to an applicant originating from Sierra Leone on the grounds that the applicant was not 17 years old as he claimed but an adult.

In the instant case, the age assessment had been made by an Asylum Senate official on the basis of his subjective view about the physical appearance, personal charisma and maturity of the appellant during the interviews. The Court held that this was not sufficient to establish the age of the appellant in a conclusive manner, since there were no clear indications in the file to support the claim that the age stated by the appellant was obviously incorrect. For this to be the case, it would have been necessary that the falsehood of the appellant's statements regarding his age was blatant or noticeable by anyone without special skills.

The Court dismissed the argument put forward by the respondent authority that the official who had made the age assessment had long experience in dealing with African asylum seekers, stating that "the general medical knowledge required for the age assessment of asylum seekers is not obtained by merely dealing with asylum seekers in the context of hearings or negotiations".

The Court further noted that it is possible that even with the assistance of an expert opinion, the age assessment may remain inconclusive in some cases. The Court held that when the expert admits that he or she cannot give a determinative opinion on age, the benefit of the doubt should be granted and the date of birth stated by the applicant must be relied upon.

Asylum Court (*Asylgerichtshof*) decision no. S 400.131-1/2008/2E, of 14.07.2008

The requirement that age assessments be based on expert opinions was further elaborated by the Asylum Court in its decision of 14 July 2008. The Court held that the expert opinions must clearly indicate the professional qualifications of the experts, the methods applied in the age assessment and the reliability and margin of error associated with those methods.

The Asylum Senate had requested an expert opinion report to determine the age of an asylum applicant, born in Afghanistan, whose date of birth was unknown, and endorsed the report's conclusion that the applicant was an adult. The applicant appealed to the Asylum Court, which reversed the contested decision on the grounds that the expert report was too superficial and therefore inconclusive. The report lacked information regarding the qualifications of the expert who prepared the report, the reliability of the methods employed and the relative weight of the different methods, and made no reference to other circumstances that could justify the findings, such as the existence of contradictory statements in the applicant's life history. The Court stated that, in a matter as sensitive as age assessment, the respondent authority should have enquired *ex officio* (of its own initiative) about the reputation of the expert and about the research methods to be adopted before requesting the expert opinion.

2. France

In France, age assessment procedures are initiated by the Public Prosecutor's Office whenever there are doubts as to the age declared by a person claiming to be a child. The method most

commonly used to make the age assessment is a medical examination consisting of a bone and a dental test (Greulich and Pyle method). This method has been widely criticised in France for its lack of accuracy and its human rights' implications.⁹⁸ In 2005, it was the subject of an opinion by the National Consultative Committee on Ethics for Health and Life Sciences, which concluded that the method is inadequate and cannot be used to determine age in any precise way and therefore should not be relied upon exclusively when determining whether to treat a person as a child or as an adult.⁹⁹ Following this opinion, the methodology was refined and age assessments also began to rely on a general psychological examination, as well as on the consideration of all other elements likely to help establish the person's age.¹⁰⁰ Bone tests continue, however, to be used and relied upon almost exclusively, which has prompted the Committee on the Rights of the Child to express its concern and to urge France to "introduce recent methods of age determination which have been proven to be more accurate than the determination by bone test currently in use".¹⁰¹

Moreover, the age assessments are often done without the prior consent of the child whose age is disputed or of his or her guardian.¹⁰² In this regard, the National Consultative Commission on Human Rights has recommended that the decision on whether to subject someone who claims to be a child to a medical examination for age assessment purposes must be taken by the person's guardian (*administrateur ad hoc*) and also that both the guardian and the child whose age is disputed must have the opportunity to request a further examination.¹⁰³ Similarly, ANAFE has argued that, in the absence of the child's parents, it is the guardian who must decide whether or not to authorise a medical examination. ANAFE has also argued that the child's consent must always be sought because, as pointed out by the Consultative Committee on Ethics for Health and Life Sciences, radiological examinations and medical observations may infringe the right to privacy or physical integrity of the children involved and they may not understand their purpose, as the hospital facilities used look very similar to police headquarters.¹⁰⁴

There are considerable differences in approach to age assessment between the various agencies which come into contact with migrant children and their practices vary accordingly.¹⁰⁵ The French Office for the Protection of Refugees and Stateless People, for example, is sometimes reported to be in conflict with the Public Prosecutor's Office regarding the age assessment of asylum seeking children.¹⁰⁶ Also, as noted by Justice Catherine Sultan, during the Judicial Colloquium, a child will be treated differently depending on which court hears his or her appeal.

The case law reviewed for this section confirms this diversity of approach. While many courts dismiss the bone tests results as inconclusive, and did so even before the National Consultative Committee issued its opinion in 2005, other courts continue to rely on such results and place the burden of proof on the person claiming to be a child. That was notably the case with the Court of Appeal of Paris decision No. 2006/22156, of 1 June 2007, which held that for a person to benefit from child welfare services, it was necessary that he or she prove his or her age. In the instant case, the Youth Tribunal of Paris had entrusted a boy, of Afghan nationality, who claimed

⁹⁸ Among its critics are the National Consultative Commission on Human Rights, (*Commission Nationale Consultative des Droits de l'Homme (CNCDH)*), the National Academy of Medicine and the national association for border assistance for foreigners (*Association nationale d'assistance aux frontières pour les étrangers (ANAFE)*). See, for instance, the report submitted by the CNCDH to the OHCHR on the protection of children's rights in the context of migration, pp. 3-4; and the minority report submitted by ANAFE to the Human Rights Committee, *Rapport Alternatif Présenté au Comité des Droits de l'Homme en vue de l'examen du quatrième rapport périodique de la France dans le cadre du Pacte international relatif aux droits civils et politiques, 93ème session, du 7 au 25 juillet 2008*, pp. 8-9.

⁹⁹ Comité Consultatif National d'Ethique pour les Sciences de la Vie et de la Santé, *Avis No. 88 sur les méthodes de détermination de l'âge à des fins juridiques*, 23 June 2005, p. 5.

¹⁰⁰ French report for the EMN comparative study, p. 10.

¹⁰¹ Committee on the Rights of the Child, concluding observations on the report of France (CRC/C/FRA/CO/4 of 11 June 2009), paras. 87-88.

¹⁰² ANAFE, *Rapport Alternatif*, p. 8.

¹⁰³ Report submitted by the CNCDH to the OHCHR on the protection of children's rights in the context of migration, pp. 3-4.

¹⁰⁴ ANAFE, *Rapport Alternatif*, pp. 8-9.

¹⁰⁵ Synthesis report of the study coordinated by France Terre d'Asile on the reception and care of unaccompanied minors in eight countries of the European Union, October 2010, p. 30.

¹⁰⁶ See footnote 100.

to be 15 years old, to the Child Welfare Service of Paris. The boy had been subjected to a medical examination, which had concluded that, having regard to his physical development and the extent of his bone maturity, his chronological age was over 18 years. He later submitted a birth registration and a birth certificate, which attested that he was 15 years old. The Youth Tribunal of Paris relied on these documents to treat the boy as a child and entrust him to the Child Welfare Service. In an appeal lodged by the Child Welfare Council, the authenticity of these documents was disputed and the Court of Appeal concluded that, in view of the results of the medical examination and of the uncertainty regarding the authenticity of the documents presented, the boy had failed to prove that he was a child and was therefore not entitled to child welfare services.

Court of Appeal (*Cour d'Appel de Lyon, Chambre Spéciale des Mineurs*) decision no. 04/97, of 26.04.2004

The Court of Appeal of Lyon dismissed the results of a radiological examination, which had concluded that a boy, who was a national of Guinea, was older than 18, noting that “the reliability of the Greulich and Pyle method of age assessment is extremely doubtful, in particular for people of African origin”. The Court also dismissed as inconclusive the argument that, during his questioning by the police, the boy had given a date of birth that indicated that he was an adult, as the conditions under which the child had been questioned by the police were uncertain.

The Court was satisfied that the birth registration presented by the child was reliable proof that he was 17 years old as he claimed. The Court noted that under French Law every public form issued in a foreign country concerning the civil status of French or foreign citizens is to be recognized as probative, provided it was issued according to the appropriate legal procedures in those countries. In the instant case, the evidence showed that the boy had presented an excerpt of his birth registration produced by the chief clerk of the Court of Appeal of Conakry, which was a reliable indicator that it had been issued legally in Guinea.

The Court of Appeal therefore confirmed the decision of the Youth Tribunal of Lyon, which had extended the stay of the child under the guardianship of the Child Welfare Service for a period of six months, until he became an adult. The appellant (the Child Welfare Council of Rhône) invoked the CRC, among a number of other international and domestic legal instruments, but the Court did not make an explicit reference to the CRC when giving the grounds for its decision.

Administrative Court (*Tribunal Administratif de Rennes*) decision no. 0900239, of 29.01.2009

The Administrative Court of Rennes invoked the opinion of the National Consultative Committee on Ethics for Health and Life Sciences, as well as reports by experienced physicians, to dismiss as inconclusive a medical examination which had purported to establish that a boy, of Afghan origin, who claimed to be 16 years old, had a bone age of over 18 years according to the Greulich and Pyle charts. The results of the medical examination had been used by the Prefect of Vienne as grounds to order the boy’s deportation to Afghanistan. The boy had been placed in administrative detention awaiting deportation.

The Administrative Court noted that the appellant, who was undocumented, had been consistent when providing his date of birth in all his statements before the administrative authorities and at the Court hearing. The Court further noted that the Greulich and Pyle method was not reliable, given that it had a margin of error of about 18 months for those between 15 and 18 years of age, and had been abandoned in other European countries, for example, Germany, owing to its inaccuracy. The Court held that the results of such medical examinations should be accorded weight only according to their perceived accuracy, as recommended by the Consultative Committee in its opinion, so that the recognition of a person as a child is not exclusively dependent upon them.

The Court held that the medical examination to which the appellant had been subjected should not, by itself, determine his age, as his age would influence the legal regime applied to him

and would in particular determine whether he would be protected by the provision in the French Code on Immigration and Asylum which prohibits the deportation of children. In the absence of any other evidence or examination that could confirm the medical assessment, the Prefect of Vienne had no grounds for treating the appellant as an adult and ordering his deportation. The Administrative Court therefore quashed the Prefect's decision to deport the appellant and to place him in administrative detention. The Court also urged the Prefect to provide the appellant with a temporary residence permit and to arrive at a decision on the appellant's status within two months.

3. Ireland

In Ireland, age assessments are based on individual interviews conducted by Immigration Officers, social workers or officials of the Office of the Refugee Applications Commissioner (ORAC), depending on whether the assessment is undertaken at the point of entry or at a later stage.¹⁰⁷ No bone testing is provided for in the legislation, although NGOs such as the Irish Refugee Council have reported that bone density testing still occurs in practice (even if not carried out on behalf of the ORAC), particularly in hospital settings. The official position is that, in some cases, the opinions of professionals such as dentists may be included in assessments when offered informally, but such opinions should not be sought.¹⁰⁸

The reliance on interviews to determine whether a person is a child has been criticised because it is considered to give a high level of discretion to the individual officers conducting the interviews and making the assessment. Furthermore, in the absence of standardized procedures for age assessment, the Immigration Office, the Health Service Executive and the ORAC follow a diverse range of practices. The initial age assessments made at the point of entry by Immigration Officers are a source of particular concern, since that is where the possibility of error is greatest and the consequences of errors most grave.¹⁰⁹ The Department of Justice, Equality and Law Reform has stated that age assessments are conducted with regard to the Separated Children in Europe Programme *Statement of Good Practice of 2004*, but this is disputed by several NGOs, which have commented that, contrary to what is prescribed in the *Statement*, age assessments are not conducted by "independent professionals with appropriate expertise".¹¹⁰ Also, as pointed out by Siobhán Mullally, there is as yet little to suggest that uncertainty in age assessments is resolved to the benefit of the individual applicant.¹¹¹

The leading cases regarding age assessment are *Moke v The Refugee Applications Commissioner* and *Odunbaku (a minor) v Refugee Applications Commissioner & Ors*. Both cases concern age assessments within the asylum process and outline the procedures required of the ORAC when considering the question of whether a person is an unaccompanied child and how an unlawful age assessment may affect subsequent decisions in the asylum process.

Moke v The Refugee Applications Commissioner [2005] IEHC 317

In *Moke v The Refugee Applications Commissioner*, the High Court of Ireland set out minimum procedural requirements for age assessment decisions in the asylum process, holding that the power to determine whether a person who claimed to be a child was under the age of 18 years should be exercised by or on behalf of the ORAC in accordance with the principles of constitutional justice and fair procedures.

Ms. Justice Mary Finlay Geoghegan held that when assessing the age of a person claiming to

¹⁰⁷EMN study, p. 79.

¹⁰⁸ Corona Joyce and Emma Quinn, *Policies on Unaccompanied Minors in Ireland* (The Economic and Social Research Institute Dublin, 2009), pp. 54-55.

¹⁰⁹ Siobhán Mullally, "Separated Children in Ireland: Responding to 'Terrible Wrongs', *International Journal of Refugee Law*, 2011 (forthcoming).

¹¹⁰ Joyce and Quinn, , p. 55.

¹¹¹ See footnote 109.

be an unaccompanied child, several important factual aspects must be taken into account. The first was that an immediate decision should be taken, since the accommodation to which the person will be referred is dependent on that decision and it is necessary to prevent adults being housed with children, as well as children being housed with adults. The second was that age assessment is an inexact science and when it is carried out simply by means of an interview and observation of a person who is from a different cultural, racial and ethnic background and may have suffered traumatic events in his or her life, it becomes even more difficult. In addition, while the possibility of reassessment appears an important balance to the informal nature of the initial assessment and the admitted inexact science and wide margin of error of age assessments by interview, the possibility of such reassessment is of no benefit to an applicant unless its existence is effectively communicated.

Relying on Justice Stanley Burnton's judgement in *R (on the application of B) v The Mayor and Burgesses of the London Borough of Merton [2003] EWHC 1689 (Admin)* (below), Ms. Justice Finlay Geoghegan identified the minimum procedural requirements in relation to the initial age assessment decision to be taken on behalf of the ORAC in relation to a person claiming to be an unaccompanied child:

- “i. The applicant must be told the purpose of the interview in simple terms. This may be as straight forward as informing the applicant that the interviewers need to decide whether the applicant is or is not under the age of eighteen years.
- “ii. Where an applicant claims to be under eighteen years of age and the interviewers form a view that this claim may be false, the applicant is entitled to be told in simple terms the reasons for or grounds upon which the interviewers consider the claim may be false and to be given an opportunity of dealing with those reasons or grounds.
- “iii. Where, as in this instance, the applicant produces a document which purports to be an original official document which includes a record of his alleged date of birth and the interviewers are not prepared to rely upon such document the applicant is entitled to be told of their reservations and given an opportunity to deal with same.
- “iv. If the decision is adverse to the applicant then he must be clearly informed of the decision and the reasons for same. The reasons need not be long or elaborate but should make clear why the applicant's claim to be under eighteen is not considered credible. The initial information and communication may of necessity be given orally but should be promptly confirmed in writing.
- “v. Where the decision is adverse to the applicant and, as stated, there exists the possibility of reassessment then such information should be communicated clearly to the applicant again initially orally and also in writing. Such communication should include how such reassessment may be accessed by the applicant”.

Ms. Justice Finlay Geoghegan concluded that such minimum procedural requirements had not been met in the instant case. The applicant had not been made aware in the course of the interview of the reasons why the officials considered his claim to be under the age of 18 to be false, nor had he been given an opportunity of dealing with these matters. He had not been given the reasons of the officials' decision nor had he been given the decision in writing. Furthermore, he had not been informed of the possibility of any reassessment. For these reasons, Ms. Justice Finlay Geoghegan concluded that the decision taken on behalf of the ORAC in relation to the assessment of the child's age was in breach of the constitutional obligation of the ORAC to do so by a procedure which accords with constitutional justice and fair procedures.

The applicant submitted that if the age assessment decision was determined to be invalid, then

as a consequence the ORAC had acted in jurisdictional error or *ultra vires*¹¹² in processing his application for a declaration of refugee status as an adult. However, the High Court refrained from concluding that the fact that there had been an invalid age assessment necessarily led, of itself, to the invalidity of the subsequent decisions made in the refugee process. Ms Justice Finlay Geoghegan noted that, in the statutory scheme established by the Act of 1996 for making and determining applications for asylum, “the most that can be said is that the invalid age assessment decision of the respondent may have deprived the applicant of the potential benefit of the assistance of a guardian appointed by the health board either to make the application on his behalf or to assist him in pursuing the application already made”.

Odunbaku (a minor) v Refugee Applications Commissioner & Ors [2006] IEHC 28

In *Odunbaku (a minor) v Refugee Applications Commissioner & Ors*, the High Court went a step further by holding that there could be little doubt that the assessment of an account given by a person (and in particular any alleged inaccuracies or inconsistencies in such an account) could be materially affected by the age of the person concerned. The case involved an applicant (Ms. Odunbaku), who had initially been assessed as being a child and had been placed in a reception centre for children under the age of 16, but who had later been reassessed as an adult following doubts about her age expressed by a social worker at the reception centre. Ms. Odunbaku had then made an application for asylum, which had been processed based on her being an adult and which eventually resulted in a refusal to grant her refugee status. She had appealed against this decision to the Refugee Appeals Tribunal, which dismissed the appeal.

Before the High Court, the applicant challenged the decisions made prior to and in the course of her asylum application, in particular, the original decision to treat her as not being a child, which affected in a material way the subsequent decisions made in the course of the asylum process. Mr. Justice Clarke referred to the procedures set out in *Moke* and was satisfied that there were substantial grounds for arguing that the appropriate procedures had not been followed, since the appellant had not been informed that it was open to her to seek a further assessment and to rely on expert evidence when doing so. Furthermore, it would appear from the evidence that the basis for the adverse finding in relation to her age had not been put to the appellant. There were, therefore, substantial grounds to give permission for a full hearing of a challenge to the age assessment decision of the ORAC.

However, Mr. Justice Clarke added, it was clear from *Moke* that the mere fact that there had been an invalid age assessment did not, of itself, necessarily lead to the conclusion that subsequent decisions made in the refugee process were themselves invalid. “It is, therefore, clear that in order that an invalid age assessment might be said to have affected any subsequent decisions made by either the Refugee Applications Commissioner or the Refugee Assistance Tribunal, it is necessary for the court to be satisfied that the impugned age assessment decision had some material and practical effect upon the process before those other bodies”. On this point, Mr. Justice Clarke held that there could be little doubt that the assessment of an account given by a person (and in particular any alleged inaccuracies or inconsistencies in such an account) could be materially affected by the age of the person concerned. “While [it] is unlikely that any significant difference as to the assessment of the credibility of such person would flow from the fact that a person was (say) 18 years and one month on the one hand or 17 years and 11 months on the other hand, [a] more significant age disparity could well have a material effect on the assessment of an account given”.

Noting that the difference between the age contended for by Ms. Odunbaku, which was 14 years old, and the age as found by the ORAC was of the order of a minimum of three years, Mr. Justice Clarke concluded that material events, important to the assessment of the credibility of Ms.

¹¹² To act *ultra vires* means to act outside the limits of any authority provided in law and therefore to have no legal basis for that act.

Odanbaku's account, occurred at a time when, on her own case, she may well have been barely a teenager but where, on the view taken by the ORAC, she was significantly older. Justice Clarke held that, in his view, it was at least arguable that the assessment of Ms. Odanbaku's credibility was potentially affected in a material way by the view of her age taken by the ORAC. He was therefore satisfied that there were sufficient grounds for granting leave to challenge the decisions of both the ORAC on the substantive refugee application and the Refugee Assistance Tribunal on appeal from the decision of the ORAC.

4. Spain

In Spain, age assessment is based on a cross-checking of documentary evidence, if available, in consultation with the Police Registry of Unaccompanied Foreign Minors, and/or on a medical examination, which is ordered by the Public Prosecutor's Office whenever the person claiming to be a child is undocumented and does not appear in the Police Registry of Unaccompanied Foreign Minors.¹¹³ Medical examinations are also ordered when the authorities find that the age stated in the person's documents is inconsistent with his or her physical appearance. This practice, which has become standard in recent years, is generally accepted as legitimate by the courts provided that the identity documents were issued by States with which Spain does not have mutual recognition agreements.

Medical examinations consist for the most part of an osteometric study comparing the X-rays of the person's left hand and wrist with the Greulich and Pyle charts.¹¹⁴ The margin of error of the osteometric tests is acknowledged by the Spanish authorities and the Public Prosecutor's Office, in its Instruction 2/2001, has stated that for tests such as these, which result in a considerably wide age range, the age must be established at the lower limit of the range.¹¹⁵ However, the case law indicates that it has become common practice for the Spanish Child Welfare Services to subject children under their care, who claim to be 16 or 17 years old, to medical examinations, following which the children are declared to be older than 18 and are released from the reception centres and State care. Maria Luisa Cava de Llano, Spanish Ombudsperson, referred to this practice during the Judicial Colloquium, as a matter of great concern.¹¹⁶

As a result of this practice, age assessment has been a heavily litigated issue in Spain in recent years. The appeals brought before the courts do not usually concern the age assessment decisions themselves, but focus on the decisions adopted by the Child Welfare Services to terminate State guardianship upon reception of osteometric tests indicating that the individuals are older than 18.

The recourse to medical examinations is, in general, accepted by the courts, which, however, tend to dismiss the results of the examinations when they contradict the documentation available, on the grounds that the examinations have a significant margin of error and, therefore, the benefit of the doubt should lead to the conclusion that the person whose age is disputed is a child. Precisely because the radiological examinations have a significant margin of error, some Spanish courts have begun to question the admissibility of subjecting a person who claims to be 17 years old to radiological examinations, since these examinations constitute an interference with the child's physical integrity that can, if not justified by very strong reasons of general interest or public order, amount to a discriminatory act.

Contrary to what is seen in the case law from Austrian, French, Irish and United Kingdom courts reviewed in this chapter, Spanish courts make direct reference to the best interests principle and

¹¹³ Spanish report on EMN study, June 2009, p. 34. As reported in the Spanish Ombudsman's study on age assessment procedures, the Police Registry of Unaccompanied Foreign Minors is not yet fully operational and the information is not shared among the Autonomous Communities, which results in migrant children moving between Autonomous Communities and being treated as children or as adults depending on the Autonomous Community where they find themselves at any given time (Defensor del Pueblo de España, *¿Menores o Adultos? Procedimientos para la determinación de la edad*, 2011, pp. 102, 107-109 and 170).

¹¹⁴ Synthesis report of the study coordinated by France Terre d'Asile on the reception and care of unaccompanied minors in eight countries of the European Union, October 2010, p. 30.

¹¹⁵ Spanish report on EMN study, June 2009, p. 34.

¹¹⁶ See also Defensor del Pueblo de España, pp. 147-154.

to the CRC, as a basis for granting the benefit of the doubt to anyone who may be a child and to protect any such person from being released from State care and left destitute on the streets.

**Court of First Instance (*Juzgado de Primera Instancia 28, Madrid*)
decision no. 202/2010, of 04.05.2010**

The Court reversed the decision by the Guardianship Commission of Madrid to terminate the guardianship of a boy on the grounds that, according to the medical examinations conducted, he was over 18 years of age. The Court noted that none of the medical examinations had provided a conclusive result regarding the age of the appellant, and that all three examinations had disclosed that the child could be 17 years old.

The Court noted the growing concern motivated by the rise in child immigration in recent years and the arrival of unaccompanied children in particular. It stressed that the situation of a migrant whose age is disputed is very uncertain, but that the general regulations in force establish as a starting point a rebuttable presumption that the person is a child. This means that, until proven otherwise, the person is to be treated as a child. The probative means available to determine age include juridical means, which consist in consulting the Registry of children under State guardianship and the records of public and private child care institutions, and medical examinations, which are more problematic because the determination of bone age presents a serious risk of over- or underestimation of chronological age.

The Court remarked that the charts commonly used to determine bone age (Greulich and Pyle) had been established several decades prior and in the context of research on growth-related pathologies, not for the purpose of determining exactly the age of an undocumented person. It further remarked that said charts had been established by reference to Caucasian individuals, who had benefited from a comfortable lifestyle, and that it had been proved that poor life conditions interfere with the process of bone formation, and that it was not constant for all races. The Court held therefore that the margin of error when assessing age in this way was at least 18 months and therefore an age assessment must always be equated with the minimum age possible within the margin of error, "because that is what, in general, satisfies the child's interest".

Court of First Instance (*Juzgado de Primera Instancia 16, Barcelona*) decision no. 406/2010, of 18.03.2011

The Court reversed the decision by the General Office for Child and Youth Care to terminate its guardianship of a child originating from Mali on the grounds that he had already become an adult and was no longer entitled to the State guardianship accorded to children in need. The child, who was 14 according to his passport, had been placed under the care of the General Office for Child and Youth Care, upon identification by the police, and had been admitted to a reception centre for children while his personal and family files were being examined. Owing to his physical appearance and to the fact that the police had a record of him being almost 18 years old, the Public Prosecutor's Office ordered radiological examinations to assess his age. Upon receiving the forensic report, which concluded that the boy was over 18 years, the Public Prosecutor treated him as an adult and determined that he was not entitled to the benefits accorded by law for the protection of children. A few weeks later, the General Office for Child and Youth Care terminated the guardianship and released the boy from the reception centre where he had been lodged.

The Court agreed that the physical appearance of the applicant, his inscription in the Police Registry as an adult, and the fact that his passport had been issued by a country with which Spain did not have a mutual recognition agreement justified the medical examinations ordered by the Public Prosecutor. However, after noting that different national courts ascribe different weight to passports and medical examinations, the Court held that, when faced with a contradiction

between the content of the passport and the results of the medical examinations, preference must be given to the former.

The Court disregarded the results of the medical examinations on two grounds: the inaccuracy of the radiological examinations and the best interests of the child. First, the Court noted that the radiological examinations are not reliable, since they are based on criteria defined by reference to American or European physical types and ignore the very different racial, ethnic, nutritional, environmental, psychological and cultural factors which influence the development of people from sub-Saharan Africa. The Court mentioned a number of expert opinions on the inaccuracy of radiological examinations and noted the opinion issued in 2009 by UNICEF and the General Council of the Spanish Bar Association, which had advised against a systematic and exclusive use of the Greulich-Pyle radiological technique to determine the age of unaccompanied children, owing to its high margin of error. The age assessment made on the basis of the radiological examinations was therefore incomplete and did not determine the age of the appellant.

Finally, since it was not possible to determine with certainty that the appellant was an adult, the Court held that the principle of the best interests of the child, "which must be given preference over all others" and which is enshrined in national legislation and in many international treaties ratified by Spain, including the CRC and the ECHR, demands that he be considered a child.

**Court of First Instance (*Juzgado de Primera Instancia 19, Barcelona*)
decision no. 107/2011, of 02.05.2011**

The Court granted the preventive readmission to a reception centre for children of a boy, claiming to be 17 years old, who had been under State guardianship but whom the General Office for Child and Youth Care had declared not to be a child in need following a medical examination which indicated that the boy was an adult. The boy had lodged an appeal against the decision by the General Office for Child and Youth Care to terminate its guardianship and had requested, as a preventive measure, readmission to a reception centre for the duration of the appeal procedure.

The Court held that it was evident that the request should be granted given that, where there was a contradiction between the appellant's documents and his physical appearance and some "alleged bone examinations", the validity of the documents was to be assumed. The Court noted that the object of the main procedure, still pending, was precisely to determine the appellant's age and it was possible that the Court in the main procedure might conclude that there had been a mistake in the evaluation of the radiological results.

The preventive readmission of the appellant to a reception centre for children had to be granted because the existence of documents attesting to the appellant's claimed age suggested that they had been issued as part of a proper legal process and gave the basis in law for preventative measures to be adopted and also because the protection due to a child could not be put on hold until the courts decided whether the child was a child or not. The Court stressed the fact that there was a risk that delay would prevent the child receiving the protection to which he was entitled as a child, at all stages of his childhood in order for his development to be adequate. All the time that the appellant was being denied the protection that the law granted him as a child these advantages were lost forever. Therefore his right to appeal before the courts would be frustrated if the protection to which he was entitled as a child was suspended until a final decision in the main procedure, in particular because he would probably turn 18 before the court reached a verdict. The Court dismissed as irrelevant the claim that the appellant had his basic needs covered by being accommodated in a reception centre for adults, since, if he was a child and while he was still a child, he was entitled to the satisfaction of the needs arising from the fact that he was a child, whose needs, if he was abandoned, could only be guaranteed by the General Office for Child and Youth Care.

Furthermore, the Court questioned the standards by which the Public Prosecutor's Office had

evaluated the physical appearance of the appellant, noting that on its own judgement the appellant, who had been before the Court, did not have a physical appearance, in terms of stature or physiognomy, incompatible with the age contained in the passport on which he relied or the appearance of other children who had been before the Court. The Court did not share, therefore, the conclusions by the Public Prosecutor's Office that the appellant was an adult.

The Court went even further and held that it would be discriminatory to subject a migrant child under State guardianship to radiological examinations when, according to the child's passport, he was only a few months away from becoming an adult. The radiological examinations constitute an interference with the child's person that can only be justified, in such circumstances, by very strong reasons of general interest or public order.

**Court of First Instance (*Juzgado de Primera Instancia 51, Barcelona*)
decision no. 141/2011, of 13.05.2011**

In a similar case, the Court also granted the preventive readmission to a reception centre for children of a boy, originating from Ghana, who was 2 months away from becoming 18 according to his birth certificate and whom the General Office for Child and Youth Care had decided to release from its care following a medical examination which had concluded that his approximate bone age was 18 or more. The Court noted that the results of the medical examinations were not inconsistent with the child's claim to be 17 years and 10 months old and added that, in any case, "given a minimum shred of doubt regarding a young person's age, the prevailing principle must be in favour of protecting the person as a child".

The Court held that there was a significant risk (*periculum in mora*) that otherwise a child would be left destitute on the streets with minimal assistance from private institutions. The Court stressed that unlike the Public Prosecutor's Office, whose main concern was that there were no adults lodged in reception centres for children and that adults did not benefit from the special care provisions designed for children, the Family Court is bound to act under the principle that, in case of doubt in such cases it must apply the principle of the best interests of the child (*pro minoris* principle, as the Court referred to it). It was only in this way that the Court could prevent the risk of leaving a child destitute on the streets or dependent on private institutions when the child is entitled to State care and to be admitted to a public reception centre which would meet his specific needs as a child.

5. United Kingdom of Great Britain and Northern Ireland

In the United Kingdom it is generally accepted that it is not appropriate for age to be determined by X-ray examination, since X-rays should be administered only for therapeutic purposes. In an opinion sought by the Children's Commissioner for England, it was noted that the Ionising Radiation (Medical Exposure) Regulations 2000 SI 2000/1059, which were adopted in response to EU Council Directive 97/43/Euratom,¹¹⁷ requires a medical practitioner to justify the use of X-rays for non-medical purposes. In particular medical practitioners are asked to give special consideration to whether exposure is justified in cases which have no direct health benefit for individuals and where exposure is undertaken on medico-legal grounds. The UK Border Agency has instructed its entry clearance officers that the use of X-rays to assess the age of children is not admissible and that doctors must not be asked to use radiological data when making age assessments.

Initial age assessments are made by the local authorities, who will be responsible for accommodating the individual if he or she is found to be a child, in response to a request from the United Kingdom Border Agency or at times as a result of their own doubts about a child's age. The assessments are based on individual interviews undertaken by two social workers who have the necessary training and experience to do so. Mr. Justice Stanley Burnton, in *R (on the application of B) v The Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689 (Admin), set out the requirements of a lawful assessment by a local authority of the age

¹¹⁷ Council Directive 97/43/Euratom, of 30 June 1997, on health protection of individuals against the dangers of ionizing radiation in relation to medical exposure, and repealing Directive 84/466/Euratom.

of young asylum seekers claiming to be under the age of 18 years, which became known as the “Merton criteria”. These criteria include the requirement that the decision maker does not determine age solely on the basis of the appearance of the applicant, but seeks to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years, as well as ethnic and cultural information and the disclosure by the local authority of adequate reasons for deciding that an applicant claiming to be a child is not a child. He also held that if the decision maker forms the view that an applicant is lying about his or her age, the assessors must explain the basis for this conclusion and provide the applicant with an opportunity to respond.

Despite the apparent clarity of Mr. Justice Stanley Burnton’s judgement, age assessments continued to be a highly contested procedure and local authorities did not always comply with the recommended procedures. As a consequence, similar challenges continue to be brought. For example in the very recent case of *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, it was necessary for the Court of Appeal to find that it was “axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case, which may weigh against him. Obvious possible points are the absence of supporting documents, inconsistencies, or a provisional conclusion that he is not telling the truth with summary reasons for that provisional view”.

This is a typical example of a public law challenge to the manner in which a local authority carries out an age assessment, which is based on an assertion that the procedure did not provide the applicant with an opportunity to make his or her own case or that it was based on an unreasonable or perverse assessment of the facts of the case. The issues raised are usually procedural and are not based on any interpretation of the CRC. Over the years a number of other challenges have also been brought based on the local authority having failed to give any or due weight to an age assessment undertaken by an experienced consultant paediatrician. This eventually led to a case being brought by a number of local authorities, which asserted that reliance could not be placed on such reports as their methodology was flawed and could not give rise to an accurate assessment of age. This was part of a larger challenge to the manner in which age assessments should be carried out, but the assertion relating to the reliability of assessments carried out by consultant paediatricians was eventually heard by Mr. Justice Collins in *R (A) v London Borough of Croydon; R (WK) v Kent County Council* [2009] EWHC 939 (Admin). He heard evidence from an eminent consultant paediatrician who relied on the guidance provided by the Royal College of Paediatrics and Child Health in its November 1999 publication, *The Health of Refugee Children: Guidelines for Paediatricians*. This stated that “in practice, age determination is extremely difficult to do with certainty, and no single approach can be relied on. Moreover, for young people aged 15-18, it is even less possible to be certain about age. [Therefore] age determination is an inexact science and the margin of error can sometimes be as much as 5 years on either side”. Most importantly the guidelines asserted that “assessments of age measure maturity, not chronological age” and that “it was virtually impossible to deduce the age of an individual from anthropometric measures”. Mr. Justice Collins did not find that medical reports could never be relied upon but did conclude that they were no more or less reliable than assessments undertaken by trained and experienced social workers.

Meanwhile, other issues raised in the same case were litigated up to the United Kingdom Supreme Court and resulted in a decision which radically changed the manner in which age assessments were to be dealt with in the courts in the United Kingdom. In the case of *R (on the application of A) (FC) v London Borough of Croydon and one other action* [2009] UKSC 8, the Supreme Court held that the question whether a person is a “child” is one for which there is a right or a wrong answer, even if it may be difficult to determine what that answer is, and therefore if a decision maker cannot reach a decision which is not challenged, it is up to courts to reach their own conclusions. This was a major departure from the previous practice of the High Court and the Court of Appeal, which had been to consider whether the decision reached by the decision maker had been one that was reasonable and conformed with any published policies.

This Supreme Court decision has led to the High Court having to hear live evidence in judicial review cases involving challenges to age assessments, which is very unusual in this jurisdiction. It also meant that cases had to be set down for two or three days in each instance. Many members of the judiciary were unhappy about having to conduct such fact-finding exercises in the Administrative Court, which usually dealt with questions of law without hearing live evidence. In an attempt to clarify the tasks, which the Administrative Court would have to undertake, Mr. Justice Holman gave a range of directions in the case of *The Queen on the application of F v London Borough of Lewisham and others* [2009] EWHC 3542 (Admin). For example, he directed that in such cases judges should apply the ordinary civil standard of the balance of probabilities when deciding questions of fact. He also recognised that medical evidence may be one element of the factual basis upon which a court would reach its decision. However, it has now been decided that as from October 2011 the majority of these judicial reviews will be transferred to the Upper Tribunal (Immigration and Asylum Chamber), once permission has been granted for a substantive judicial review of any age dispute, as the Tribunal has experience of both fact finding and issues relating to unaccompanied or separated children.

***R (on the application of B) v The Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689 (Admin)**

In a claim for judicial review of a decision by the London Borough of Merton to deny accommodation and financial support to a boy originating from Senegal on the grounds that, according to the age assessment made by a social worker, he was an adult, Mr. Justice Stanley Burnton noted that it was impossible for any decision maker to make an objectively verifiable determination of the exact age of an applicant who may be in the age range of 16 to 20. He suggested that, if a history was taken from the child which could be accepted as true and was consistent with his or her age being under 18, the decision maker could conclude that he or she was a child. However, he also accepted that if someone lied about their past, it did not necessarily mean that he or she had also lied about his or her age.

Mr. Justice Stanley Burnton held that the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.

Mr. Justice Stanley Burnton held that a local authority is obliged to give adequate reasons for its decision as the "consequences of such a decision may be drastic for the applicant and he is entitled to know the basis for it, and to consider, if he can, with legal assistance if it is available to him, whether the decision is a lawful one". He held that the reasons given need not to be long or elaborate and that the court should be careful not to impose unrealistic and unnecessary burdens on those required to make decisions such as that under consideration. He noted that cases "will vary from those in which the answer is obvious to those in which it is far from being so, and the level of inquiry unnecessary in one type of case will be necessary in another. The Court should not be predisposed to assume that the decision maker has acted unreasonably or carelessly or unfairly: [on] the contrary, it is for a claimant to establish that the decision maker has so acted".

The judge was satisfied that in the instant case the social worker did not make her decision only on the basis of the claimant's appearance and demeanour but that she took a full family and personal history, including the claimant's educational history. He also held that it was not necessary for the local authority to provide support for a period of some days or weeks to give the opportunity for others to observe the claimant, and for him to be observed and assessed over that period, as there was sufficient information already available on which to base a decision.

Mr. Justice Stanley Burnton also held that, if the decision maker forms the view that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view, so that he can explain himself if he can. In addition, he held that the claimant should have been given an adequate opportunity to answer the points that the defendant was minded to hold against him, and the social worker did not suggest that that had been done. Therefore, it followed that her decision should be set aside unless the defendant had established that his responses to the matters on which she relied could not reasonably have affected her decision.

R (on the application of A) (FC) v London Borough of Croydon and one other action; R (on the application of M) (FC) v London Borough of Lambeth and one other action [2009] UKSC 8

A arrived in the United Kingdom from Afghanistan on 13 November 2007 and claimed asylum the following day, stating that his date of birth was 8 April 1992, which made him 15 and a half years old. The immigration officer considered that he was 18 and referred him to the London Borough of Croydon for an age assessment. He was interviewed by two social workers, who concluded that he was an adult. He was therefore referred to the National Asylum Support Service for accommodation and financial support as an adult asylum seeker. Soon afterwards, his solicitors produced a copy of a birth certificate from Afghanistan, showing his date of birth as 8 April 1992. They also arranged for him to be examined by a paediatrician, who reported that in her opinion he was aged between 15 and 17. A claim for judicial review of the decision that he was not entitled to accommodation under section 20 of the Children Act 1989, as a child in need of accommodation, was made on 7 March 2008 and an interim order was made against the authority obliging it to provide him with such support until the determination of the claim for judicial review.

M arrived in the United Kingdom in November 2006 and claimed asylum three days later, saying that he was born on 15 December 1989, which made him just under 17 years old. His age was disputed and he was referred to the London Borough of Lambeth, where his age was assessed by two social workers, who concluded that he was over 18. Once again, a paediatrician's report was obtained, which concluded that he was indeed aged 17. Judicial review proceedings were brought and the London Borough of Lambeth reviewed its decision but concluded that M was more than 20 years old.

These two cases and five other claims for judicial review were joined for the purpose of deciding a number of preliminary issues, with these two being treated as the lead cases. Among those preliminary issues was the question of "child or not" for the purpose of section 20 of the 1989 Act was one of precedent fact for the court to determine on the balance of probabilities. On 20 June 2008, Mr. Justice Bennett decided all issues in favour of the local authorities and decided that it was not.

On 18 December 2008, the Court of Appeal dismissed the appellants' appeals from the decisions on the preliminary issues of law. The issues were then slightly reformulated for the purpose of the subsequent petition to the Supreme Court. Two of the issues brought before the Supreme Court were: (a) whether, as a matter of statutory construction, the duty imposed by section 20(1) of the Children Act 1989 is owed only to a person who appears to the local authority to be a child, or whether it is owed to any person who is in fact a child, so that the court may determine the issue on the balance of probabilities; and (b) whether the issue "child or not" is a question of "precedent" or "jurisdictional" fact to be decided by a court on the balance of probabilities.

Lady Hale, in a judgement supported by the other members of the Supreme Court, held that "where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and 'Wednesbury reasonableness' there are no clear cut right or wrong answers". But she added that "the question whether a person is

a ‘child’ is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact, which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers”.

She also held that “the public authority, whether the children’s services authority or the UK Border Agency, has to make its own determination in the first instance and it is only if this remains disputed that the court may have to intervene. But the better the quality of the initial decision making, the less likely it is that the court will come to any different decision upon the evidence”. In her conclusions, Lady Hale said that she would allow the appeals and set aside the order of the Court of Appeal, adding that the “result is that if live issues remain about the age of a person seeking accommodation under section 20(1) of the 1989 Act, then the court will have to determine where the truth lies on the evidence available”.

R (A) v London Borough of Croydon; R (WK) v Kent County Council [2009] EWHC 939 (Admin)

The factual base for the case of A has already been outlined as this claimant’s case also proceeded to the Supreme Court on other issues. However, at the High Court level in A, Mr. Justice Bennett declined to hear a further ground relating to the evidential value of paediatricians’ reports, as he believed that it was not appropriate to do so at a preliminary hearing, which was concerned with procedural as opposed to substantive issues. This case was subsequently joined to that of WK and came before Mr. Justice Collins. Mr. Justice Collins noted that in the case of *R (I and O) v Secretary of State for the Home Department* [2005] RWHC 1025 (Admin), the High Court had decided that the opinion as to the age of a child made by an experienced paediatrician using dental data should be preferred to that of local authority social workers. This was also the basis of the claimants’ challenges to the refusal of the Croydon and Kent authorities to follow a paediatrician’s opinion in relation to their ages or at least to accept that they raised doubts about their ages and that therefore they should be given the benefit of that doubt.

Mr. Justice Collins based his judgement on the criticisms raised about the methodology adopted by two paediatricians who had historically provided a large number of age assessments in cases involving unaccompanied or separated children and also on the view of the reliability of age assessments which had generally been adopted by the medical profession. Mr. Justice Collins stated that he did not doubt that a paediatrician who has experience in the field of age assessment could assist in a particular case and added that the Secretary of State and the local authorities cannot in general disregard reports from paediatricians. However, he held that it is up to the Secretary of State for the Home Department and the local authorities to decide how much weight (if any) to attach to such reports, adding that he would expect that “only in rare cases would such a report persuade the decision maker to reach a different view”.

Mr. Justice Collins relied on the evidence before him to accept that the social workers involved in the decision-making process who are employed by the local authorities in these particular cases had had appropriate training and did have substantial experience in assessing the age of unaccompanied asylum-seeking children. Nevertheless, after stressing the importance of entrusting the assessments to experienced trained social workers and of guaranteeing that all the safeguards to ensure fairness are in place, Mr. Justice Collins recognised that “the system at present is undoubtedly far from perfect”, and added that “The need for specialist units is I think apparent – furthermore, since paediatricians recognise that they can play a part, it would be desirable for such units to have the services of properly trained paediatricians even though medical science cannot produce a correct answer”.

C. GOOD PRACTICE

Drawing from the cases reviewed and those discussed at the Judicial Colloquium, the following can be identified as good practice:

- Taking into account the wide margin of error involved in medical or dental assessment examinations and therefore finding that the results of such examinations are inconclusive or that it is appropriate to rely on the lowest age indicated within that margin of error
- Finding that the reliability of the Greulich and Pyle and other radiological methods of age assessment is extremely doubtful and should not be used to assess age
- Concluding that radiological examinations, for non-medical reasons, constitute an interference with the child's development and could only be justified in such circumstances by very strong reasons of general interest or public order. Concluding that the same medical reasons to limit radiological examination for national children should apply to all children in the territory
- Requiring any experts to give full details of their professional qualifications, the methodology which they have applied and the margin of error attached to such methods
- Upholding the principle of giving the child the benefit of the doubt when expert evidence is neither conclusive nor determinative on the basis that this approach is in the best interests of the child
- Finding that age assessments cannot be based solely on the physical appearance of the person whose age is disputed and should be conducted on the basis of a combination of different methods, which may include consideration of any identity documents produced by the child, interviews with the child and others and medical examinations
- Imposing strict procedural requirements when an age assessment was undertaken by a social worker or other state employee so that the child was told the reasons for doubting his or her age and was given the opportunity to respond to any allegations about the validity of his or her identity or documents or the credibility of his or her account of past events
- Providing the child with the opportunity to appeal against or seek a judicial review of any decision to refuse to accept his or her age
- Determining that it is a task for the courts to assess the age of a child in the light of all available evidence if there is no agreement between the authorities and the child concerned.

CHAPTER III

ARTICLE 3 OF THE CRC AND DURABLE SOLUTIONS FOR CHILDREN

The ultimate aim in addressing the fate of migrant children, in particular children with an irregular immigration status and unaccompanied or separated children, is to identify a durable solution that addresses all their relevant rights and that is in the best interests of the child.¹¹⁸ The appropriate solution might include return to the country of origin, remaining in the host country or joining family members in a third country. Since these decisions are likely to have a fundamental and

¹¹⁸ General Comment No. 6, para. 79; Council of Europe Parliamentary Assembly Resolution 1810 (2011), para. 5.12.

long-term impact on the child's life,¹¹⁹ the child's best interests must be a primary consideration when evaluating any and all options.

What constitutes the child's best interests will necessarily be different in different contexts, depending on the situation of each individual child. It is necessary, therefore, to ensure that the individual circumstances of each child are taken into account and that the different factors affecting the child's situation and prospects are carefully weighted up when deciding what would be the appropriate durable solution for him or her.¹²⁰ While efforts to find durable solutions should be initiated and implemented without undue delay,¹²¹ they should not be rushed through and decision makers should take as much time as necessary to conduct a careful and comprehensive assessment of which solution is best suited to securing the attainment of the child's best interests in the long term. While decisions are reached on the appropriate durable solution, the child's best interests require that he or she be provided with adequate temporary care and benefit from legal residence status in the host country.¹²² Also, as recommended by the Council of Europe Parliamentary Assembly, no child should be denied access to the territory or be summarily turned back at the borders of a State.¹²³

All options for a durable solution should be considered on an equal basis and bearing in mind all the child's rights, as they are enshrined in the CRC and in other relevant international and regional instruments on human rights, international humanitarian law, refugee law and child-specific hard and soft law instruments.¹²⁴ Several comments, guidelines and recommendations have been adopted in recent years providing guidance on the broad parameters that decision makers should apply when considering which of the available options constitutes a durable solution that serves the child's best interests. General Comment No. 6 of the Committee on the Rights of the Child provides the most definitive guidance.

Following its rights-based approach, the Committee on the Rights of the Child states that the search for a durable solution should commence with analysing the possibility of family reunification, since it is the "obligation of States under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will".¹²⁵ The purpose of restoring or maintaining the unity of the family may require that the child be returned to his or her country of origin or be sent to a third country. It may also require that the child be admitted in the country of destination if the child's parents are legally residing there and may even protect the child's parents against expulsion from the host country. Although family reunification is generally regarded as being in the best interests of the child, there are instances when that is not the case, either because of the risks represented by the place where the parents live or because of the risks represented by the parents themselves. For example, in some cases, the parents may have been involved in trafficking the child in the past or may be unable to protect him or her from being trafficked again in the future. Irrespective of the location, family reunification should not be pursued in cases involving abuse or neglect of the child by the parents (article 9.1 of the CRC).

¹¹⁹ UNHCR, "Guidelines on Determining the Best Interests of the Child", May 2008, p. 30.

¹²⁰ Study of the OHCHR, July 2010, para. 25. These circumstances and factors include, among others, the child's background (nationality, upbringing, cultural and linguistic background, affective ties, capabilities and interests), the child's vulnerabilities and particular protection needs, as well as the capacity of the adults willing to care for the child. UNHCR, "Guidelines on Determining the Best Interests of the Child", May 2008, p. 57.

¹²¹ General Comment No. 6, para. 79.

¹²² Council of Europe Parliamentary Assembly Resolution 1810 (2011), para. 5.13.

¹²³ *Ibid.*, para. 5.3.

¹²⁴ Mailis Reps, , paras. 107-110.

¹²⁵ General Comment No. 6, para. 81. Ideally, reunification will be with one or both parents. If it is not possible to reunite the child with his or her parents, reunification with other family members is usually the preferred alternative. See *Inter-agency Guiding Principles on Unaccompanied and Separated Children*, January 2004, p. 37. On this topic, Mailis Reps deems it important to encourage a broader interpretation of the term "family" when considering family reunification. Mailis Reps, para. 106.

Family reunification in the country of origin or in a third country¹²⁶ should not be pursued where there is a reasonable risk that it would lead to the violation of fundamental human rights of the child.¹²⁷ Such a reasonable risk will exist whenever the child has been granted refugee status¹²⁸ or when non-refoulement obligations apply, for example because the child would otherwise be returned to the borders of a State where there is a real risk of underage recruitment or of direct or indirect participation in hostilities.¹²⁹ The Committee recommends that the assessment of the risks should be conducted in an age- and gender-sensitive manner and should take into account, among other aspects, the particular serious consequences for children of insufficient provision of food or health services.¹³⁰ It also notes that where the circumstances in the country of origin contain less serious risks, such risks should be given full attention and balanced against other rights-based considerations, including the consequences of further separation of the child from his or her parents.¹³¹

Furthermore, when assessing whether the return to his or her country of origin is in the child's best interests, decision makers should consider, among other aspects, the safety, security and other conditions, including socio-economic conditions, awaiting the child upon return;¹³² the availability of care arrangements for the child;¹³³ the views of the child and those of his or her caretakers; the child's level of integration in the host country and the duration of the absence from the country of origin; the child's right to preserve his or her identity, including nationality, name and family relations; and the desirability of continuity in a child's upbringing and with the child's ethnic, religious, cultural and linguistic background.¹³⁴ Other related aspects that should be considered include the possible danger of exposure to sexual abuse and exploitation, as well as harmful traditional practices; the existence of discrimination patterns against girls; the availability and quality of health and educational services; the opportunities for social integration into the community and the community's capacity to care for and protect children, particularly those with specific needs.¹³⁵

When considering return to the country of origin, the best interests of the child may be overridden, in exceptional circumstances, by other considerations, provided that these are rights-based. That may be the case when the child constitutes a serious risk to the security of the State or to the society. However, non-rights-based arguments such as those relating to general migration control cannot override the child's best interests.¹³⁶ In particular, as recommended by the Special Rapporteur on the human rights of migrants, Jorge Bustamante, children should never be deported

¹²⁶ According to the Committee on the Rights of the Child, resettlement in a third country is only in the best interests of the child if it serves family reunification or if resettlement is the only means to effectively and sustainably protect a child against refoulement or against persecution or other serious human rights violations in the country of stay (General Comment No. 6, para. 92).

¹²⁷ General Comment No. 6, para. 82.

¹²⁸ Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein (General Comment No. 6, para. 82).

¹²⁹ General Comment No. 6, para. 28.

¹³⁰ *Ibid.*, para. 27.

¹³¹ *Ibid.*, para. 82.

¹³² To this end, the Special Rapporteur on the human rights of migrants, Jorge Bustamante, recommends the development of standardized procedures to ensure an assessment of the situation in the country of origin before deciding on the repatriation of the child (see A/HRC/11/7, para. 101). Similarly, the Council of Europe Parliamentary Assembly has recommended that a professional child-protection body should conduct the assessment of return conditions and also that a follow-up plan should be established in order to ascertain that the protection of the child is guaranteed following the return (Council of Europe Parliamentary Assembly Resolution 1810 (2011), para. 5.15).

¹³³ In the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements for the care and custody of the child upon return to the country of origin (General Comment No. 6, para. 85).

¹³⁴ General Comment No. 6, para. 84.

¹³⁵ *UNHCR Guidelines on Determining the Best Interests of the Child*, p. 65. In spite of the importance accorded to the quality of education and health services, the UNHCR Guidelines state that access to better health services or educational facilities should normally not be prioritized over the possibility of family reunification or over the maintenance of cultural continuity. "In special situations, such as that of an adolescent for whom access to higher education is essential to his or her development needs, more weight can be attributed to education. However, in order to be in the child's best interests, access to educational facilities must be provided in a way that does not sever the child's link with his or her family and culture" (p. 75).

¹³⁶ Committee on the Rights of the Child, General Comment No. 6, para. 86.

as a punishment for irregular migration status.¹³⁷

Remaining in the host country may be in the best interests of the child either for humanitarian reasons, or because the child's parents reside there or because it is not possible or desirable that the child joins his or her parents in their country of origin or in a third country. Local integration must be based on a secure legal status (as refugee, beneficiary of complementary forms of protection, or a legal immigrant) and be governed by the Convention rights that are fully applicable to all children who remain in the country.¹³⁸ However, as has been pointed out by the Separated Children in Europe Programme, temporary residence is not a durable solution and must not be granted merely as an administrative response that will be ended abruptly upon the child turning 18 years of age.¹³⁹ If the child is unaccompanied or separated, the relevant authorities should determine the appropriate long-term arrangements, such as foster care, group homes or adoption,¹⁴⁰ within the local community in order to facilitate the child's integration, bearing in mind that institutional care should serve only as a last resort.¹⁴¹ Under articles 9 and 10 of the CRC, the host country is furthermore bound to consider the applications for family reunification therein in a positive, humane and expeditious manner.¹⁴²

Regarding the implementation of durable solutions in the host country, the Committee of Ministers of the Council of Europe has adopted a recommendation on life projects for unaccompanied migrant children.¹⁴³ Life projects are individual plans, which take into account each child's specific situation and comprise individualised, open-ended objectives, which the child undertakes to pursue. Life projects aim to develop the capacities of children by allowing them to acquire and strengthen the skills necessary to become independent, responsible and active in society. They pursue objectives relating to the social integration of children, personal development, cultural development, housing, health, education and vocational training, and employment. According to Mailis Reps, Rapporteur of the Committee on Migration, Refugees and Population, of the Council of Europe, the first pilot phase of implementing the life projects in eight member States, which was completed by the European Committee on Migration in 2010, allows the conclusion that this is the way forward for ensuring durable solutions.¹⁴⁴

A. CHALLENGES TO FINDING DURABLE SOLUTIONS IN EUROPE

One common criticism directed at the European Union and at EU member States is that they place undue emphasis on returning migrant children to their countries of origin over any other options.

¹³⁷ Jorge Bustamante (A/HRC/11/7), para. 43.

¹³⁸ General Comment No. 6, para. 89.

¹³⁹ The Separated Children in Europe Programme, in its *Statement of Good Practice*, recommends therefore that individuals who arrived as children and were allowed to remain for humanitarian or compassionate reasons or who receive any other kind of temporary status expiring at the age of 18, should be treated in a generous manner when they reach the age of majority and full regard should be given to their potential vulnerability (Separated Children in Europe Programme, *Statement of Good Practice*, 4th edition, 2010), p. 39. Similarly, Mailis Reps has recommended that the potential of the child's long-term integration in the local community should be taken into account as a key element when deciding on the child's legal stay in the host country on reaching adulthood and that a "buffer age" between the age of majority and when a solution is found should be established, which would enable the young person – at least for a specified period of time – to continue education or training, or to compete on the labour market on the same basis as the national population (see Mailis Reps, Explanatory memorandum, paras. 93-94).

¹⁴⁰ Adoption may also be considered as a durable solution that serves the best interests of the child, provided that article 21 of the CRC and other relevant international instruments, including in particular The Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, are respected. It must have been established that the child is in a position to be adopted, which means, inter alia, that efforts with regard to tracing and family reunification have failed, or that parents have consented to the adoption. The views of the child, depending upon his or her age and degree of maturity, should be sought and taken into account in all adoption procedures. Priority must be given to adoption by relatives in their country of residence. Where this is not an option, preference should be given to adoption within the community from which the child came or at least within his or her own culture (General Comment No. 6, para. 91).

¹⁴¹ General Comment No. 6, para. 90.

¹⁴² *Ibid.*, para. 83.

¹⁴³ Recommendation CM/Rec(2007)9 of the Committee of Ministers of the Council of Europe to member States, adopted on 12 July 2007.

¹⁴⁴ Mailis Reps, , para. 116.

The creation of an “EU-wide presumption”¹⁴⁵ that it is in a child’s best interest to return to his or her country of origin has been mooted. As noted by Mailis Reps, States often take the view that, unless there is an asylum claim, it is almost always in the best interest of a child to return to family and that therefore there is no need for a thorough individual assessment of their needs.¹⁴⁶ Jorge Bustamante, Special Rapporteur on the human rights of migrants, has regretted that the EU Returns Directive authorizes the deportation of children migrants in the same manner as adults, despite some specific protection measures, and that it adopts a “punitive approach” instead of a “protection approach”.¹⁴⁷ For migrant children who are accompanied, they often suffer as a consequence of the irregular immigration status of their parents and are returned as a result of their parents’ status, without any individual assessment of their own.¹⁴⁸

One particular focus of concern has been the recent plans by some EU member States, such as Denmark, the Netherlands, Norway, Sweden and the United Kingdom, to open reception centres in countries of origin, such as Angola, Afghanistan and Iraq, in order to facilitate large-scale returns of children as well as adults.¹⁴⁹ These countries are still fragile and war-torn and face critical challenges in putting child protection systems in place or, where rudimentary systems do exist, there remain substantial challenges in making the systems operational. There is therefore a clear risk that the care systems in these countries will be unable to provide adequate care and protection and that the children may simply disappear from institutions and try to undertake dangerous journeys again.¹⁵⁰

When considering the return of a child to his or her country of origin, there is an obvious tension between the State’s desire to maintain effective immigration control by removing those who have entered illegally and the State’s obligations under international law to find a solution that meets the best interests of the child, which may require that the child be allowed to stay or that his or her return be delayed until all steps have been taken to ensure that this can be done safely.¹⁵¹ While the broad parameters for assessing whether deportation is in the child’s best interests are well defined, their implementation remains highly dependent on the level of effort, commitment and resources that EU member States are willing to put into ensuring that a child is being returned safely and that his or her best interests are being met.¹⁵²

While all children who have entered any of the EU member States have by law access to asylum procedures, in practice a number of children never manage to gain access to these procedures owing to practical or legal hurdles.¹⁵³ Furthermore, although the concept of child-specific persecution has been enshrined in the EU legal framework and transposed into national legislation across Europe, very few countries have adopted guidelines to assist decision makers in assessing protection claims from children and child-specific persecution is not sufficiently taken into account in practice.¹⁵⁴

In addition, while family reunification is recommended and it is considered as a possible means for other members of an unaccompanied or separated child’s family to subsequently enter the host country, there is little evidence to suggest that family reunification with unaccompanied or

¹⁴⁵ As reported by Human Rights Watch, in February 2010, the Government of the United Kingdom circulated a policy paper on unaccompanied children during a Brussels workshop that called for an “EU-wide presumption” that a child’s best interest is to return (see www.hrw.org/news/2010/06/04/eu-defer-hasty-returns-migrant-children-0 [29.10.2011]).

¹⁴⁶ Mailis Reps, para. 98.

¹⁴⁷ Bustamante (A/HRC/11/7), para. 57.

¹⁴⁸ Study of the OHCHR (A/HRC/15/29), sect. IV.

¹⁴⁹ Christine Mougne, *Trees only move in the wind. A study of unaccompanied Afghan children in Europe* (United Nations High Commissioner for Refugees (PDES/2010/05, June 2010), paras. 231-232.

¹⁵⁰ Mailis Reps, paras. 100-101.

¹⁵¹ Study commissioned by the European Union Agency for Fundamental Rights on the protection of the rights and special needs of irregular immigrant minors and asylum seeking children, April 2008, p. 3.

¹⁵² Study commissioned by the European Union Agency for Fundamental Rights .

¹⁵³ Mailis Reps, para. 60.

¹⁵⁴ Mailis Reps, paras. 66-67.

separated children who have been granted legal status occurs to any large extent.¹⁵⁵ Regulations have become more restrictive, a number of countries imposing new conditions that make family reunification more difficult, based on the assumption that reunification should take place in the country of origin.¹⁵⁶

It has been pointed out that often children are granted discretionary leave to stay until age 18 not because it is necessarily in their best interests but because of the cost and complexity of carrying out investigations to assess the options for family reunification in their home countries. Practices differ between EU member States in the management of the transition from childhood to adulthood, but in most cases reaching age 18 either triggers removal action without many or all of the safety net provisions associated with children, or the young person may be left in a state of limbo, remaining in the host country either illegally or in many cases without a clear status or legal rights.¹⁵⁷ In particular, young people whose legal status was not decided by the time they turned 18 years old and those whose application for asylum was refused face a great risk of drifting into an irregular status.¹⁵⁸ As a result, many unaccompanied or separated children in state care “vanish” from reception centres or other accommodation shortly before their eighteenth birthday and may be at the mercy of trafficking networks and criminal gangs, leading to a high risk of exploitation and abuse.¹⁵⁹

Many of these concerns were addressed during the discussions in the Judicial Colloquium. Johannes Wedening, UNICEF representative, recalled his experience with the repatriation of Ashkali children from Germany to Kosovo, noting that following their return, 75 per cent of the children no longer went to school and the poverty of their families was even more severe than that of families who had never left Kosovo. He stressed the importance of conducting follow-up reports on the conditions in which children live after return and regretted that, in spite of the recommendations by international organisations and agencies, monitoring and review of care arrangements in the country of return or resettlement hardly ever take place in practice.

It was also regretted that very often children are repatriated with their families for reasons related to their parents, without any individual assessment of their integration in the host country which has arisen independently to that of the adult members of the family. Marianne Rootring, Judge at the Court of The Hague, mentioned, however, a recent decision by the Secretary of State of the Netherlands, which contradicts the overall trend. The Secretary of State refused the return of two Afghan girls to Afghanistan on the grounds that, owing to the number of years of residence in the Netherlands, they were better integrated into Netherlands society than into Afghan society. Regarding the use of the number of years of residence as an indicator of integration into the host society, Kirsten Sandberg, member of the Committee on the Rights of the Child, noted that time is different from the perspective of the child and argued that three years or less should be considered to be enough for the child to be considered to be well integrated.

As summarised by Jan Jařab, OHCHR Regional Representative, it is necessary to evaluate the levels of integration of parents and of children separately, so as not to dilute the child’s interests with the more general facts of the family’s background and it is necessary to bear in mind that time flows differently for children as compared to adults. Furthermore, the child’s integration could be seen as a reason for the family to stay.

B. NATIONAL CASE LAW

The need to consider the best interests of the child is the argument most often used before and by

¹⁵⁵ Mailis Repts, para. 80.

¹⁵⁶ Study of the OHCHR, para. 61.

¹⁵⁷ Study commissioned by the European Union Agency for Fundamental Rights, April 2008; Mailis Repts, paras. 83-85.

¹⁵⁸ European Union Agency for Fundamental Rights, Separated Asylum-Seeking Children in European Union Member States, Comparative report, 2011.

¹⁵⁹ Mailis Repts, para. 86.

national courts when assessing the legality of administrative decisions which refuse the child asylum a temporary residence permit and order the removal of either unaccompanied or separated children or adults with dependent children living in the host country. As a rule, unaccompanied and separated children are not to be removed to their countries of origin unless adequate arrangements for their care are in place there, although, as seen above, national administrative authorities are not always compliant. National courts do not normally assess for themselves the conditions available in the country of origin. In addition, in most cases the involvement of the judiciary is limited to deciding whether the administrative authorities had carried out an assessment which took into consideration the best interests of the child.

The child's return to his or her country of origin is deemed unlawful whenever the administrative authorities fail to obtain reliable proof that there are adequate arrangements for the child's reception and assistance in that country or whenever it is foreseeable that he or she will be abandoned, without work and in extreme poverty. Administrative decisions to return a child to his or her country of origin must offer a clear justification for doing so and must show that the individual circumstances of the child were duly taken into consideration.

National courts are sensitive to the importance of finding durable solutions for migrant children and tend to prioritise their reunification with their biological parents (in the country of origin or in the country of destination) whenever the parents prove to be capable of exercising their parental duties, by raising the children in a suitable family environment and by taking proper care of the children's needs. This may determine the admission of the children to the country of destination, where their parents are legal residents, the return of the children to their country of origin along with or to rejoin their parents, as well as the protection of the parents against expulsion whenever such measure is deemed to be detrimental to the best interests of the child.

Frequent references are made to the European Court of Human Rights case law in this context, in particular with reference to the right to respect for private and family life (article 8, European Convention on Human Rights). The ECtHR *Boultif v Switzerland* judgement¹⁶⁰ is often mentioned in order to stress the need to confirm that there is a genuine family life and that the parent on the verge of expulsion actually contributes to the child's support and upbringing. The courts are adamant that it is the interest of the child in the enjoyment of a suitable family environment that justifies departing from the general rules on immigration, not the interests of the parent in staying in the country, and many judgements express a concern that the parents may be using the children to obtain residence permits that they would not otherwise obtain.

1. Belgium

Under the Aliens Act of 1980, migrant children as well as adults who arrive at Belgian borders without documentation may be denied leave to enter Belgium and be removed from the territory. Unaccompanied migrant children, however, have benefited, since 2004,¹⁶¹ from special protection and are not removed until a thorough assessment of their situation is conducted by the Aliens Office or by the Commissioner-General for Refugees and Stateless Persons and, even then only if the guardian appointed to the child concludes that return to the country of origin or to a third country is a durable solution.¹⁶²

Upon interception at the border or in the territory, every unaccompanied migrant child is referred to the Guardianship Services, which appoint a guardian to assist him or her in all legal procedures and to ensure that the authorities find a durable solution for the child in accordance with his or

¹⁶⁰ Case of *Boultif v Switzerland*, application No. 54273/00, judgement of 02.08.2001.

¹⁶¹ Under what is designated as the Guardianship Act of 24 December 2002 (*Loi-programme du 24 décembre 2002/ Programmawet van 24 December 2002*, with the changes introduced by the *Loi-programme du 27 décembre 2004/ Programmawet van 27 december 2004*).

¹⁶² Belgium country report for the EMN comparative study, *Unaccompanied Minors in Belgium. Reception, Return and Integration Arrangements*, July 2009, p. 54.

her best interests.¹⁶³ The child is provisionally placed in an Observation and Orientation Centre for a period of 15 days, renewable once for 5 days. If the child was intercepted at the border, his or her stay at the Observation Centre is considered to be “at the border”. Only if expulsion does not occur within the 20-day period, will the child be granted leave to enter the territory.¹⁶⁴ The child will then be issued with a temporary residence permit for the duration of the asylum or residence application procedure. The child may apply for refugee status or subsidiary protection, protection as a victim of human trafficking or for a residence authorisation under the specific procedure instituted by the Circular of 15 September 2005 for the protection of unaccompanied children whose residence applications on other grounds, such as asylum, protection as a victim of human trafficking or regularization, would or have failed.¹⁶⁵ If the child does not meet the requirements set by the Circular, he or she can still apply for regularisation on the basis of article 9 bis (exceptional reasons) or article 9 ter (medical reasons) of the Aliens Act.¹⁶⁶

The decisions of the Aliens Office and of the Commissioner-General for Refugees and Stateless Persons, as well as all the decisions taken in the application of the Aliens Act, may be appealed to the Court for Alien Law Litigation, an administrative court which, in 2007, took over the Council of State’s jurisdiction on alien litigation. The Court has full power of judicial review over the decisions taken by the Commissioner-General regarding the grant of refugee status or subsidiary protection and is therefore competent to substitute its decision. As for all other decisions taken when applying the Aliens Act, the Court only has the power to quash a decision and must remit the case to the original decision maker for a new decision.¹⁶⁷

In its abundant case law, the Court has had the opportunity to address the issue of protecting the best interests of the child when deciding whether to allow the child to stay in Belgium or to return the child to his or her country of origin. This has not been done, however, by reference to the CRC, since the Court is of the opinion that article 3 and several other CRC provisions are not directly applicable. The Court considers that the spirit, content and phrasing of articles 2, 3, 9, 28 and 29 of the CRC are not sufficiently precise or complete to dispense with the need for further regulation and that as a consequence the appellants cannot usefully invoke the direct breach of these provisions.¹⁶⁸ Article 3, in particular, contains a very general provision and cannot be interpreted in such a way as to exclude the applicability of the procedural rules set by the Aliens Act. Furthermore, even the more precise provisions in the CRC, such as articles 5, 7, 8, 10 and 16, are not sufficient to provide the basis for an appeal and do not dispense with the need for the appellant to invoke relevant provisions in national legislation.¹⁶⁹ It should be mentioned, however, that the principle of the best interests of the child is enshrined in several provisions of the Aliens Act, including articles 10 ter, 12 bis and 61/2, and in article 2 of the Guardianship Act, which stipulates that in every decision concerning an unaccompanied child his or her best interests must be *the* primary consideration.

Court for Alien Law Litigation decision no. 8230, of 29.02.2008

The Court granted an appeal lodged under the expedited procedure by the guardian of a child of Albanian nationality suspending the execution of an order that the child leave Belgium and be held in detention pending his departure. The child had been referred to the Guardianship Services on the grounds that he may be an unaccompanied child with irregular immigration

¹⁶³ *Ibid.*, p. 6.

¹⁶⁴ *Ibid.*, p. 54.

¹⁶⁵ This special procedure is designed to find a durable solution for all unaccompanied children who initiate it. The Aliens Office, together with the child’s guardian, assesses the different options: family reunification in Belgium; return of the child to his or her country of origin; or unlimited residence in Belgium. If, after a period of three years, no durable solution has been found and the child fulfils the conditions set by the Aliens Office (e.g., attends classes, provides identity documents, etc.) a residence permit of unlimited duration can be issued. Belgium country report, p. 7.

¹⁶⁶ Belgium country report, p. 7.

¹⁶⁷ See www.cce-rvv.be/rvv/index.php/fr/readmoremission/57-de-raad-voor-vreemdelingenbetwistingen [09.09.2011].

¹⁶⁸ Conseil du Contentieux des Étrangers, *Rapport Annuel 08-09*, p. 70.

¹⁶⁹ *Ibid.*, pp. 70-71.

status and the Services had appointed a guardian for him. By order of the Interior Minister, the municipality of Liège had issued the child with a declaration of arrival, which entitled the child to remain in the country for a period of three months. This period had later been extended until the date when the child would reach 18.

About a month before the expiry of the declaration of arrival, the Interior Minister had ordered his removal from the territory and his detention for that purpose. The following day, both the appellant and his guardian had been notified by the Guardianship Services that it was necessary to do a medical examination in order to verify whether the appellant was less than 18. The Guardianship Services had eventually concluded that the appellant was a child but in the meantime the Aliens Office, without waiting for the results of the medical examination, had tried to remove the child.

The Court stated that it deplored the conduct of the Aliens Office and found that there were serious grounds to justify the quashing of the decision to remove the appellant. The Court noted that the appellant had asserted that his expulsion would cause him to interrupt his studies, with the consequence that he would fail his exams and not finish his school year. The appellant had also argued that he had no family to assist him in his country of origin and that no measures had been taken in order to guarantee the presence of a friend or someone else to provide similar support. In raising this matter, the Court invoked the European Court of Human Rights holding that the return of a child in such circumstances constituted inhuman and degrading treatment for the purposes of article 3 of the ECHR. The Court was satisfied that the appellant had established the existence of a risk of serious and irrecoverable damage. In effect, the execution of the expulsion order would result in the appellant, a child, being returned to his country of origin without being accompanied by his guardian and without minimal guarantees regarding his reception in Albania.

Court for Alien Law Litigation decision no. 53321, of 17.12.2010

The Court dismissed an appeal lodged by the guardian of a child of Turkish origin against a decision to remove the child from Belgium. The child had requested a visa for family reunification in order to join her aunt and uncle as adoptive parents in Belgium. The request had been rejected on the grounds that the adoption was not recognized by the competent Belgian authority. The child had nevertheless gone to Belgium and, upon arrival, had been accorded the status of unaccompanied child and designated a guardian by the Guardianship Services. The guardian had requested and obtained a declaration of arrival on her behalf, which was valid for three months.

The child had been interviewed by the administration, which had concluded that the child's wish to rejoin her aunt did not fall under any of the situations covered by the Circular of 15 September 2005 and that she should be returned to her country of origin, as her parents still lived there. The administration said that it was in the child's best interest to join her parents in Turkey as soon as possible. The appellant had asserted that her adoption by her aunt and uncle had been motivated by the extreme poverty in which her biological family lived. She had also argued that the administration had not fulfilled its legal obligation to search for a durable solution that would safeguard the best interests of the child, because it had not conducted a thorough evaluation, based on credible data, of her best interests, prior to deciding whether or not to return her to her country of origin.

The Court concluded, however, that the administration had in fact considered the best interests of the child and had legitimately concluded that the durable solution that best served her interests was her return to her country of origin, where her own parents lived. The Court dismissed the claim that the child would face very precarious living conditions in her country of origin with the argument that the child in her testimony had merely stated that her parents' financial situation was "not brilliant". The Court also noted that the appellant's testimony showed that she kept in regular telephone contact with her parents and that her father was employed in a factory.

The Court dismissed the guardian's argument that the child was well integrated in Belgium and

that she treated her aunt and uncle as her parents. The Court held that that was immaterial, as the child's natural parents were alive and clearly cared for her future. The Court concluded that the respondent administration had been correct to find that there were sufficient guarantees that she would be met and assisted by her natural parents in her country of origin and that it was in her best interests to join them there. The Court added that article 8 of the ECHR protects only a restrictive range of forms of family life, which only exceptionally might be extended beyond the biological nuclear family. Therefore, the fact that she could be reunited with the persons who, under Belgian Law, were her parents meant that the respondent administration had fulfilled its obligations under article 8.

In relation to articles 3 and 27 (right to an adequate standard of living) of the CRC, the Court noted that these provisions were not directly applicable and did not, on their own, confer subjective rights that the appellants may directly invoke before the national administrative or judicial authorities.

Court for Alien Law Litigation decision no. 58112, of 18.03.2011

The Court granted an appeal lodged by the guardian of a child of Afghan nationality against a decision to refuse him a declaration of arrival. The child had been intercepted by the police and the Aliens Office had issued an order for his removal. The child had not left Belgium and had requested a declaration of arrival under the Circular of 15 September 2005, but the administration had refused to reassess his case and continued to rely on its initial decision, which had ordered his removal.

The administration had argued that the child did not meet the conditions set out in the Circular of 15 September 2005, since the child's mother had let him leave Afghanistan and had deliberately chosen not to accompany him. It had been accepted by the parties that the appellant's mother resided in Afghanistan, where she took care of her other children and therefore the administration had concluded that there was a guarantee that he would be provided with proper reception and care in his country of origin. The administration had stressed the fact that the child's mother had parental guardianship and the corresponding duties and responsibilities for him and had dismissed as irrelevant for the purposes of the Circular the argument that the child displayed exemplary behaviour and that he attended school regularly in Belgium. The administration had concluded that, even if his family lived in modest conditions, the best interests of the child required his return to his country of origin with the assistance of the competent authorities.

Before the Court, the appellant had pointed out that it was his guardian's opinion that a durable solution required that, at least for an initial period, he should be granted a residence permit in Belgium. He had argued that a decision on a durable solution could not be taken without bearing in mind his right to an education and the fact that he did not and could not attend school in Afghanistan, given the volatile situation there, as attested by many international reports on the education of children in Afghanistan. The appellant had also noted that the administrative decision was based on suppositions not certainties, which was incompatible with the positive obligation of the State regarding the protection of children. The appellant had noted furthermore that he had left Afghanistan two years before and that there had been no confirmation of his mother's current circumstances. Given that Afghanistan was a country at war, the administration could not be certain that, after two years, his mother would still be residing in the same place and would still be caring for her other children. Finally, the appellant had argued that the administration had not taken into consideration the requests he had made to the Tracing Services of the Red Cross to locate his family. The Court based its decision on this fact alone, as the failure on the part of the administration to trace the child's family in a country at war and to attribute any relevance to the child's efforts in tracing his mother was a sufficient basis upon which to quash the administrative decision.

2. France

Under the French Code on Immigration and Asylum, migrant children are not required to have a residence permit in order to reside in France. However, if they are accompanied by their parents, they will have the same status as their parents and they may therefore be denied access to the territory and deported if their parents' immigration status is irregular. This rule applies whether the children and their parents are intercepted at the border or are already on French territory.¹⁷⁰ Unaccompanied migrant children intercepted at air, rail or maritime borders may be denied leave to enter France if they do not have the necessary visa and may be deported, but from the moment they enter the territory they benefit from the protection of child welfare regulations and cannot, in principle, be deported.¹⁷¹

Every unaccompanied migrant child who is denied leave to enter France is placed in a transit zone and designated a guardian (*administrateur ad hoc*), whose function is to assist and represent the child in all administrative and judicial procedures regarding the child's stay in the transit zone and his or her request for admission into France.¹⁷² The child may apply for asylum, for family reunification or for admission as a child at risk.¹⁷³ The child's time in the transit zone should be limited to the minimum necessary to arrange the child's return to his or her country of origin or, if the child submits an asylum application, to determine whether the application is manifestly ill-founded. The child's presence in the transit zone cannot in principle exceed 48 hours, but this period can be administratively renewed once and can be extended, by a court ruling, for a period of eight days, and then, in exceptional circumstances, for another eight days. When this period of time has come to an end, the child is granted leave to enter the territory.

Every unaccompanied or separated migrant child who submits an asylum application is entitled to challenge any administrative decision which refuses his or her admission into the territory, with suspensive effect, but a similar right of appeal is not recognised for other migrant children, who may be returned to their countries of origin immediately upon arrival.¹⁷⁴ The Committee on the Rights of the Child has expressed its concern regarding the situation of unaccompanied migrant children placed in transit zones at French airports, noting in particular that these children are often returned to countries where they face risk of exploitation without a proper assessment of their circumstances.¹⁷⁵ Furthermore, family reunification has been made increasingly difficult¹⁷⁶ and, in spite of the decision of the Council of State of 24 March 2004, which held that a decision made by the local authorities to prevent a child from entering France to join her *kafalah* parents infringed the right to private and family life, the institution of *kafalah*¹⁷⁷ is often still disregarded by the administration in the context of family reunification procedures.¹⁷⁸

As noted earlier, accompanied children share their parents' immigration status and may be refused leave to enter the territory and be deported if their parents' status is irregular. If the family is intercepted when they are already on French territory, an argument which the parents often raised is that as their children are attending school and it is in their best interests to pursue their studies

¹⁷⁰ Report submitted by CNCDH to OHCHR on the protection of children's rights in the context of migration, pp. 3-4.

¹⁷¹ Unaccompanied migrant children may be returned to their country of origin at the decision of a Youth Court, if the judge considers that the return is in the child's best interests (French report for the EMN comparative study), pp. 4, 7-8.

¹⁷² French report for the EMN comparative study, p. 8.

¹⁷³ France Terre d'Asile, alternative report to the Committee on the Rights of the Child on the implementation of the Convention on the Rights of the Child (English abstract), June 2008, pp. 3-4.

¹⁷⁴ Minority report submitted by ANAFE to the Human Rights Committee, *Rapport Alternatif Présenté au Comité des Droits de l'Homme en vue de l'examen du quatrième rapport périodique de la France dans le cadre du Pacte international relatif aux droits civils et politiques*, 93rd session, 25 July 2008, pp. 9-11; France Terre d'Asile, pp. 7-8.

¹⁷⁵ Committee on the Rights of the Child, concluding observations on the report of France (CRC/C/FRA/CO/4, of 11 June 2009), para. 84.

¹⁷⁶ France Terre d'Asile, p. 4.

¹⁷⁷ *Kafalah* is an Islamic law institution, which is usually defined as the commitment to voluntarily take care of the maintenance, education and protection of a child, in the same way as a parent would do for his or her children. *Kafalah* is similar, but not identical, to adoption, which is prohibited under Islamic law. The *kafalah* parents exercise parental authority and have the duty to provide for the care and upbringing of the child, but the family ties to the child's natural family persist, as well as the child's family status (see www.crin.org/bcn/details.asp?id=15852&themeID=1002&topicID=1014). *Kafalah* is recognized as a form of alternative care by article 20.3 of the CRC.

¹⁷⁸ Committee on the Rights of the Child, concluding observations on the report of France, para. 90.

in France, they should be granted a residence permit. A Circular of 2006 by the French Interior Minister has recommended to the municipal authorities that they grant a residence permit to the families which include at least one of the children in attendance at school. The French municipal authorities have, however, argued that the children's integration in France is not an obstacle to the ability of families to resume their lives in their country of origin,¹⁷⁹ a position which has been supported by the courts. For example, the Administrative Court of Appeal of Lyon, in its decision No. 07LY02516, of 8 July 2008, held that the fact that two of the appellant's children attended secondary school in France was not a sufficient reason to find that an administrative decision which had refused the appellant's application for a residence permit and ordered that the family be deported to Serbia, was unlawful.¹⁸⁰

As more a positive trend, the recent case law of the National Asylum Court, which decides on appeals from decisions by the French Office for the Protection of Refugees and Stateless People, has held that migrant girls whose parents have only a temporary residence permit may be granted subsidiary protection on the basis of the objective risks of female genital mutilation if returned to their countries of origin. In such a case, and in order to ensure that the subsidiary protection granted to the child is effective, the mother's immigration status follows the status of the child and the mother is also granted subsidiary protection.¹⁸¹

In general, French courts apply the principle of the best interests of the child and invoke article 3 of the CRC when deciding matters concerning migrant children, since the direct applicability of article 3 of the CRC has been firmly recognised in the jurisprudence of the Supreme Court and the Council of State. Most other provisions of the CRC are not recognised as having such direct effect, however, which has led the Committee on the Rights of the Child to recommend that France take measures to ensure that the Convention, in its entirety, is directly applicable in the whole territory and that all the provisions of the Convention can be invoked as a legal basis by individuals and applied by judges at all levels of administrative and judicial proceedings.¹⁸² Furthermore, in relation to the best interests principle, the Committee has noted that differences persist in practice in understanding its application.¹⁸³

**Council of State (*Conseil d'Etat, 2ème et 6ème Sous-Sections
Réunies*) decision no. 161364, of 22.09.1997**

The Council invoked article 3.1 of the CRC as grounds to quash an administrative decision, which had denied a residence permit for family reunification to a 4-year-old child of Turkish origin because the child had entered France irregularly. The Council stressed that article 3.1 of the CRC is directly applicable and can be invoked to challenge the legality of any administrative decision, since the administrative authorities are bound to give primary attention to the best interests of the child in all decisions concerning children.

In this case, the child's mother, a Turkish national who was residing with her parents in France under a 10-year residence permit, had brought the child illegally from Turkey and only then submitted a request for family reunification to the mayor of Moselle. The mayor had rejected the family reunification request and had ordered the removal of the child to Turkey. The Council of State noted that the child's father, whom he did not know and who had never made any contribution to the child's education, could not care for the child in Turkey and that there was no

¹⁷⁹ Report submitted by CNCDDH to OHCHR on the protection of children's rights in the context of migration, p. 12.

¹⁸⁰ Similarly, the Administrative Court of Appeal of Nantes, in its decision No. 06NT02028, of 29 December 2006, held that an administrative decision to deport an Armenian national and her 14-year-old daughter did not breach article 3 of the CRC, in spite of the fact that the child had attended school in France for the preceding three years, spoke French and was well integrated. The Court noted that, even if the child had never lived in Armenia, the fact was that her mother tongue was Armenian, which she spoke fluently, and nothing prevented the child from accompanying her mother and pursuing her studies in Armenia.

¹⁸¹ Cour Nationale du Droit d'Asile, *Contentieux des Réfugiés. Jurisprudence du Conseil d'Etat et de la Cour Nationale du Droit d'Asile Année 2009*, p. 1.

¹⁸² Committee on the Rights of the Child, concluding observations on the report of France, paras. 10-11.

¹⁸³ *Ibid.*, para. 35.

one else close to the family who could. The Council held that in such circumstances, the mayor's decision to return the child to Turkey and to separate him from his mother, even if provisionally, was contrary to the child's best interests and was therefore in breach of article 3.1 of the CRC.

Youth Court (*Tribunal pour Enfants de Bobigny*) decision of 01.09.2001

The Youth Court invoked articles 3 and 9 of the CRC, as well as articles 8 and 9 of the ECHR, as grounds to prevent the deportation of two children to Cameroon, where they had no one to take care of them. The children, one aged 2 years and a half and the other 14, had arrived from Cameroon with their mother and had been detained at the airport because they did not have the required visas. Their mother had been admitted into France because she had a regular residence permit, but the children had been placed in a transit zone and were about to be deported.

Reaching a decision under an expedited procedure, the Youth Court noted that the children did not have a father in Cameroon and that their aunt, who had had them under her charge until then, had been diagnosed with cancer and was no longer capable of taking care of them. The Court considered that the information available on file indicated that the children were eligible for family reunification and had the right to live with their mother, as recognised by French and international law, even if the procedural requirements for family reunification had not been met, owing to ignorance or neglect on the part of their mother. The Court held that it was in the children's best interests, as enshrined in article 3 of the CRC, that they not be separated from their mother because of an administrative difficulty, which could be resolved.

The Court pointed out that it did not question the legality of the procedure for the detention and the deportation of migrant children, but that it had concluded that in the present case the urgency with which the deportation was being executed put the children in danger. The Court further noted that the fact that the children had been placed in a transit zone, or in fact a hotel, which was outside the transit zone but considered to be extraterritorial, did not exclude the Court's jurisdiction over the children's welfare.

The Court stated that it went without saying that, under article 9 of the CRC, children should not be arbitrarily separated from their parents. In the present case, executing the removal order would have led to the separation of the children from their mother for an indeterminate period of time, against their will and without any objective reason. The Court noted that the Youth Judge, in charge of ensuring the defence of individual liberties, is entitled to invoke on its own initiative a CRC provision which is clear and which does not require transposition, as already acknowledged by the Council of State.

As a temporary solution for the children, the Youth Court decided to entrust them to the guardianship of the Child Welfare Service, with visiting rights to the mother and her husband, until a decision about the children's future could be reached.

Council of State (*Conseil d'Etat, 5ème Sous-Section*) decision no. 236148, of 02.06.2003

The Council invoked article 3 of the CRC and the obligation on the part of the administrative authorities to accord primary consideration to the child's best interests in all decisions concerning children as grounds to confirm a lower court's decision which had reversed the deportation order of a Polish national, who had been denied a residence permit and who had a child with a Lebanese national who was living in France under a valid residence permit.

The Council held that the deportation would be contrary to the principle of the best interests of the child since it would force the separation of the child from one of her parents. The child would be separated from his mother if he stayed in France with his father, and would be separated from his father if he accompanied his mother to her country of origin, since it had not been established that the father, who was legally residing in France, would be allowed to follow them there.

Council of State (*Conseil d'Etat, Statuant au Contentieux*) decision no. 249369, of 24.03.2004

The Council of State held that, while under the law the children who may benefit from family reunification are natural or legitimate children, with legally established family ties, and adopted children, it is incumbent upon the administrative authorities, subject to judicial review, to ensure that a decision which denies the family reunification requested on behalf of a child who does not belong to one of those two categories is not contrary to the child's right to respect for private and family life nor to the principle of the best interests of the child as enshrined in article 3.1 of the CRC. The Council of State had been asked by the Minister for Social Affairs, Work and Solidarity to reverse a decision by the Administrative Court of Appeal of Paris, which had permitted the mayor of Hauts-de-Seine to authorise the family reunification of a Moroccan child with the person she had been entrusted to by a *kafalah* decision. The Council refused the appeal.

The Council noted that the child had been abandoned by her mother after birth, did not have a known father and had no family attachments in Morocco. Owing to the fact that Moroccan law does not recognise adoption, the child had been entrusted by means of a *kafalah* decision to the guardianship of a Moroccan citizen, legally residing in France with her husband. The guardian's personal and professional circumstances did not allow her to make frequent visits to Morocco to assist the child there. Therefore, the Council concluded that the mayor's decision to deny the child family reunification with her guardian had breached their right to respect for private and family life, in breach of article 8 of the ECHR.

Council of State (*Conseil d'Etat, 10ème et 9ème Sous-Sections Réunies*) decision no. 305031, of 09.12.2009

The Council of State held that, in principle, it is in the child's interest to live with the person who, due to a judicial decision the effects of which are recognised in France, has parental rights over the child. For this reason, under article 3.1 of the CRC, the administrative authorities cannot refuse to issue a visa that would allow a child to join the person who has parental rights over her by saying that the child's best interest is to remain near her parents or other members of her family. What the administrative authorities can do, within the limits imposed by the respect for the right to private and family life, is to refuse a visa if it is established that the reception and care conditions available in France would be contrary to the child's best interests, in view of the resources and the living conditions of the person holding parental rights.

In the instant case, a 9-year-old child from Benin had been entrusted to the guardianship of a French national by a decision of the Court of First Instance of Cotonou, which was given *exequatur* (order to execute or to give effect) by the High Court of Bordeaux. The Council noted that, notwithstanding the fact that the child had always lived in Benin with her parents, the guardian, who had provided evidence of sufficient resources and reception arrangements, benefited from a delegation of parental rights, which could be exercised in France, and could act as her guardian. Therefore, the Council concluded that the visa would be in the child's best interests.

3. Italy

Under the Italian Immigration Act of 1998, migrant children cannot be expelled, unless they constitute a threat to public order or to the security of the State or unless they are expelled with their parents or the persons holding parental rights. As is the case in France, accompanied migrant children have the same immigration status as their parents and can be expelled if that status is irregular. Accompanied migrant children may even be detained with their families in detention centres prior to deportation. Furthermore, the fact that the children are attending school does not protect the family from expulsion.¹⁸⁴ It may delay the expulsion only until the end of the school year. The child's best interests are supposed to be taken into consideration when deciding whether

¹⁸⁴ See www.stranieriinitalia.it/normativa-via_i_clandestini_anche_se_hanno_figli_a_scuola_10554.html [12.09.2011].

to expel the family or not, but it seems that in practice that is not always the case.¹⁸⁵

Unaccompanied migrant children are protected against expulsion (except for reasons of security and public order) and cannot be returned to their country of origin unless it is established that it is in their best interests to do so.¹⁸⁶ Upon arrival or when intercepted by the police authorities, these children are referred to the Committee for Foreign Children and granted a temporary residence permit for children.¹⁸⁷ If an adult family member regularly residing in Italy is traced, the relevant judicial authority will entrust the child to the guardianship¹⁸⁸ of that person. Otherwise the child will be entrusted to the custody¹⁸⁹ of a foster family or of a host community.¹⁹⁰ There are, however, considerable differences in the way the legal provisions for the protection of unaccompanied migrant children are interpreted and applied in practice by the regional administrations and the central institutions involved in the process.¹⁹¹ The Committee on the Rights of the Child has expressed its concern about the lack of harmonization of procedures dealing with unaccompanied children in the various regions and has recommended that a harmonized procedure be adopted throughout Italy in order to ensure that the best interests of those children are met.¹⁹²

If the child's parents are traced in the country of origin, the Committee for Foreign Children also considers the possibility of an assisted return by the child. If it concludes that the return is not possible, it reports the situation to the social services and to the relevant judicial authority, which then decides who will have the guardianship or custody of that child and initiates a social and civic integration project, which will last at least two years. Upon turning 18, the child's residence permit may be changed into a residence permit for work or study, provided that, apart from the general requirements of accommodation and registration in a school or possession of a work contract, three specific requirements are met: the child has been under guardianship or custody, the child has been present in Italy for at least three years, and the child has participated in a social and civic integration project for at least two years (article 32 of the Italian Immigration Act). In recent years the cumulative or alternative nature of these requirements has been disputed in courts and Law No. 94 of 15 July 2009 tried to settle the matter by establishing that the requirements are cumulative.¹⁹³ However, as shown below, the courts have continued to hold that the requirements

¹⁸⁵ Gruppo di Lavoro per la Convenzione sui Diritti dell'Infanzia e dell'Adolescenza, *I diritti dell'infanzia e dell'adolescenza in Italia. 2.º Rapporto Supplementare alle Nazioni Unite sul monitoraggio della Convenzione sui Diritti dell'Infanzia e dell'Adolescenza in Italia*, September 2009, p. 147.

¹⁸⁶ *Ibid.*, pp. 143-145.

¹⁸⁷ Unaccompanied migrant children who apply for asylum follow a specific procedure. They are referred to the National Commission for the Right of Asylum and, through it, to the competent territorial commissions. Upon identification as an asylum seeker, each child is appointed a guardian to assist him or her during the asylum procedure and issued a temporary residence permit for asylum applicants. Once the asylum application has been submitted, the police will issue a document certifying that the child is an asylum seeker and the child will then be entitled to the reception services offered by the Central Services for the Protection of Asylum Applicants and Refugees. If the child is denied refugee status, he or she may appeal against this decision to the courts. If the appeal is rejected, the child will be referred to the Committee for Foreign Children and follow the common procedure for unaccompanied migrant children (Italian report for the EMS comparative study, *Unaccompanied Minors: Quantitative Aspects and Reception, Return and Integration Policies. Analysis of the Italian Case for a Comparative Study at the EU Level*, 2009, pp. 4 and 12-13).

¹⁸⁸ Under articles 343 and ff. of the Italian Civil Code, the Court establishes the guardianship (*tutela*) of every child whose parents are either dead or incapable of exercising their parental duties. The Court must appoint as guardian the person indicated by the parents, unless it is against the child's interests to do so. If there is no indication from the parents or if the person indicated is not suited to act as guardian, the Court must preferably appoint as guardian a close relative of the child. The person appointed as guardian must prove to be suited to the functions and must make a commitment to provide for the child's upbringing and education.

¹⁸⁹ Law No. 184 of 4 May 1983, on the right of the child to a family, establishes the legal mechanisms – custody and adoption – for the protection of children whose families do not have the means or the conditions to provide for their upbringing and education. Under article 2 of Law No. 184, a child temporarily deprived of a suitable family environment must be placed under the custody of a family or of a single person, capable of providing him or her with the upbringing, education and affective ties that he or she may need. If such placement is not possible, the child will be placed in a host community or, failing that, in a public or private social welfare institute.

¹⁹⁰ Gruppo di Lavoro per la Convenzione sui Diritti dell'Infanzia e dell'Adolescenza, *I diritti dell'infanzia e dell'adolescenza in Italia. 2.º Rapporto Supplementare alle Nazioni Unite sul monitoraggio della Convenzione sui Diritti dell'Infanzia e dell'Adolescenza in Italia*, September 2009, p. 143.

¹⁹¹ *Ibid.*, pp. 144-145.

¹⁹² Committee on the Rights of the Child, concluding observations on the report of Italy (CRC/C/15/Add.198, 18 March 2003), paras. 45-46.

¹⁹³ Gruppo di Lavoro per la Convenzione sui Diritti dell'Infanzia e dell'Adolescenza, , p. 145.

are alternative, which has been deemed to be the constitutionally appropriate interpretation.¹⁹⁴ An appeal against the constitutionality of Law No. 94 is pending before the Constitutional Court.

If the Committee concludes that an assisted return is possible and that it is in the child's best interests, the case is taken to the Youth Court, which authorizes his or her return. The child may appeal against this decision to the ordinary or the administrative courts.¹⁹⁵ The case law reviewed in preparation for this section shows that the Committee for Foreign Children often enforces the assisted return against the child's will and against the opinion of social services and of the child's guardian, a trend which has not been approved by the courts.¹⁹⁶ It has also been reported that sometimes an assisted return is not enforced even if the child requests it. Another matter of concern is the absence of any effective monitoring of children who have returned and their reintegration in their country of origin.¹⁹⁷ On this issue, the Committee on the Rights of the Child has recommended that Italy should ensure that assisted repatriation is considered only when it is in the best interests of the child and that a follow-up procedure is guaranteed for those children.¹⁹⁸

The CRC is directly invoked by the Italian courts and the principle of the best interests of the child has been made a constitutional principle by the Constitutional Court.¹⁹⁹ It should be noted, however, that not all courts share a common understanding of the scope of the CRC, in particular because some courts hold that a person aged 16 or 17 is no longer a child. That was the case, for instance, with the Regional Administrative Court decision No. 284/02, of 22 August 2002, in which the Court held that childhood begins at 6 and ends when the child reaches puberty, at around 11 years of age.²⁰⁰

Supreme Court (*Corte de Cassazione, Sezione Prima Civile*) decision no. 7472, of 20.03.2008

The Supreme Court confirmed the lower court's decision, which had ordered the Italian Consulate in Casablanca to issue a visa for family reunification to a child, of Moroccan origin, who had been entrusted by her parents to the *kafalah* guardianship of a Moroccan couple legally residing in Italy. The Supreme Court dismissed the appellant administration's argument that the *kafalah* could not be considered relevant for family reunification purposes because of its contractual nature and because no court of law had confirmed that the child was abandoned and that the guardian (*kafil*) was suitable. The Court noted that the administration's reasoning was based on the wrong assumption that, in line with the purpose of containing immigration, family reunification should be allowed only in the exceptional circumstances expressly permitted by law.

The Supreme Court recalled that, while family reunification presupposes a balance between two constitutional values, that is, the protection of the child and the protection of State borders, the jurisprudence of the Constitutional Court has favoured the protection of the child, even the migrant child, vis-a-vis immigration control. Furthermore, the exclusion of children entrusted under *kafalah* from the right to family reunification would hinder, in a manner incompatible with the principle of equality, all children of Arab origin, who might be orphans, illegitimate or abandoned, for whom the *kafalah* is the only available form of protection as guardianship permitted.

¹⁹⁴ See opinion by Attorney Gennaro Santoro, available from www.stranieriinitalia.it/normativa-minori_non_accompagnati_conversione_del_permesso_12407.html.

¹⁹⁵ Italian report for the EMN comparative study, pp. 14-15.

¹⁹⁶ That was, for instance, the case with the Regional Administrative Court of Trentino-Alto-Adige decision No. 284/02, of 22 August 2002.

¹⁹⁷ Italian report for the EMN comparative study, p. 30.

¹⁹⁸ Committee on the Rights of the Child, concluding observations on the report of Italy, (CRC/C/15/Add.198, 18 March 2003), para. 46.

¹⁹⁹ *Ibid.*, para. 23.

²⁰⁰ In the instant case, the Court held that the appellant, an Albanian boy aged 16, who had been returned to Albania against his will, could not, in truth, be considered a child for the purpose of applying CRC provisions, since he was already 16 years old and showed considerable maturity. The Court added that, nevertheless, the CRC provisions would be of little help to his cause, given the preference accorded in the CRC to the unity of the family. The Court concluded by granting the appeal on the grounds that the decision by the Committee for Foreign Children lacked sufficient motivation, for it had not considered the individual circumstances of the appellant, namely his positive training and work prospects and the difficult conditions lived in Albania.

The Supreme Court noted that the *kafalah*, which consists of entrusting a child to a couple or a single guardian who takes responsibility for raising and educating the child until he or she becomes an adult, is expressly recognised as a form of child care by article 20 of the CRC. It also noted that in most Islamic countries, Morocco included, judicial courts intervene in the *kafalah* procedure. The Supreme Court held therefore that there was no reason not to equate *kafalah* and custody for purposes of family reunification.

Administrative Court (*Tribunale Amministrativo Regionale per il Lazio*) decision no. 32718/10, of 07.10.2010

The Administrative Court held that the requirements established by law for the conversion of a temporary residence permit for children into a residence permit for work were not to be interpreted as cumulative, but as alternative, and granted the appeal brought by a Bengali who had been denied a residence permit for work on the grounds that he had been in Italy only for two years prior to reaching 18. The appellant had arrived in Italy when he was 16 and had been placed under the custody of a foster family.

The Administrative Court recalled the constant jurisprudence regarding the alternative character of the requirements set by law for the conversion of the permit for children into a permit for work and stated that former children placed under custody or guardianship are entitled to obtain a residence permit for work, provided that, upon reaching majority, they meet the general requirements for the renovation of the residence permit. In the instant case, the appellant had provided evidence to show that he had a work contract.

Supreme Court (*Corte de Cassazione, Sezioni Unite*) decision no. 21799, of 25.10.2010

The Supreme Court granted the appeal and reversed the lower court's decision, which had denied the right of a Nigerian citizen, mother of three children resident in Italy, to a temporary residence permit under article 31.3 of the Immigration Act for serious reasons connected with the mental and physical development of her children, given their young age and their medical conditions.

The Supreme Court's ruling was prompted by the existence of two different lines of jurisprudence regarding the interpretation of article 31.3 of the Immigration Act. The prevailing line of jurisprudence held that that article applied only in emergency situations, in which the sudden absence or distance of the parent might endanger the normal development of the child's personality, and that, in view of the temporary and exceptional nature of the permit, "*serious reasons*" were not to be confused with the need felt by every parent to accompany the development of his or her child. A more recent line of jurisprudence, however, held that article 31.3 did not apply solely in emergency and exceptional circumstances connected with the child's health, but could also apply for reasons relating simply to the very young age of the child, given the serious risk of damage for the psycho-physical balance of the child that may result from the absence of one of his or her parents.

The Court recalled the well-established jurisprudence regarding the protection of the family as the optimum context for the development of the child's personality and the recognition of the right of the child to be cared for by a parent for as much time as possible. It noted that the right to family life deserves special protection when it involves children, as established by the Constitution and in many international conventions ratified by Italy (including the CRC).

The Court accepted that a constitutionally oriented interpretation of the legal provision, which sets the requirements for granting a temporary residence permit, did not allow a restrictive interpretation that would limit its application to exceptional and urgent situations in which there was an extreme danger to the health of the child. But it also held that to protect the parent because his or her departure is likely to cause some emotional damage to the child would turn the exception into the norm and would virtually extend the parent's protection until the child reached 18. The

Court held that such interpretation would be inconsistent with the combined system of constitutional, European and international legal norms, which allow for the expulsion from the territory of the State of any foreigner without a valid residence permit. The Court noted that it would not be reasonable to simultaneously have a legal provision protecting the mother from expulsion in the six months after giving birth and another provision protecting both parents for the duration of the child's minority.

The Court held that the scope of article 31.3 of the Immigration Act was to be understood in conjunction with the provisions regarding family reunification and the protection of children against expulsion, as well as with the provisions which allow for the expulsion of adult migrants with irregular immigration status. The temporary residence permit under article 31.3 is to be granted solely for serious reasons connected with the mental and physical development of the child, but these will have to be assessed having due regard to the individual circumstances of the child and they may be based on a prognosis that the child's condition will be severely and adversely affected. Also, a residence permit is to be granted solely in the interest of the child and not of the parent and the evolving condition of the child (to be assessed on a periodic basis) will determine whether serious reasons continue to exist.

The Court stressed the requirement that a significant emotional bond existed and was documented between the parent and the child to justify the exception to the rule under which the child acquires the legal status of the parent and to determine that the parent is to acquire the legal status of the child. This would be to ensure that the child was not subjected to the traumatic loss of the parental figure until then present in his or her life. The Court held that what was at stake was the protection of a subjective right to the safeguard of the unity of the family, subject to the best interests of the child and therefore necessarily founded on the existence of an actual family life, as stressed by the ECtHR in *Boultif*. The Court held that the mere biological ties are not enough, because such a reading would legitimise the exploitation of the children by their parents for immigration purposes.

The Court held that the lower courts are bound to make a careful assessment in order to be sure that the family cohesion existed in practice and that within the family the applicant actually exercised parental functions in relation to his or her children, in such a way that his or her abrupt departure would represent an irreversible harm to the child's development. In particular when the children are extremely young, the lower courts must also ascertain whether the parent is capable of exercising his or her parental duties, by raising the child in a suitable family environment and meeting the child's needs.

In the instant case, the Supreme Court concluded that the lower court had failed to make these assessments, since it simply relied on the fact that the children had been entrusted to court-appointed guardians and had not examined the relations between the appellant and her children nor considered the possible harm that the expulsion of the appellant would inflict on them. The Supreme Court therefore quashed the lower court's decision and ordered it to re-examine the issue bearing in mind that article 31.3 of the Immigration Act does not necessarily require the existence of exceptional or urgent situations strictly connected with the child's health, but encompasses any actual, concrete, perceptible and objectively serious damage which, given the age or the health conditions of the child, may result from the departure of the parent or from the child's permanent displacement from the environment in which he or she grew up.

3. Portugal

Under the Portuguese Immigration Act of 2007,²⁰¹ migrant children cannot be admitted to the territory if they are not travelling with a person holding parental rights or if there is no one in Portugal authorised and willing to take responsibility for their stay. If the child who is denied leave to enter the country is travelling in the company of an adult, that person will also be denied leave to enter and will be returned with the child to his or her country of origin. If the child is travelling

²⁰¹ Law No. 23/2007, de 4 de July.

alone, he or she will be returned only to his or her country of origin or to a third country if there are guarantees of adequate care and assistance upon arrival, namely, the presence of one of the parents.²⁰² When such guarantees are not satisfied, the child is granted leave to enter Portugal and is placed under State guardianship, which automatically entitles the child to a temporary residence permit.²⁰³

Unaccompanied migrant children may apply for asylum at the border or within 48 hours after their arrival, which will grant them automatic leave to enter the territory. The application will follow the same course as the applications submitted by adult asylum seekers, but the Asylum Act of 2008²⁰⁴ prescribes that the best interests of the child must be considered throughout the procedure and determines that special care is warranted in matters of accommodation and representation. There are very few cases of unaccompanied children arriving in Portugal, and even fewer asylum applications, which allows for careful and individualised assistance to each child.²⁰⁵

Migrant children travelling with their parents will, in principle, be granted leave to enter Portugal only if their parents are granted leave to enter. Likewise, if the parents (or the parent holding parental rights) are deported, the children will be deported with them. Migrant children born in Portugal, however, are protected against deportation and in some instances protect their parents as well. That will be the case if the parent facing expulsion effectively exercises his or her parental rights and provides for the child's upbringing and education.²⁰⁶ The assessment of these requirements has been the most, and practically the only, litigated issue involving migrant children that has been addressed by Portuguese courts in recent years. In fact, very few cases involving migrant children reach the courts.

The principle of the best interests of the child is a fundamental principle of Portuguese law and is incorporated in the three legal diplomas which govern the protection of migrant children in Portugal: the Immigration and Asylum Acts, and the Law for the Protection of Children at Risk of 1999. Portuguese courts make frequent references to the principle and to the CRC as a whole, even if mainly in cases concerning children who are Portuguese nationals.

Court of Appeal (*Tribunal da Relação de Guimarães*) decision no. 864/08-2, of 24.04.2008

The Court granted the appeal lodged by a Russian citizen, awaiting assisted return to the Russian Federation after a deportation order, against a decision to separate her from her 5-year-old child and to entrust the child to the couple who had taken care of her in the previous two and a half years, during which period the appellant had resided illegally in Portuguese territory.

Relying on the evidence before it, the Court dismissed the allegations that the mother was a drunk and a prostitute and that the best interest of the child would be to stay in Portugal with the foster family instead of going to the Russian Federation with her mother. The Court also held it to be immaterial that the foster family could offer the child better material conditions than the ones provided by the child's mother.

Referring to the CRC, the Court stressed the fact that families, even the more troubled ones, perform a crucial and irreplaceable role in the life of the child. When deciding about child protection measures, preference must therefore be given to solutions that allow for the integration of

²⁰² Portuguese report for the EMN comparative study, p. 27.

²⁰³ *Ibid.*, pp. 19-21.

²⁰⁴ Law No. 27/2008, of 30 June, establishing the conditions and procedures for granting asylum or subsidiary protection and the statuses of asylum seeker, refugee and subsidiary protection, transposing Directives Nos. 2004/83/EC, by the Council, dated 29 de April, and 2005/85/EC, by the Council, , dated 1 December, to the Portuguese legal framework.

²⁰⁵ Portuguese report for the EMN comparative study, pp. 3-4 and 16.

²⁰⁶ It is argued in the literature that the right to respect for private and family life and the right to personal integrity have given rise, through law and jurisprudence, to a "fundamental right" to enter and stay in Portuguese territory for foreigners who have children under their care who are legally residing in Portugal (Carla Amado Gomes and Anabela Costa Leão, *A Condição de Imigrante. Uma Análise de Direito Constitucional e de Direito Administrativo*, Coimbra, Almedina, 2010, p. 34).

the child within the biological family and only when that is proved to be unworkable should the institutional solutions be considered.

Critical for the Court's decision to reverse the court-appointed custody was the belief that the child would benefit from a stable and economically comfortable family environment in the Russian Federation, where she would live with her mother, her grandparents, her uncle and her stepsister. The Court also noted the commitment by the Russian authorities to provide social assistance to the family when necessary.

Supreme Court (*Supremo Tribunal de Justiça*) decision no. 66/06.OPJAMD-A.S1, of 17.02.2011

The Supreme Court dismissed the appeal by a citizen of Cape Verde convicted for drug trafficking and sentenced to six years and six months in prison and to expulsion from Portuguese territory for a period of five years following that prison sentence. The Court held that the fact that the appellant had now given birth to a child did not justify the latter decision being reviewed, since the birth occurred after the lower court issued its decision. However, the Supreme Court acknowledged that, although the decision to expel the appellant was fair when it was taken, it may become unfair at the time of its execution in view of the new circumstances created by the birth of the appellant's child. Under Portuguese immigration law, it is not possible to order the expulsion from Portuguese territory of foreigners who either are the parents in charge of children of Portuguese nationality residing in Portugal, or are the parents in charge of migrant children, legally residing in Portugal, to whom they provide the means of subsistence and education.

The Supreme Court stressed the fact that migrants will be protected from expulsion only if they have had effective responsibility for their children, if they keep a close relationship with the children or if they contribute, in a decisive and effective manner, to their subsistence and to the development of their personality; "[in] other words, it is necessary that the separation between parent and child results in significant material and psychological damage" to the child.

The Supreme Court concluded that, due to his imprisonment, the appellant was not the parent with such responsibility, in spite of the alleged small monetary contributions for the child's subsistence and education. Therefore, while the expulsion might prevent the appellant from having responsibility for his child in the future, it would not actually mean a break with a situation in which the appellant was effectively in charge of the child. The Supreme Court accepted, nevertheless, that the expulsion of the appellant from Portuguese territory might prove to be unfair, and declared that the court in charge of the execution of the expulsion should not order the expulsion if, at the time of the execution, it is proved that the child is a Portuguese national in the appellant's care or that the child is a foreign national residing in Portugal in the appellant's care and the appellant is the person who provides for the child's subsistence and education, having due regard to the limitations derived from the appellant's imprisonment.

4. Spain

Under Spanish immigration law,²⁰⁷ unaccompanied migrant children benefit from special protection and cannot, in principle, be denied permission to enter the territory and deported upon arrival.²⁰⁸ Whenever the police authorities come across an unaccompanied migrant child, they must immediately refer the child to the Child Welfare Service and to the State Attorney, which verifies and declares the abandonment of the child, places him or her under its guardianship and adopts the necessary protective measures.²⁰⁹ If the child applies for asylum, the Child Welfare Service also provides assistance and representation throughout the procedure, which is common

²⁰⁷ Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social; Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000.

²⁰⁸ Spanish report for the EMN comparative study, p. 14. The case law reviewed for this section indicates, however, that sometimes unaccompanied migrant children are denied leave to enter the territory and returned to their country of origin without proper consideration for their safety.

²⁰⁹ Spanish report for the EMN comparative study, pp. 10-12.

to adult and child asylum seekers.²¹⁰

The placement of the child under State guardianship regularises the child's immigration status. The child's residence is considered legal to all intents and purposes. Upon request of the public body in charge of guardianship, the child may obtain a residence permit once nine months have elapsed since the child was referred to the Child Welfare Service and provided that it has been established that the child cannot be returned to his or her family or country of origin. The residence permit has retroactive effect to the date of the child's referral to the Child Welfare Service.²¹¹ As indicated by the case law reviewed in this section, the public bodies in charge of guardianship often fail to make the request on time,²¹² which is particularly damaging for children on the verge of becoming adults, who will be left with an irregular immigration status and face deportation as soon as they reach the age of 18. Whenever children under State guardianship reach 18 without being granted said residence permit, the public bodies responsible for their care may recommend that a temporary residence permit for exceptional circumstances be issued to them, provided that the children have taken part in the activities and programmes designed by the public bodies to ensure their social integration.

The placement of the child under State guardianship does not prevent the child from being returned to his or her country of origin or to a third country, if it is established that such return is possible and in accordance with the child's best interests. Priority is given to the reunification of the child with his or her family, but, if that is not feasible, the child may also be returned to the public institutions responsible for child welfare and guardianship in his or her country of origin, provided that the care and assistance there are deemed adequate. In principle, only if the child's safety is at risk or in danger, will the assisted return not be carried out. However, it has been reported that the return of unaccompanied children has been paralysed since 2008, owing to difficulties of the government delegations and sub-delegations in carrying out the return procedures.²¹³

The immigration status of accompanied children is, in principle, the same as their parents' status. Migrant children born in Spain to foreign parents, who are legally residing in the country, are automatically entitled to a residence permit equal to that of one of the parents.²¹⁴ Migrant children born abroad to foreign parents, who are legally residing in the country, may be granted a residence permit, provided that they prove to have resided in Spain for the previous two years and that the parents satisfy the accommodation and income requirements set for family reunification. Furthermore, if the children are of mandatory school age, it is also necessary to prove that the children have been registered in a school and have attended class regularly. The residence permit will have the same validity as that of the parents. If the parents' immigration status is irregular, the children will also be in an irregular situation and may be deported with the rest of the family.

**Administrative Court (Juzgado Contencioso Administrativo 12,
Madrid) decision no. 603/10, of 14.09.2010**

The Court granted an injunction requested on behalf of a child who was soon to reach 18 and be left with an irregular immigration status because her request for family reunification had not yet been processed by the Administration. The child's aunt and legal guardian had requested and obtained a visa for family reunification for her niece and the child had joined her in Spain. However, the administrative procedure for the child's residence permit was delayed and the child's visa was about to expire. Furthermore, the child would turn 18 soon and, being in an irregular situation, would risk being deported.

²¹⁰ Ibid., pp. 32-33.

²¹¹ Ibid., p. 13.

²¹² Defensor del Pueblo de España, *¿Menores o Adultos? Procedimientos para la determinación de la edad*, 2011, pp. 104-105, 115.

²¹³ Spanish report, pp. 14 and 51.

²¹⁴ In case the parents have refugee status, the child may opt between obtaining refugee status or a residence permit, according to what is in the child's best interests.

The Court held that family reunification is a sufficient reason to suspend the expulsion or deportation of a foreigner, given its social relevance, which cannot be ignored even if the family member who resides in Spain has a precarious economic situation, as family ties and the authenticity of the family relations are more important. It is necessary to ascertain whether family members live together, share affections and fulfil the corresponding legal duties, bearing in mind the personal and socio-cultural circumstances of the individuals concerned, which may point to a type of family which is broader than the nuclear family. The Court noted that in the instant case the child had no other family member in her country of origin, since her parents had been deprived of their parental rights and the child's aunt, who had been appointed as her guardian, had been the only person to take care of the child's development. The Court decided therefore to authorise the child's stay in Spain, as a provisional measure and in order to prevent the deportation of the child for the duration of the administrative procedure for assessing her application for a residence permit for family reunification.

High Court (*Audiencia Nacional, Sala de lo Contencioso Administrativo*) decision no. 765/09, of 15.09.2010

This was an appeal submitted on behalf of a child from Côte d'Ivoire against the administrative decision that had denied him refugee status. The child had requested asylum in Spain invoking the war in his country of origin and the subsequent dispersal of his family, whom he had never seen again. He had travelled to Spain through Guinea, Mali and Mauritania. The Administration had denied his request on the grounds that he had not shown any evidence of direct persecution against him in his country of origin and because he had had the opportunity to request asylum in one of the other countries he had travelled through before reaching Spain.

The Court held that the appeal was not well founded because the appellant had not provided any evidence that might support the claim that he had suffered from persecution or had reasonable grounds for fearing persecution in his country of origin. The Court noted that, according to the available information and the position adopted by the United Nations High Commissioner for Refugees, the situation in Côte d'Ivoire had currently stabilized, particularly in the area where the child was supposed to have lived. The Court concluded that the child's presence in Spain was not due to persecution for any of the reasons protected by the Refugee Convention, but due to the extreme poverty, abandonment and lack of work that he faced in Côte d'Ivoire.

The Court examined whether there were humanitarian or public interest reasons that might allow for the child's stay in Spain and concluded that it was unmistakable that the child had come to Spain as a result of being utterly abandoned, to the point of being declared abandoned and placed under State guardianship by the competent authorities. The Court considered that his return to his country of origin would put him in a situation of real danger and lack of protection, incompatible with the enjoyment of rights inherent to every human being, and therefore concluded that these reasons justified the recognition of his right to stay in Spain for humanitarian reasons.

High Court of Justice (*Tribunal Superior de Justicia de Madrid*) decision no. 800/2010, of 24.09.2010

The High Court reversed the lower court and the administrative decisions which had denied the request for a residence permit lodged by a child under State guardianship on the grounds that the child would turn 18 on the day after the submission of the request. The lower court had accepted the argument that there was no time for the procedure and the enjoyment of the permit to take place and had confirmed the administrative decision. The High Court granted the appeal and declared the right of the appellant to obtain the residence permit requested.

The High Court noted that the child had been under State guardianship for a period of 18 months and that, under Spanish immigration law, it is incumbent upon the administration in charge of

the guardianship, in the instant case the Madrid Family and Children's Institute, to request the residence permit on behalf of the child whenever it is established that it is not possible to return the child to his or her country of origin. In such circumstances, the child is entitled to a residence permit with retroactive effects to the moment when the guardianship started.

The High Court acknowledged that the law does not set a deadline for the Administration to request the residence permit on behalf of the child. What the law does require is that the child be under State guardianship for a minimum of nine months prior to the request of the permit. The High Court pointed out that this legal deficiency had been commented by the Spanish Ombudsman, who had noted that it is particularly serious whenever the children are very close to becoming adults because they may be left in an extremely vulnerable situation as a consequence of two related factors: the fact that the administrative authority in charge of the guardianship did not initiate the request for a permit in due time, and the fact that, as a consequence, there was no time to issue the residence permit, to which he had been entitled.

In the instant case, it had been the child who had had to request the residence permit one day before becoming an adult. The High Court considered that the indication of a nine-month period as a requirement to grant the residence permit could not be devoid of any meaning and that therefore the Administration could not simply wait for it to be over to initiate the procedure. The Court held that this nine-month period had to be read in conjunction with the provision regarding the repatriation procedure, in such a way that if repatriation had not been ordered or executed in that time frame, the residence permit should necessarily be granted to the child. The appellant therefore should have been issued a residence permit nine months after his initial placement under State guardianship.

The Court held that when the Administration in charge of the guardianship does not request the residence permit in the nine-month period prescribed by law, the best interests of the child, which is a public order principle, demands that the child be accorded the right to request the permit himself. The best interests of the child also demand that the child be granted the legal standing to act before the Administration and to request legal assistance for the defence of his or her rights, independently of whoever exercises parental duties in respect of him and even against the will of his or her legal guardians.

**Administrative Court (Juzgado Contencioso-Administrativo,
Madrid) decision no. 645/2010, of 29.09.2010**

The Court reversed the administrative decision, which had denied entry into Spain and had ordered the repatriation of two children of Paraguayan nationality travelling alone, whose parents were legally resident in Spain. The Administrative Court concluded that, owing to the particular circumstances of the case, it was necessary to suspend the execution of the administrative act in order to prevent foreseeable damage to the children.

The particular circumstances of the case were the fact that the State Attorney, in charge of defending the children's interests, had not been heard during the administrative procedure; the fact that the parents of the children were legally resident in Spain; and the fact that there was a possible danger for the children in their country of origin, as indicated by a complaint lodged with the Paraguayan police. The Court invoked the principle of the best interests of the child (*favor minoris* principle, as the Court referred to it) as expressed in the CRC and in Spanish legislation and case law. In the instant case, the Court considered it to be in the best interests of the children to remain in Spain with their parents and to preserve the unity of the family. The Court, therefore, ordered the immediate admission of the children into Spain and their release to their parents.

5. United Kingdom of Great Britain and Northern Ireland

Section 3 of the Immigration Act 1971 requires any non-EEA national to have leave to remain in

the United Kingdom for their residence there to be lawful unless they have the “right of abode”.²¹⁵ This includes children as well as adults. Anyone, even a child, becomes liable to administrative removal from the United Kingdom under Schedule 2 to the Immigration Act 1971 if they enter the country illegally. However, removal is prohibited under section 77 of the Nationality, Immigration and Asylum Act 2002 if a person has a pending application for asylum. It is also prohibited by section 78 of that same Act while any subsequent appeal is pending against a decision to refuse them asylum. When an adult applies for asylum, they will either be detained under paragraph 16 of Schedule 2 to the Immigration Act 1971 or be granted temporary admission under paragraph 21 of that Schedule for the time in which application is considered and any consequent appeal rights are exhausted. Unaccompanied or separated migrant children are not detained for more than the few hours necessary to arrange alternative care arrangements. The decision to detain in these exceptional circumstances must be taken solely for child protection reasons and must take account of the duty to have regard to the need to safeguard and promote the welfare of children.²¹⁶ Instead, these children will be granted temporary admission under paragraph 21 of Schedule 2 and referred to the appropriate local authority children’s services department for accommodation and support.²¹⁷ In practice, unaccompanied or separated children are encouraged to apply for asylum as this entitles them to temporary admission. When they make such an application, they can also assert that their removal would amount to a breach of the European Convention on Human Rights or that they are entitled to remain for humanitarian reasons and this will also be considered by the Secretary of State for the Home Department. If the Secretary of State decides that a child is entitled to protection under the Refugee Convention, he or she will initially be granted five years’ limited leave to remain in the United Kingdom. If the child’s fear is for a reason that is not within the Refugee Convention but there are substantial grounds for believing that he or she would face a real risk of suffering serious harm if returned to his or her country or origin, he or she will be granted Humanitarian Protection under paragraph 339C of the Immigration Act 1971 for an initial period of three years and will then be able to apply to extend this leave. If the Secretary of State decides that the child’s removal would breach the ECHR, the child will be granted an initial period of three years’ discretionary leave to remain, which may be extended for another three years and at the end of the subsequent six-year period the child will be able to apply for indefinite leave to remain in the United Kingdom.²¹⁸

If an unaccompanied child has been trafficked to the United Kingdom, he or she could also rely on the policies²¹⁹ adopted by the United Kingdom when it brought the Council of Europe Convention on Action against Trafficking in Human Beings into force on 1 April 2009. Under the National Referral Mechanism established under this policy, a trafficked child can apply for an initial recovery and reflection period of 45 days if the UK Border Agency, which acts as the competent authority for the purposes of the National Referral Mechanism in relation to non-EEA nationals, decides that there are reasonable grounds to believe the he or she is a victim of human trafficking. If the Agency decides that there are, he or she will be granted temporary admission under paragraph 21 of Schedule 2 to the Immigration Act 1971. If the Agency then decides within the 45 days, or a longer period if necessary, that on a balance of probabilities the child is a victim of human trafficking, he or she will be entitled to a renewable residence permit for one year. The first basis upon which such a residence permit may be granted is if the competent authority considers that the child’s stay is necessary because of their personal circumstances (for example, because of ill health, pregnancy or to complete an educational course). The second basis is that their stay is necessary because they are providing evidence to the police for a criminal investigation or have agreed to appear as a witness in a criminal trial of a trafficker. There is as yet no published data

²¹⁵ These include those who hold full British citizenship and certain commonwealth citizens who retained a right of abode after the British Nationality Act 1981 came into force on 1 January 1983 because their parents were born in the United Kingdom or they had acquired a right of abode through marriage.

²¹⁶ *Enforcement Instructions and Guidance*, chap. 55, para. 55.5.3 (UK Border Agency).

²¹⁷ *Processing an Asylum Application from a Child*, Asylum Process Guidance (UK Border Agency), para. 6.4.

²¹⁸ *Humanitarian Protection and Discretionary Leave* (Asylum Policy Instructions (UK Border Agency)).

²¹⁹ See *Working together to safeguard children - Safeguarding children who may have been trafficked*, HM Government, Department of Children, Schools and Families and the Home Office 2007, *London Procedure for Safeguarding Trafficked and Exploited Children*, London Child Protection Committee 2007).

of any children being granted such residence permits.

It is the published policy of the Secretary of State for the Home Department that no unaccompanied or separated child who has been refused asylum, humanitarian protection or discretionary leave for ECHR purposes will be removed from the United Kingdom unless safe and adequate reception arrangements are in place for them in the country to which the child is to be removed.²²⁰ When this is the case, the child will be granted discretionary leave to remain in the United Kingdom until the age of 17 and a half or for a period of three years, whichever is the shorter period of time.²²¹ Before this leave expires, the UK Border Agency should arrange a “contact meeting” with the child and his or her social worker to discuss whether he or she will apply for further leave to remain (on the grounds that it will be a breach of the Refugee Convention or the ECHR to refuse such leave) or an assisted voluntary return to his or her country of origin.²²²

When considering any application made by a child, the Secretary of State for the Home Department is required by section 55 of the Borders, Citizenship and Immigration Act 2009 to take into account the need to safeguard and promote the welfare of any child who is in the United Kingdom. This policy is set out in more detail by the UK Border Agency in its Asylum Process Guidance under the section *Processing an Asylum Application from a Child*. The United Kingdom has not incorporated the CRC into its laws and its legislation does not refer to the duty under article 3 of the CRC but this policy states that “in making any decision about a child/young person, there must be a proper consideration of their ‘best interests’ in accordance with our responsibility under article 3 of the United Nations Convention on the Rights of the Child and section 55 of the Borders, Citizenship and Immigration Act 2009”. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, the Supreme Court also equated the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 with that under article 3 of the CRC.

T v Secretary of State for the Home Department, Special Immigration Appeals Commission Appeal No. SC/31/2005

T was an Algerian national who arrived in the United Kingdom and claimed asylum. On 9 August 2005 he was served with notice of intention of the Secretary of State for the Home Department to deport him from the United Kingdom, as his presence was not conducive to the public good. It was asserted that he was a risk to national security because of his links with international terrorist activity and he was detained pending deportation. A deportation order was made against him but he applied for it to be revoked and when this application was refused, he appealed.

He asserted that it would be unlawful to deport him to Algeria and relied on the effect of such a deportation on his four children, who were born in the United Kingdom. In particular, he asserted that the best interests of his children should be a primary consideration in any decision to deport him. The Special Immigration Appeals Commission accepted that this was the case and gave the best interests of the children considerable weight when deciding whether it would be a breach of article 8 of the ECHR to deport T and his family to Algeria. In particular, it stated that “in a case such as this, where there are now no convincing grounds to believe that T poses a risk to national security, the best interests of children who have spent their whole life in the United Kingdom, in particular the two eldest, must weigh heavily in the balancing exercise which the Secretary of State and we must conduct” under article 8 of the ECHR.

CL (Vietnam) v Secretary of State for the Home Department [2008] EWCA Civ 1551

This was a case involving an unaccompanied child who had been trafficked from Viet Nam where the Secretary of State for the Home Department was asserting that it would be reasonable

²²⁰ *Processing an Asylum Application from a Child*, para. 17.7.

²²¹ *Ibid.*.

²²² *Active Review of Unaccompanied Asylum Seeking Children (UACS) Discretionary Leave*, Section 3, Asylum Process Guidance (UK Border Agency).

to return him to institutional care in Viet Nam. At paragraph 21, the Court of Appeal held that “In the case of a child applicant, it would seem to be difficult for a decision maker to carry out a proper assessment of the effect of removal on the child’s right to private life without considering the circumstances which would await that child upon removal. Those circumstances must surely include in most cases the adequacy of reception and care arrangements for the child in the receiving country. If they were inadequate, there might be serious consequences for the child’s physical and mental well being”. The Court then held that “It seems to me to be impossible for that aspect of the assessment to be taken away from the Immigration Judge and left to the Secretary of State, since the judge would then be having to decide the article 8 claim on only some of the facts and with only part of the picture”.

ZH (*Tanzania*) v Secretary of State for the Home Department [2011] UKSC 4

ZH was a national of the United Republic of Tanzania, who had made three unsuccessful applications for asylum, two of which were in a false identity. As a consequence, she was liable to removal from the United Kingdom. However, during the time she had been in the United Kingdom, she had given birth to two children, one in 1998 and one in 2001. Their father, with whom they were still in contact, was a British citizen and they also held British citizenship.

When considering whether it would be proportionate for the purposes of article 8(2) of the ECHR to remove ZH to the United Republic of Tanzania, Lady Hale, giving judgement on behalf of the rest of the Supreme Court, noted that article 3 of the CRC was “a binding obligation in international law” and that section 55 of the Borders, Citizenship and Immigration Act 2009 had translated article 3 of the CRC into domestic law in “spirit, if not the precise language”.

The Supreme Court subsequently held that it would not be in the children’s best interests for their mother to be removed from the United Kingdom and that, therefore, it would be unlawful to remove her.

Since then there have been a number of further cases, considering the need to take into account the effect of section 55, and by implication article 3 of the CRC, when considering cases involving children.

DS (*Afghanistan*) v Secretary of State for the Home Department [2011] EWCA Civ 305

DS was an unaccompanied child who had arrived in the United Kingdom and applied for asylum. The Secretary of State for the Home Department accepted that following the decision in *LQ (age; immutable characteristics) Afghanistan* [2008] UKAIT 00005, it could be said that there were no adequate reception facilities in Afghanistan for unaccompanied orphans. DS was not an orphan but he relied on this case as his father was dead and although his mother and maternal uncle lived in Taghab, he had lost contact with them. The Secretary of State asserted that he had not proved that this was the case and therefore he was not entitled to international protection.

DS relied on the fact that regulation 6(1) of the Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005/7) states that “so as to protect an unaccompanied minor’s best interests, the Secretary of State shall endeavour to trace the members of his or her family as soon as possible”, if this did not place the child or his family at risk. Therefore, DS asserted that the burden was on the Secretary of State to ascertain whether his mother and uncle could be traced and could care for him. The Reception Regulations gave domestic effect to Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers. Therefore, in paragraph 62 of the judgement Lord Justice Lloyd also reminded himself and the Court that article 18.1 of European Community Directive 2003/9/EC stated that when implementing the provisions of the Directive in the case of a child, their best interests shall be a primary consideration.

In response the Secretary of State asserted that under the Refugee Convention the burden of proof lay on any asylum seeker to substantiate that he was entitled to international protection. However, the Court of Appeal referred to *ZH* in paragraph 45 of its judgement and the fact that article 3 of the CRC, and in particular section 55 of the Borders, Citizenship and Immigration Act 2009, which required the Secretary of State to safeguard and promote a child's welfare, required a proactive attitude to the return of an unaccompanied child to family members abroad. Therefore, it found that the Secretary of State was required to undertake family tracing where appropriate. Lord Justice Pill and Lord Justice Lloyd also relied on paragraph 80 of General Comment No. 6, which stated that "tracing is an essential element component of any search for a durable solution and should be prioritised".

Lord Justice Rimmer also agreed that the appeal should be allowed as "no steps had been taken by the Secretary of State towards enquiring as to the availability of adequate reception facilities for the appellant in Afghanistan; nor [had] a best interests consideration of the nature referred to in chapter 15 of the Secretary of State's policy document *Processing an Asylum Application from a Child* been carried out".

C. GOOD PRACTICE

Drawing from the cases reviewed and those discussed at the Judicial Colloquium, the following can be identified as good practice:

As to the substance of the decisions:

- Quashing a decision to return a child to his country of origin without his or her guardian and when he or she has no family members to assist him or her there and when there are no reception arrangements in place for him or her
- Finding that it would be in a child's best interests to return to live with his or her parents in his or her country of origin when they are able to provide him or her with adequate care and support his or her return
- Deciding that a child should not be returned to a country at war, despite the fact that he or she had been sent to the country of destination by his or her mother, when it had not been possible to trace his or her mother and he or she had not had any contact with her for two years
- Deciding that it was not in the best interests of a child to be returned to his or her country of origin when his or her mother is in the country of destination and his or her father, who remained in his or her country of origin, could not care for him or her
- Finding that it would not be in a child's best interests to be returned to a country of origin with one parent if the other parent would remain in the country of destination
- Acknowledging that the best interests of any children in a family must be given particular weight when they have been in a host country for some years whatever is alleged against their parent.

Regarding procedural requirements:

- Finding that if it was proposed to return a child to his or her country of origin, his or her welfare would be safeguarded and promoted only if the State took steps to trace his or her family before any decision was taken to remove him or her

- Finding that before a child could be returned to institutional care in a country of origin, a proper assessment had to be conducted into the adequacy of the proposed reception and care arrangements
- Recognising other forms of family life besides the nuclear family for the purpose of family reunification, including parental rights based on *kafalah* under Islamic law and with guardianship by an aunt or uncle
- Protecting the child from removal or deportation whenever the child's irregular immigration status is due to his or her parents' ignorance or neglect of legal immigration procedures
- Demanding that administrative decisions to return the child to his or her country of origin must offer a clear justification and must show that the individual circumstances of the child had been taken into consideration
- Finding that it is in the best interests of a child to permit him or her to make his or her own application for residence and to become a party in any subsequent court proceedings if those in whose guardianship he or she has been placed neglect to do so
- Demanding that the public agencies responsible for providing the child with legal guardianship act diligently in order to obtain a residence permit for any child approaching 18 years of age, who otherwise would be left with an irregular immigration status upon becoming adult and therefore in an extremely vulnerable situation
- Finding that a parent would be protected from expulsion only if he or she had a close relationship with a child who was to remain in a country of destination and was contributing to his or her subsistence and development.

CHAPTER IV

ARTICLE 3 OF THE CRC IN CONNECTION WITH ACCESS TO BASIC SOCIAL SERVICES AND ENJOYMENT OF OTHER RIGHTS

Access to basic social services and the enjoyment of economic, social and cultural rights are of crucial importance for migrants. The obstacles faced by migrants in access to such services and rights constitute a key human rights challenge and are both a cause and a consequence of social exclusion. Unaccompanied migrant children, in particular, are often discriminated against and denied access to food, shelter, housing, health services and education.²²³ Furthermore, given the indivisibility and interdependence of all human rights,²²⁴ the failure to protect and ensure economic, social and cultural rights can also have severe consequences for the realization of civil and political rights and vice versa. For example, a requirement to present a residence permit in order to register a child at birth effectively deprives children born to irregular migrant parents of the right to identity and the registration of their birth, which can in turn deny them access to education.²²⁵

Article 2 of the CRC requires States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's

²²³ Committee on the Rights of the Child, General Comment No. 6, para. 3.

²²⁴ As remarked in General Comment No. 6, para. 6, "all human rights, including those contained in the Convention, are indivisible and interdependent".

²²⁵ Opening remarks by Marcia Kran, Director of the Research and Development Division, OHCHR, at the Consultation on "Protecting the Rights of the Child in the Context of Migration", 25 May 2010.

or his or her parent's or legal guardian's national origin or other status. General Comment No. 6 stresses this point by stating that the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.²²⁶

The Committee on the Rights of the Child also noted that these State obligations cannot be arbitrarily and unilaterally curtailed either by excluding transit or other zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory.²²⁷

Unaccompanied or separated children are beneficiaries of States' obligation under article 20 of the CRC and are entitled to special protection and assistance provided by the State, including foster placement or placement in suitable institutions for the care of children. When selecting from the available options, the particular vulnerabilities of each child are to be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background. Furthermore, such care and accommodation arrangements must comply with requirements flowing from the CRC – for example, that children should not, as a rule, be deprived of liberty; that changes in residence should be limited to instances where such change is in the best interests of the child; and that regular supervision and assessment ought to be maintained in order to ensure, among other aspects, the child's physical and psycho-social health and the child's access to educational and vocational skills and opportunities.²²⁸

In application of article 37 of the Convention and of the principle of the best interests of the child, unaccompanied or separated children should not, as a rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37 (b) of the Convention, which requires detention to conform to the law of the relevant country and to be used only as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so. Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact with and receive visits from friends, relatives and religious or legal representatives, as well as their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education, which ought, ideally, to take place outside the detention centre in order to facilitate the continuation of their education upon release. They also have the right to recreation and play as provided for in article 31 of the CRC.²²⁹

States are bound, under article 28 of the CRC, to ensure that children's access to education is maintained during all phases of the displacement cycle. Every migrant child, irrespective of status, should have full access to education in the country that he or she has entered. Such access should be granted without discrimination and in particular, migrant girls should have equal access to

²²⁶ General Comment No. 6, para. 12.

²²⁷ *Ibid.*,

²²⁸ *Ibid.*, paras. 39-40.

²²⁹ *Ibid.*, paras. 61-63.

formal and informal education, including vocational training at all levels. Access to quality education should also be guaranteed for children with special needs and disabilities. All adolescents should be allowed to enrol in vocational/professional training or education, and early learning programmes should be made available to young migrant children.²³⁰

Furthermore, under article 27 of the CRC, States must ensure that migrant children have a standard of living which is adequate to meet their physical, mental, spiritual and moral development and must also provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.²³¹ Also, when implementing the right to enjoy the highest attainable standard of health and medical facilities, under article 24 of the CRC, States are obliged to ensure that migrant children have the same access to health care as children who are nationals, while taking into account the particular plight and vulnerabilities of unaccompanied or separated children.²³²

A. ACCESS TO RIGHTS AND SOCIAL SERVICES IN EU MEMBER STATES

In Europe, migrant children are usually entitled by law to access to basic services like housing, education and medical care, irrespective of their or their parents' immigration status. However, in many cases, they are de facto excluded from access to social services and end up living in situations of social exclusion.²³³ In respect to health care, in particular, it has been reported that the practices across Europe are not always consistent with the legal standards and, in particular, that the undocumented migrants' entitlements to health care are not always uniformly implemented by regional and local authorities.²³⁴

Furthermore, there are still many ways besides express prohibition by which migrant children, in particular those with an irregular immigration status, may be prevented from gaining effective access to housing, education and health care. Migrant children and their families can often be found living in substandard housing, whether because they cannot pay high rents, or because their legal status prevents them from renting legally, or because they have joined diaspora communities that live in run-down and geographically segregated parts of the city. Access to education and health care may be impeded by fears that their irregular situation will be reported to the police by teachers or health professionals, as well as by unaffordable enrolment fees and health costs and also by a general lack of information about migrant's entitlements in relation to education and health services and goods.²³⁵

In relation to reception facilities, concerns have been expressed that the minimum requirements are not always met and that sometimes the distinction between reception and detention facilities is not easy to draw, which may explain the large number of children who "disappear"²³⁶ from reception centres. Reception centres often have limited capacity and unexpected arrivals may result in ad hoc arrangements resulting in children being housed in facilities that fall below the required standards.²³⁷ Also, as noted during the Judicial Colloquium by Justice Marc Dallemagne, Employment Tribunal Brussels, sometimes unaccompanied or separated children are placed in hotels, where they become very isolated. There was a consensus among the judges at the Judicial Colloquium that migrant children should not be accommodated in reception centres with unrelated

²³⁰ Ibid., paras. 41-42.

²³¹ Ibid., para. 44.

²³² Ibid., paras. 46-47.

²³³ Mailis Reps, Explanatory memorandum, para. 53.

²³⁴ Even when access to health care is achieved, it is sometimes sub-standard owing to the lack of awareness on the part of health-care professionals of the special needs of unaccompanied children. A similar observation can be made in regard to education, since the transition of the child into mainstream schooling can often result in his or her particular needs being overlooked and the distress that he or she may have suffered (European Union Agency for Fundamental Rights, *The Protection of the Rights and Special Needs of Irregular Immigrant Minors and Asylum Seeking Children*, 2008, p. 18).

²³⁵ Study of the OHCHR, para. 63-68.

²³⁶ European Union Agency for Fundamental Rights, *The Protection of the Rights and Special Needs of Irregular Immigrant Minors and Asylum Seeking Children*, 2008, p. 16; Mailis Reps, paras. 55-56.

²³⁷ European Union Agency for Fundamental Rights, p. 15.

adult migrants, but also that these children should not be housed on their own.

Another point of concern raised in the Judicial Colloquium by Justice Catherine Sultan was that the institutions that are available to accommodate unaccompanied or separated children are not necessarily prepared to assist and provide care for children with irregular immigration status, in particular they are not prepared to accommodate these children on a long-term basis. The Committee on the Rights of the Child has also expressed the view that there is a lack of adequate services in EU member States receiving asylum-seeking children, including provision for their recovery and reintegration.²³⁸

The type of reception facilities and the reception conditions, and in particular the actual material conditions and level of social assistance, vary significantly between and within EU member States. In some countries, there are centres reserved exclusively for unaccompanied migrant children, for example in Denmark, Italy and Spain. In contrast, in other countries, such as Poland, these children are accommodated in orphanages or reception centres for migrant children and reception centres for children in general. Unaccompanied migrant children are also accommodated in separate areas within reception centres for adult asylum seekers, which is the case, for example in Slovakia, Lithuania and Hungary.²³⁹

There is also considerable variation in the way in which responsibility for the reception and care of unaccompanied children is allocated within EU member States. In some cases reception and care are funded by the central Government, in others by regions, local authorities or by NGOs or a combination of all of these. This creates a number of problems and can result in sub-standard treatment for children, owing for the most part to time taken up in identifying which authority has the legal responsibility for a particular case or problem²⁴⁰ or who is responsible for funding the accommodation.

B. NATIONAL CASE LAW

National courts are quite protective of migrant children's rights to access to basic services like housing, education and medical care, irrespective of their or their parents' immigration status, and tend to quash administrative decisions that attempt to limit or place conditions on their entitlements by requiring proof of a valid residence permit.

In many countries unaccompanied or separated children are entitled to the appointment of a legal guardian, whose role includes ensuring that the child is safe and properly cared for. National courts can be very exacting in the manner in which they require public agencies, which are accommodating or have acquired legal guardianship of such a child, to provide them with age-appropriate accommodation.

Some national courts have also expressed concerns that reception facilities and the rules under which they function may not be appropriate for the specific needs of children. In the United Kingdom there has also been considerable litigation to prevent local authorities limiting the services it provides to unaccompanied migrant children and their access to "leaving care services" when they become adults but have yet to be removed from the country.

1. Belgium

When the Government of Belgium ratified the CRC, it also entered a declaration, which stated that it did not interpret article 2.1 of the Convention to mean that non-discrimination on grounds of national origin necessarily implied the obligation of States to automatically guarantee to migrant

²³⁸ Ibid., p. 14.

²³⁹ Ibid., p. 15.

²⁴⁰ Ibid., p. 17.

children the same rights as its national children. It added that this “concept should be understood as designed to rule out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies”.²⁴¹ The enjoyment by children who are not Belgian of the rights contained in the CRC is therefore open to restrictions, which the Committee on the Rights of the Child regretted in its recent concluding observations reviewing the implementation of the CRC in Belgium.²⁴² The case law reviewed in preparation of this section shows, however, that Belgian courts protect migrant children, even children with irregular immigration status, from discrimination in access to social benefits, and do so not only on the basis of article 2 but also article 3 of the CRC.

In 2006, the ECtHR ruled that Belgium, by keeping a 5-year-old girl alone in a detention centre for adult irregular migrants, had violated article 3 of the ECHR, under which no one shall be subjected to torture, or to inhuman or degrading treatment or punishment.²⁴³ Since then, Belgian legislation has been revised and unaccompanied migrant children can no longer be held in closed centres at the border, but should be held in the so-called Observation and Orientation Centres.²⁴⁴ In 2010, the Committee on the Rights of the Child welcomed the establishment of a multidisciplinary task force on children travelling alone and the opening of two centres for the reception of asylum-seeking unaccompanied and separated children.²⁴⁵

Nevertheless, the Committee has expressed its concern that unaccompanied and separated children older than 13 years of age who do not file an asylum claim are denied access to reception centres and find themselves on the streets and that, because of the lack of available places, unaccompanied children may be housed in asylum centres for adults and, in some cases, excluded from any type of assistance. Furthermore, the Committee noted that some children and their parents are still being detained in precarious conditions in facilities unsuitable for children and that families whose application for asylum has been rejected have to leave the facilities and often end up living on the streets.²⁴⁶

Court of First Instance (*Tribunal de Première Instance de Bruxelles, Chambre du Conseil/Rechtbank van Eerste Aanleg te Brussel*) decision of 16.10.2002

The Court held that the detention of a 5-year-old child in a reception centre for adults was incompatible with article 3 of the CRC and ordered her immediate release. The child had been brought from the Democratic Republic of the Congo, her country of origin, by her uncle, a national of the Netherlands living in that country. The child’s mother, who was living in Canada as a refugee, had asked her brother to bring the child to Europe in order for the child to join her in Canada. Since the uncle did not have the necessary travel and immigration papers for the child or documents to show that he had parental authority, the Belgian authorities had denied the child leave to enter Belgium and had ordered her removal, following which the child’s uncle had returned to the Netherlands and the child had been detained in a Transit Centre at the airport, pending deportation.

Before the Court, the applicant had requested that the removal directions be set aside and also that, in view of the child’s age and situation, the child be released from the reception centre, where she was very isolated and at risk of psychological damage as a result of being detained with adult foreign nationals whom she did not know. The applicant had requested that the child be placed with a young woman, of Belgian nationality, who would act as foster parent or, fail-

²⁴¹ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec [19.09.2011].

²⁴² Committee on the Rights of the Child, concluding observations on the report of Belgium (CRC/C/BEL/CO/3-4), paras. 9-10.

²⁴³ Case of *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, application No. 13178/03, judgement of 12 October 2006.

²⁴⁴ Belgium report for the EMN comparative study, July 2009, p. 41.

²⁴⁵ Committee on the Rights of the Child, concluding observations on the report of Belgium, para. 74.

²⁴⁶ *Ibid.*, paras. 74-76.

ing that, with an institute for young children. While ordering the child's immediate release from the Transit Centre, the Court noted, however, that it had no jurisdiction to authorise the child's placement in a foster home or an institution. It therefore held that the application was only partly well-founded.

Court of Arbitration (*Cour d'Arbitrage/Arbitragehof*) decision no. 189/2004, of 24.11.2004

The Court held that the provision in the Law of 8 July 1976 governing public centres for social welfare, which excludes families with irregular immigration status from access to social benefits, violates articles 10 and 11 of the Belgian Constitution, combined with articles 2, 3, 24.1, 26 and 27 of the CRC. The Court had been asked by the Labour Tribunal of Brussels to issue a preliminary ruling on the conformity of said provision with the Constitution and the CRC, since the provision created a divergence in treatment between children on the basis of the administrative status of their parents.

The disputed provision stated that in relation to migrants with irregular immigration status, the role of a public welfare centre is limited to the provision of urgent medical assistance. The Court recalled a previous ruling in which it had held that social welfare should be granted whenever three conditions are met: the competent authorities verify that the parents do not fulfil or are in no position to fulfil their duty to support the child; the request is in regard to expenses which are indispensable to the development of the child; and the welfare centre is satisfied that the welfare benefits will be used solely to meet the child's needs. The Court also recalled that it is incumbent upon the centre to grant such welfare benefits in order to meet the needs of the child, either through direct assistance or by paying expenses incurred by the parents.

The Court noted that article 2.2 of the CRC requires that States parties take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status of his or her parents. The Court held that, from the moment that it is established that the parents are not fulfilling or are not in a position to fulfill their duty to support the child, the child with an irregular immigration status should be able to benefit from general social welfare provisions. Neither the parents' administrative status nor the reasons why they remain in the territory can justify the child being refused such welfare benefits, provided that there is no risk that the parents who are not entitled to social welfare might use the child's welfare benefits for their own benefit.

2. France

Under French legislation, access to social rights and financial benefits is in principle open to migrant children, but some restrictions persist, mostly for children with irregular immigration status, since access to financial benefits is made conditional upon presentation of documents attesting to the child's regular immigration status. Furthermore, although the Supreme Court has recognised that migrant families legally residing in France with their children are fully entitled to child benefits, this ruling is still not being implemented in practice. The Committee on the Rights of the Child, in its 2009 concluding observations, urged France to implement the Supreme Court's jurisprudence on the right of families which are not French to be granted child benefits.²⁴⁷

The most contentious issue in recent years has been whether migrant children who join their parents who have regular immigration status in France,²⁴⁸ without following prescribed family reunification procedures, are entitled to child benefits. Under the French Social Welfare Code, in order to have access to social benefits, the child must present a medical certificate issued by the

²⁴⁷ Committee on the Rights of the Child, concluding observations on the report of France (CRC/C/FRA/CO/4, of 11 June 2009), paras. 28-29.

²⁴⁸ When both the parents and the child's immigration status is irregular, there is no doubt in the Supreme Court's case law that the children are not entitled to social benefits. See www.courdecassation.fr/publications_cour_26/rapport_annuel_36/rapport_2008_2903/etude_discriminations_2910/discriminations_prohibees_2913/discriminations_droit_social_2914/discriminations_droit_securite_sociale_12136.html [19.09.2011].

Office for International Migration²⁴⁹ within the official family reunification procedure. Initially, the Supreme Court interpreted this as meaning that any application lodged on behalf of a child who had entered France outside the family reunification procedure, for instance, with a tourist visa, should be rejected even if the parent was legally resident in France.

The Supreme Court, however, reversed its decision on 16 April 2004²⁵⁰ and held that, since the applicant was legally residing in France with her children at the time of the application before the Social Welfare Services, her children were entitled to child benefits from the moment the application had been submitted, irrespective of the fact that she had presented the medical certificates for the children at a later date. However, since the legality of the children's immigration status was not disputed in this case, the question of the entitlement to social benefits of children in an irregular situation remained open.

In 2006,²⁵¹ the Supreme Court addressed this issue directly and held that making access to child benefits dependent upon the presentation of proof of the children's regular immigration status violated the principle of non-discrimination and frustrated the right to family life in a disproportionate way.²⁵² French courts have been adopting this interpretation of the law, which is considered to be in line with articles 8 and 14 of the ECHR, as well as with article 3 of the CRC.

Nevertheless, the issue was not completely settled and, in two decisions of 3 June 2011, the Supreme Court clarified that a distinction had to be made between the periods before and after the entry into force of Law 2005-1579, of 19 December 2005, on the financing of Social Welfare Services. Before the entry into force of this law, access to child benefits could not be made conditional upon the presentation of a medical certificate issued by the Office for International Migration. With the entry into force of Law 2005-1579, the medical certificate became indispensable, since foreign citizens may request child benefits for children in their care only if those children have entered France regularly in the context of a formal family reunification procedure. The Supreme Court considered that this requirement had "an objective character justified by the necessity in a democratic State of controlling the conditions under which children are accommodated" and that it did not constitute a "disproportionate breach of the right to family life as guaranteed by articles 8 and 14 of the ECHR", nor did it violate article 3.1 of the CRC.²⁵³

Another contentious issue regarding the welfare of migrant children in France is that of their detention in transit zones at the French border pending entry or deportation. In his report entitled, *Effective Respect for Human Rights in France*, dated 15 February 2006, Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, stressed that a stay in a transit zone is particularly traumatizing for an unaccompanied or separated child who is confronted with a world of adults, some of whom may be violent, and urged the French authorities to show more humanity and to treat unaccompanied children as children at risk, and place them in special reception facilities as opposed to a transit zone. Following that report, the French authorities made considerable improvements to the conditions available for children who were held in transit zones, by providing health-care services and the assistance of educators to better assess each child's situation. Nevertheless, in the Commissioner's 2008 report on France, the legal and human problems posed by the presence of children in transit zones were still a matter of great concern.²⁵⁴

One aspect of the children's stay in transit zones that has been particularly litigated is whether a Youth Court judge should be considered competent to adjudicate on child welfare measures on

²⁴⁹ Now the French Office for Immigration and Integration (*Office français de l'immigration et de l'intégration*).

²⁵⁰ Supreme Court (*Cour de Cassation, Assemblée Plénière*) decision No. 02-30.157, of 16 April 2004.

²⁵¹ Supreme Court (*Cour de Cassation, 2ème Chambre Civile*), decisions No. 04-30.837, of 14 September 2006, and No. 05-12.666, of 6 December 2006.

²⁵² See footnote 248.

²⁵³ Supreme Court (*Cour de Cassation, Assemblée Plénière*) decisions No. 09-71.352 and 09-69.052, of 3 July 2011. See *Communiqué relatif aux arrêts de l'assemblée plénière du 3 juin 2011 – n°09-71.352 et 09-69.052*, www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/arrets_assemblee_20212.html [19.09.2011].

²⁵⁴ Dominique Sarcelet, «La protection du mineur isolé en zone d'attente», *Recueil Dalloz*, 2009, no. 26, pp. 1794-1795.

behalf of children who are still formally outside French territory, given the extraterritorial character of the transit zones at the border. As will be shown below, the Supreme Court has ruled on this issue and held that, in spite of its extraterritorial status, transit zones are nevertheless subject to French administrative and jurisdictional control and that therefore the children placed in such zones are entitled to assistance under the child welfare legislation in force in France.

Court of Appeal (*Cour d'Appel de Rennes*) decision no. 271/2008 of 29.09.2008

The Court of Appeal held that to keep a one-year-old child in an immigration detention centre constituted inhuman treatment contrary to article 3 of the ECHR and therefore reversed the decision by the judge considering whether to grant bail to extend the child and his parents' administrative detention for a period of 15 days. The child's parents had been ordered to leave French territory and, when they did not comply, they had been taken from their home by the police and placed in administrative detention pending deportation.

The Court of Appeal considered that, while the detention centre had a special area reserved to accommodate families, it was nevertheless a closed area where foreigners were kept in detention pending their removal from French territory, for a period that could extend to 30 days. In particular, it considered that keeping a young mother, her husband and their one-year-old baby in such a place constituted inhuman treatment for two specific reasons. Firstly, because the child had been suddenly deprived, at a very young age, of his usual and appropriate habitat – his parents' home – and had been subjected, even if for a short period of time, to living conditions, which were highly unusual for a one-year-old baby. Secondly, the moral and psychological trauma suffered by the parents as a result of their baby's detention was, on account of its nature, its importance and its duration, sufficiently serious to be considered a form of inhuman treatment. The Court of Appeal held that the suffering caused by the detention was manifestly disproportionate to the aim pursued, which was to remove the parents from French territory, especially since the parents had a known address in France.²⁵⁵

Supreme Court (*Cour de Cassation, 2ème Chambre Civile*) decision no. 07-11.328, of 23.10.2008

The Supreme Court held that, since the attribution of refugee status has a purely declarative character, a person who is issued a residence permit following the attribution of refugee status is entitled to child benefits with retroactive effect to the moment when the application for asylum was lodged. The Court noted that under the French Social Welfare Code all foreigners who hold a residence permit are fully entitled to child benefits for the children in their care who are residing in France. It also noted that under articles 8 and 14 of the ECHR, the enjoyment of the right to respect for private and family life must be safeguarded without any distinction being drawn on the basis of national origin.

In this particular case, the appellant had arrived in France with his family and had obtained refugee status, following which he had requested child benefits to be granted to him retroactively. The Social Welfare Service backdated his child benefits only to the month after he was issued a residence permit as a "recognized refugee". The lower courts had confirmed the Social Welfare Services interpretation, which was that the appellant was entitled to social benefits only from the moment he was recognized as a refugee and was issued the corresponding residence permit.

However, the Supreme Court noted that the appellant had applied for asylum immediately upon his arrival in France and that he had been authorized to reside in France with his family, on a provisional basis, while his application was being processed, which meant that he had had regular immigration status from the day on which he had submitted his asylum application. The Supreme Court therefore quashed the lower court's decision and remitted the case to the Court

²⁵⁵ It should be noted that a similar interpretation was rejected by the Supreme Court (decision of 10 December 2009) in a case involving a couple who had been placed in administrative detention with a child aged 2 and a half months.

of Appeal of Toulouse for a new decision.

Supreme Court (*Cour de Cassation, 1ère Chambre Civile*) decision no. 08-14.125, of 25.03.2009

The Supreme Court held that, since the transit zone in an airport is under national administrative and judicial control, the lower court had erred in considering that an unaccompanied or separated migrant child placed in a transit zone could not benefit from the protection measures established in the French Civil Code for children whose health, safety or moral integrity are at risk or whose education conditions are severely compromised. The lower court had reasoned that such protective measures were applicable only to children who had already been admitted to French territory.

The appeal had been brought on behalf of a 17-year-old child, originating from Iraq, who had arrived unaccompanied at the Roissy Charles de Gaulle Airport and been denied entry into French territory, and then been placed in the transit zone. A bail judge had extended the child's stay there for a period of eight days. This decision had been confirmed by the Court of Appeal on the grounds that, while every child on French territory may benefit from a protection measure under article 375 of the Civil Code, such protective measures can be implemented only on national territory and the appellant had not yet been authorized to enter France. The Supreme Court held that the Court of Appeal had misinterpreted the law and quashed its decision.

3. Italy

In Italy, migrant children are in principle entitled to health care and education on the same basis as Italian children. Migrant children who hold a residence permit can register with the National Health-Care Service and are entitled to all the medical care provided by the Italian health-care system. However, migrant children with irregular immigration status cannot be registered with the National Health-Care Service and can benefit only from walk-in and day hospital care, urgent or long-term, as well as preventive health-care programmes.²⁵⁶ Access to health-care services by children with irregular immigration status cannot be used by health-care officials to report these children to the immigration police authorities.²⁵⁷

Under the 1998 Immigration Act, all migrant children present in Italian territory are subject to compulsory school attendance until the age of 16 and all legal provisions regarding the right to education, the access to educational services and the right to participate in the life of the school community apply to them. Children with regular and irregular immigration status are entitled to enrol in schools at any level. However, as indicated by the decision of the Milan Court discussed below, the provisions in the Immigration Act, which recognize a right to education to migrant children in irregular status are not always enforced, and some schools and professional institutes do not accept children who do not hold a residence permit.²⁵⁸

Unaccompanied migrant children are granted special protection and assistance, besides being entitled to education and health care. They cannot be detained in detention centres or reception centres, but must be placed in host communities for children.²⁵⁹ However, as provision for unaccompanied migrant children – and related expenses – is a responsibility of the municipalities,

²⁵⁶ Italian report for the EMN comparative study, p. 27.

²⁵⁷ During the debates leading to the 2009 reform of the Immigration Act, the Parliamentary majority submitted a proposal to suppress the provision which prohibits health-care officials from reporting migrant children in irregular situations to the immigration police authorities, but the proposal was strongly contested and was eventually withdrawn. See report by the Associazione Studi Giuridici sull'Immigrazione, available from www.centrocome.it/come_files/userfiles/File/ASGI_2899_art_6_TU-%20minori%20stranieri%20e%20istruzione.pdf [22.09.2011].

²⁵⁸ See note 256..

²⁵⁹ Gruppo di Lavoro per la Convenzione sui Diritti dell'Infanzia e dell'Adolescenza, *I diritti dell'infanzia e dell'adolescenza in Italia. 2.º Rapporto Supplementare alle Nazioni Unite*, p. 143. In its 2003 report on Italy, the Committee on the Rights of the Child had expressed its concern at the lack of adequate structures to receive unaccompanied children and had recommended that Italy strengthen efforts to establish enough special reception centres for unaccompanied children, with special attention to those who have been victims of trafficking and/or sexual exploitation, and to ensure that the stay in these centres is for the shortest time possible and that access to education and health is guaranteed during and after the stay in a reception centre. Committee on the Rights of the Child, concluding observations on the report of Italy (CRC/C/15/Add.198), paras. 45-46.

there are considerable discrepancies in the practical application of the relevant child welfare legislation across Italy.²⁶⁰

Court of First Instance (Tribunale di Milano, sezione I civile) decision no. 2380/08, of 11.02.2008

The Court allowed an appeal lodged by a Moroccan citizen against the Municipality of Milan, which had prevented her from registering her child in nursery school by issuing a Circular, which imposed as a requirement for registration the submission of her residence permit within a time limit that she could not possibly meet. The appellant had been in Italy without a valid residence permit for some time and was awaiting a decision on her request for a residence permit.

The Court stressed that the right to education, to which every child is entitled, is a fundamental right. The Court also noted that nursery schools are an integral part of the national school system and that therefore access to nursery school is guaranteed by law to every child present in Italian territory, including those who do not hold a valid residence permit.

According to the Court, the most critical aspect of the Circular was the fact that it made access to nursery school dependent upon the possession by the child's parents of a residence permit at a given date. The Court stressed the fact that the status of a child under Italian immigration law is independent from that of his or her parents, even if they are also present in the territory. The legal ban on expelling a migrant child means that the child has a right to obtain a residence permit until he or she reaches majority. Irrespective of the legal status of a child's parents, it is not lawful to assign the child irregular status in relation to his or her presence in the territory. The Court held that the Circular was inconsistent with the legal status that the Italian legal system grants to children insofar as it imposed unlawful conditions and subordinated the exercise of the child's rights to the legality of her parents' residence in Italy.

The Court considered it to be evident that the connection made in the Circular between the legality of the parents' stay and the possibility of registering the child would result in her being deprived of the substance of her right to enjoy a public service to which she was undoubtedly entitled on an equal footing with citizens. The formal requirements imposed by the Circular did not have any practical justification and were objectively in breach of the obligation to treat the best interests of the child as a primary consideration (article 3 of the CRC).

Therefore, the Court concluded that the Circular's provisions amounted to a discriminatory act in the sense that it unlawfully excluded all migrant children whose parents did not have a residence permit from being registered at a nursery school in the Municipality of Milan. The Court ordered an immediate end to the conditions in the Circular, which had been deemed discriminatory, considering that this was sufficient to prevent it having an irreversible and negative effect on the interests of children.

Labour Court (Tribunale di Montepulciano, Giudice del Lavoro) decision no. 27/2010, of 17.02.2011

The Court allowed the appeal lodged by the parents of a migrant child, suffering from a severe form of autism, who had been denied the right to apply for an attendance allowance²⁶¹ by the Social Security Institute and by the Municipality of Siena on the grounds that they did not possess either a residence card or a long-term resident's EU residence permit, both of which required them to have lived in Italy for at least five years. The child was lawfully registered on the residence permits of both parents and her parents' residence permits were valid for up to one year.

The Court noted that the 1998 Immigration Act had initially provided parity between migrants

²⁶⁰ Italian report for the EMN comparative study, pp. 11 and 16.

²⁶¹ An attendance allowance is a social benefit granted in order to facilitate the integration of a disabled child in the school system. It is conceived as a form of support to the families of disabled children to allow for their attendance at professional rehabilitation centres (*centri riabilitativi professionali*) or schools.

holding residence permits for more than one year (and the children registered on their residence permits) and Italian citizens, in relation to access to health-care benefits. However, the 2000 amendments had introduced a significant restriction by making access to such benefits conditional on the possession by non-EU citizens of a residence card instead of a residence permit, which had prompted several interventions by the Constitutional Court.

The Court recalled that, in 2008, the Constitutional Court had declared that the provisions of the Immigration Act breached the Constitution to the extent that it prevented a companion allowance or a disability pension being awarded to non-EU citizens who did not hold a residence card or a long-term resident's EU residence permit. The Constitutional Court had deemed the provision to be unreasonable and incompatible with the EU directives and with article 3 (the equality principle) of the Italian Constitution. The Constitutional Court had also noted that it was only when a residence was lawful but also episodic or of short duration that withholding health-care benefits connected with the recognition of a civilian disability could be justified.

This same reasoning had subsequently been applied to attendance allowances by the Constitutional Court, which had further invoked the United Nations Convention on the Rights of Persons with Disabilities, ratified by Italy in March 2009. The Constitutional Court had noted that the principles and norms of the Convention on the Rights of Persons with Disabilities were of relevance when considering the specific rules on the attendance allowance, since it addressed the rights of children who suffered chronic difficulties in performing tasks and functions that were appropriate to their age. The Constitutional Court had stated that children in such circumstances were among the beneficiaries of that Convention and of the special protection that it entailed.

The Labour Court also recalled that the Court of Appeal of Torino had recognised that the access of children with disabilities to an attendance allowance could not be made dependent upon the possession of a residence card, since that requirement impeded the enjoyment of a social benefit and of a fundamental right, and had invoked the United Nations Convention on the Rights of Persons with Disabilities principle that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

On the basis of this jurisprudence, the Labour Court held that the appellants' request for the recognition of the right to an attendance allowance on behalf of their child should be granted and that the Social Security Institute should pay the allowance and backdate it to the month after the application was lodged with the administrative authorities.

4. Spain

In Spain, migrant children are entitled to education and health care, as well as to basic social services, irrespective of their immigration status. The Constitutional Court has remarked that all children are entitled to a set of inalienable rights, which cannot be denied on the basis of their nationality or any other grounds. Therefore, whatever the circumstances in which a migrant child resides in Spain, he or she is entitled to health care. Furthermore, the child does not need to fulfil any formal requirements, such as registration with the municipal authorities, in order to enjoy this right.²⁶² Migrant children are also entitled to universal health-care coverage, which means that they receive any health care they may require at all times.²⁶³

Similarly, all migrant children are entitled to education, but disputes have arisen as to whether the right of all children to education, irrespective of their immigration status, relates only to compulsory basic education or if it also extends to non-compulsory education for children between 16 and 18 years of age. As will be seen below, the Constitutional Court held it to be unconstitutional to

²⁶² Djamil Tony Kahale Carrillo, "La Prestación de Asistencia Sanitaria a los Extranjeros en España", *DS*, vol. 15, No. 1, January-June 2007, p. 108.

²⁶³ Spanish report for the EMN comparative study, , p. 38.

exclude migrant children with irregular immigration status from access to non-compulsory education.

The Spanish authorities also assist unaccompanied or separated migrant children in need by providing a network of residential centres to accommodate these children and attend to their basic needs.²⁶⁴ These reception centres are run by the Child Welfare Service of each autonomous community and city, often in cooperation with NGOs, which leads to considerable differences in practices and accommodation conditions across the country. In addition, the increase in the number of unaccompanied or separated migrant children arriving in Spain each year has led the primary reception centres in some of the autonomous communities and cities reaching a point of saturation,²⁶⁵ which has had a negative impact on the standard of accommodation provided to these children. As mentioned earlier, it has become common practice in recent years for the Child Welfare Service to subject children under their care, who claim to be 16 or 17 years old, to medical examinations, following which the children who are declared to be older than 18 are discharged from the reception centres and State care. Spanish courts have been adamant in holding that the benefit of the doubt should be granted to anyone who might be a child, in order to protect any such person from being released from State care and left destitute on the streets.

Constitutional Court (*Tribunal Constitucional*) decision no. 236/2007, of 07.11.2007

The Constitutional Court declared that the inclusion in the Law on the rights of foreigners and their social integration of a requirement that a child must be “resident” in order to have access to non-compulsory education was unconstitutional and of no effect. The Constitutional Court had been asked to ascertain the constitutionality of several provisions in the Law on the rights of foreigners by the Parliament of Navarra, which had argued that the exclusion of children with irregular immigration status from such education was contrary to the Spanish Constitution, to article 28 of the CRC and to the Universal Declaration of Human Rights.

The Constitutional Court held that, although a legislator is authorised by the Constitution to regulate the rights of migrants in Spain and to impose conditions on their exercise of such rights, the restrictions imposed by law cannot limit rights which are essential to safeguarding human dignity. Furthermore, any restrictions on the rights of migrants in Spain will be constitutionally legitimate only if they respect the substance of the right, if they are instituted in order to safeguard other rights, goods or interests which are constitutionally protected and if they are proportional to their intended purpose.

The Constitutional Court analysed the substance of the right to education as enshrined in the Spanish Constitution (article 27), in the Universal Declaration of Human Rights (article 26), in the International Covenant on Economic, Social and Cultural Rights (article 13) and in the Second Protocol to the ECHR (article 2). The Constitutional Court concluded that it was unequivocal that the right to education is essential for the safeguard of human dignity, given the crucial role of education for the free and full development of an individual’s personality.

The Constitutional Court held that the constitutional provisions on the right to education, interpreted in conformity with the Universal Declaration of Human Rights and other relevant international treaties, encompass a right to all levels of education, even if only basic education is constitutionally compulsory and free of charge. Furthermore, the right to education is granted to all persons, irrespective of whether they are citizens or foreigners and irrespective of their legal status in Spain. Therefore, migrant children are also entitled to non-compulsory education and their exercise of this right can be made conditional only upon merit or capacity, not upon their administrative status or any such circumstance.

²⁶⁴ *Ibid.*, p. 37.

²⁶⁵ Spanish report for the EMN comparative study, p. 10; Defensor del Pueblo de España, *¿Menores o Adultos? Procedimientos para la determinación de la edad*, 2011, pp. 106-107.

5. Netherlands

In the Netherlands, migrant children at the border are treated in the same manner as adults and can be refused entry to the territory, irrespective of whether they are travelling alone or not. Nevertheless, whenever an unaccompanied child is refused entry, the Royal Constabulary (*Kmar*) informs the Nidos Foundation, which is responsible for providing guardians to unaccompanied migrant children.²⁶⁶ If the child does not apply for asylum, the *Kmar* assesses whether he or she can be removed from the territory of the Netherlands. Pending the conclusion of this assessment, the child will be placed in a foster family, if he or she is younger than 15 years of age. If the child is 15 or older and sufficiently independent, he or she will be placed in a transit zone at the airport under supervision.²⁶⁷

If the child applies for asylum, he or she will be initially refused entry to the Netherlands, which, however, does not preclude a subsequent request for an asylum application. The child is referred to Schiphol Airport Application Centre and appointed a guardian from the Nidos Foundation.²⁶⁸ The asylum application is in principle completed by the Immigration and Naturalisation Service²⁶⁹ within the so-called 48-hour procedure, which takes approximately five working days. If the application of an unaccompanied child is completed outside this procedure because further examination is required, the entry ban will be lifted.²⁷⁰ The rejection of an asylum application may not result in immediate removal to the child's country of origin, because asylum seekers cannot be removed if there is a temporary stop on departures, which may be issued if the situation in a specific country of origin is such that it is not certain if it is possible to remove persons to that country. During such a period, which cannot be longer than one year, the asylum seeker remains entitled to reception and all relevant reception conditions.²⁷¹

Unaccompanied asylum-seeking children who are younger than 13 years of age are placed in foster families assigned by the Nidos Foundation. For children older than 13 years of age, the daily care is provided by the Central Agency for the Reception of Asylum Seekers. Children from 13 to 17.5 years of age may be placed in "Child Residential Groups", a residential form with 24-hour supervision for a group consisting of a maximum of 12 children. Children from 15 to 17.5 years of age may be placed in "Small Residential Units", a residential form with 28 hours of supervision a week for a group consisting of a maximum of 4 children. Children from 15 to 18 years of age may be placed on "campuses", a residential form with 24-hour supervision at an asylum seekers' reception centre, for a group consisting of a maximum of 100 children.²⁷²

In spite of the efforts made to provide suitable accommodation to children pending a decision on their residence permit or asylum application or pending deportation to their country of origin, there are still reasons for concern as noted by the Committee on the Rights of the Child in its

²⁶⁶ Netherlands National Contact Point for the European Migration Network, *Unaccompanied minors in the Netherlands. Policy on reception, return and integration arrangements for, and numbers of, unaccompanied minors*, February 2010, p. 40.

²⁶⁷ *Ibid.*, pp. 19-20.

²⁶⁸ The first contact between the representative from Nidos and the unaccompanied child takes place within five days after entry. Nidos submits an application to the Youth Court to order provisional representation. Since children younger than 12 years of age are not permitted to personally submit an asylum application, Nidos submits its application for representation with all possible speed, so that it can submit asylum applications on behalf of these children. The application for representation is in writing, with a copy to the Child Protection Board, which must issue a certificate of no objection. The period between the application for representation and the Youth Court's decision is two months at the most and during this time Nidos acts on behalf of the child as if it were his or her representative. When the Youth Court grants the application, it sends the decision to the child, to the representative, and to the Ministry of Justice. From that time onwards, Nidos is the child's legal representative. (Netherlands National Contact Point for EMN, *Unaccompanied minors in the Netherlands*, February 2010, p. 34).

²⁶⁹ Asylum applications submitted by unaccompanied or separated children are handled by an Immigration and Naturalisation Department unit specialised in unaccompanied asylum-seeking children. The unit interviews unaccompanied children and decides on their asylum applications, with special attention to applications submitted by children below the age of 12 years. In addition, the unit handles applications that are otherwise related to unaccompanied children, such as, for instance, the review procedures, withdrawal of unaccompanied children permits, and the extension procedures of residence permits for unaccompanied children. Netherlands National Contact Point for EMN, *Unaccompanied minors in the Netherlands*, p. 31.

²⁷⁰ Netherlands National Contact Point for EMN, *Unaccompanied minors in the Netherlands*, p. 20.

²⁷¹ *Ibid.*, p. 29.

²⁷² *Ibid.*, pp. 34-35.

2009 concluding observations on the report of the Netherlands. In particular, the Committee is concerned about the practice of detention of unaccompanied children and families with children, and that children continue to disappear from reception centres, despite the pilot project centre to prevent the disappearance of undocumented children.²⁷³

Court in the Hague (*Voorzieningenrechter Rechtbank's-Gravenhague*) decision no. 03/284, of 23.04.2003

The Court was asked to ascertain the legality of the rules being applied in two government campuses built specifically to accommodate unaccompanied asylum-seeking children over 15 years of age. The campuses accommodated both unaccompanied asylum-seeking children who were awaiting a decision on their asylum application and those whose application had already been refused and who remained in the campus awaiting removal to their country of origin. Some of the children staying in one of these campuses protested against the rules of the campus and an application on behalf of these children was lodged with the Court against the Government of the Netherlands by a number of NGOs, which provided legal representation for these children or were concerned about their human rights. The appellants claimed that the Government was bound by national and international law, and the CRC in particular, to ensure that the facilities at these campuses were improved. Many of the issues raised by the children have now been addressed and in any event the Court was not prepared to rule on them as the campuses were pilot projects, which would be evaluated after one year.

However, the Court was prepared to reach a decision on two issues, which it viewed as too urgent to await the forthcoming review. The first was whether the children should be provided with pocket money which they could spend as they wished. The second was whether they should have access to an independent supervision board or an independent complaint committee in relation to any complaints about their living conditions in the campuses. The Court considered each issue separately in the light of the CRC, the ECHR and applicable national legal standards. It also noted that even though the large majority of children accommodated at the campuses had reached the end of the asylum process and had not been granted leave to remain and would have to leave the Netherlands upon reaching 18, there were also children in the campuses who were still awaiting a final decision. Therefore, the regime of the campuses could not be based on an assumption that none of the children there would have a future in the Netherlands.

It further held that the children should be provided with pocket money and have access to an independent complaints committee and a written complaints procedure. The Court also accepted that the extensive and mandatory activities programme enforced at the campuses left insufficient free time for the children and was therefore in breach of article 31 of the CRC. However, the Court concluded that it did not have sufficient competence and expertise to order an adjustment of the programme.

6. United Kingdom of Great Britain and Northern Ireland

In the United Kingdom all unaccompanied or separated migrant children who are destitute will be "children in need" for the purposes of section 17 of the Children Act 1989 and the children's services department of the local authority in whose area they arrive will be responsible for undertaking an initial assessment of their immediate needs within 7 days and a longer core assessment of their wider needs within 28 days. They will receive the same provision as any other child in need in the United Kingdom and will remain the responsibility of a local authority as children in need until they reach the age of 18 or leave the United Kingdom.

As unaccompanied or separated children who do not have an adult with parental responsibility

²⁷³ Committee on the Rights of the Child, concluding observations on the report of the Netherlands (CRC/C/NLD/CO/3, of 27 March 2009), para. 67.

for them in the country, they will be entitled to be accommodated under section 20 of the Children Act 1989 and children under 16 will generally be placed in the homes of foster carers. Older children, other than those with special needs or a particularly traumatic history, tend to be placed in accommodation with other older children, which may or may not have a residential adult supervisor. If an unaccompanied child is accommodated for more than 13 weeks after the age of 14 and continued to be accommodated until 16 or 17, he or she will also be entitled to further accommodation and support up until the age of 21 or even 24 if they remain in education, with the agreement of the local authority.

The Education Act 1996 provides all children who are living in the United Kingdom with the right to free primary and secondary education irrespective of their immigration status and a Personal Education Plan will be drawn up for each unaccompanied or separated child. However, many unaccompanied or separated children experience difficulties in practice in obtaining places if they arrive between the ages of 15 and 17 as the years into which they should be placed will be part way through preparing for their final General Certificate of Secondary Education or other exams. Asylum seekers 16 to 18 years old are also entitled to free education at further education colleges and can apply to learn English there or obtain further academic qualifications. However, unless a child is granted refugee status or still has leave to remain after reaching 18, he or she will not be eligible for loans or grants to attend university.

All unaccompanied or separated children are also entitled to free health care under the National Health Service as children being looked after by a local authority. This will include access to general practitioners and also hospital care and treatment for both physical and mental health conditions. The Medical Foundation for the Care of Victims of Torture and the Helen Bamber Foundation are just two of a number of voluntary organisations which provide specialist psychiatric and psychological care for children who have been victims of torture or human trafficking or who are former child soldiers.

R (on the application of Behre) v London Borough of Hillingdon [2003] EWHC 2075 (Admin)

Behre and three other claimants all arrived at Heathrow Airport during 2000 as unaccompanied asylum-seeking children. None of them had parents or relatives in the United Kingdom and all of them were destitute. They were referred to the London Borough of Hillingdon, which provided them with assistance. By the time of the claim, one of them had been recognised as a refugee, two of them had been granted exceptional leave to remain for four years and one was still awaiting a decision in relation to her application for asylum. When they reached the age of 18, the local authority told them that it no longer owed them a duty of support. It was not disputed that they had all been housed by the local authority for more than 13 weeks after the age of 14 but the local authority asserted that they were not entitled to “leaving care services” under sections 23C and 24B of the Children Act 1989 as it had not been “looking after” them because it had not been accommodating them under section 20 of the Children Act 1989. (That section places a local authority²⁷⁴ under a duty to provide accommodation and financial support to any child who has no accommodation and who has no one in the United Kingdom with parental responsibility for him or her.) Instead the local authority asserted that it had only been “assisting” them under section 17 of the Act.

On the facts of the case, the High Court found that, even if they were assisted under section 17, they had been “looked after” as at the time they were assisted, section 17 was still a “looked after” power for the purposes of the Children Act and the amendment to take it out of this category had yet to come into force.

However, the Court also noted that the Local Authority Circular LAC (2003) 13 *Guidance on*

²⁷⁴ In the United Kingdom a local authority may be a borough within a city or town or a county, city or metropolitan borough council.

Accommodating Children in Need and Their Families stated that “where a child has no parent or guardian in this country, perhaps because he had arrived alone seeking asylum, the presumption should be that he would fall within the scope of section 20 and become looked after, unless the needs assessment reveals particular factors which would suggest that an alternative response would be more appropriate”. The local authority also tried to argue that it was providing “housing” for children who required “somewhere to live” and were not accommodating them for the purposes of section 20. Mr. Justice Sullivan held that this argument was mere sophistry, based upon a “distinction without a difference”.

As a result the Court found that all four were entitled to leaving care services.

R (on the application of (1) H (2) Barhanu (3) B) v (1) Wandsworth London Borough Council (2) Hackney London Borough Council (3) Islington London Borough Council and the Secretary of State for Education and Skills [2007] EWHC 1082 (Admin)

All three claimants arrived in the United Kingdom as unaccompanied asylum-seeking children. H was a child from the Islamic Republic of Iran who arrived on 10 August 2005, the day before his 17th birthday. He claimed asylum and was granted discretionary leave to remain for one year. At the time of the hearing, his asylum application had yet to be finally determined.

He was referred to the London Borough of Wandsworth for support and it asserted that at a meeting with a social worker on 6 September 2005 he had said that he would like to remain in accommodation in Enfield and receive financial support and did not need any other assistance. He was not assisted by an interpreter from his own country at this meeting and the different types of accommodation available to him were not explained to him.

The local authority’s case was that he had elected to be assisted under section 17 of the Children Act 1989, as opposed to being accommodated under section 20. However Mr. Justice Holman held that if on the facts a duty arose under section 20 (because the child was in need of accommodation and had no one in the United Kingdom with parental responsibility for him), the local authority must be regarded as providing that accommodation under section 20 and not under section 17. Therefore, when he became 18, he was a “former relevant child” and was entitled to leaving care support.

R (on the application of SO) v London Borough of Barking and Dagenham and the Secretary of State for the Home Department and the Children’s Society [2010] EWCA Civ 1101

SO is a national of Eritrea. He arrived in the United Kingdom on 25 September 2007 and claimed asylum the next day. He gave his date of birth as 6 July 1990 and he was referred to the London Borough of Barking and Dagenham, which undertook an age assessment and decided that he was 17 years old. In contrast, the Secretary of State for the Home Department believed that he was an Eritrean who had been born on 21 February 1987, and who had initially applied for leave to enter as a visitor from Saudi Arabia. His application for asylum was refused on 28 November 2007. His initial appeal against this decision was allowed on 10 March 2008 but then the Secretary of State applied for and was granted an order for reconsideration. His substantive reconsideration hearing was heard by Senior Immigration Judge Charlton Brown, who found him to be a “witness without credibility” and dismissed his appeal on 18 October 2008. He was refused permission to appeal to the Court of Appeal on 5 November 2008 and on 17 June 2010 the Secretary of State also decided that his further representations did not amount to a fresh claim for asylum. Meanwhile the local authority had accommodated him as a child under section 20 of the Children Act 1989 and then continued to accommodate him as a “former relevant child” under sections 23C and 24B of the Children Act 1989 even when his appeal was dismissed. However, the local authority did decide to terminate this support on 9 October 2009 on the grounds that he was also entitled to support from the Secretary of State for the Home Department under section 4 of the Immigration and Asylum Act 1999 as a failed

asylum seeker. At the time of the decision in this case, SO was actually attending college and therefore he was potentially entitled to support from the local authority, under section 23(4)(b) of the Children Act, until he reached 21.

For the purposes of this appeal to the Court of Appeal, it was accepted that SO had been born on 6 July 1990 and that he was still entitled to support under section 23(4)(b) whether or not attendance at his college had been mentioned in his Pathway Plan, as he was not yet 21 years old.

However, the Court of Appeal went on to consider his position if he had not been in education and whether he would then still have been entitled to support under section 23(4)(c) purely because of any welfare needs which may have arisen. The Court of Appeal considered previous case law in relation to the use of the word "assistance" in section 17 of the Children Act 1989 and decided that "assistance" included the provision of accommodation.

It then considered that the question of whether a "former relevant child" could be said to "require" accommodation if he could apply for section 4 support from the Secretary of State for the Home Department as a failed asylum seeker. The Court of Appeal considered the scope of the two powers and decided that as section 4 support was available only when a person was destitute, it was the residual as opposed to a primary power. Therefore, SO would not be entitled under section 4 while he remained entitled to support under section 23C of the Children Act 1989. (The significance of the case was that if SO were to have to rely on asylum support, he was likely to be dispersed away from London and the South East and would no longer have the additional assistance of the local authority as a "former relevant child" or be able to continue his studies).

C. GOOD PRACTICE

Drawing from the cases reviewed and those discussed at the Judicial Colloquium, the following can be identified as good practice:

- Quashing administrative decisions to refuse migrant children access to health care or social benefits purely because a parent could not produce a valid residence permit, provided that there was no risk that the parents might use these benefits for their own benefit
- Quashing a decision to refuse a child access to nursery on the basis that the mother did not have a valid residence permit
- Finding that excluding a child with irregular immigration status from non-compulsory education was unlawful
- Recognising the entitlement to child benefits with retroactive effect to the moment when the application for asylum or residence permit was lodged
- Finding that it was not in a migrant child's best interests to be accommodated on his or her own in an adult reception centre
- Finding that a migrant child accommodated in a residential setting designed for unaccompanied asylum-seeking children should be provided with sufficient free time, in accordance with article 31 of the CRC
- Finding that unaccompanied migrant children who reached 18 had the same entitlement to leaving care services as any other child in that host country
- Finding that transit zones at borders do not enjoy any extraterritorial status and that they

fall under the jurisdiction of the appropriate court and that any child placed in such a zone is entitled to assistance under relevant child welfare legislation

- Finding that it is unlawful to place very young children in reception facilities, even when they are accompanied by their parents, and equating such placement with inhuman treatment for the purpose of article 3 of the ECHR.

CHAPTER V

PROCEDURAL SAFEGUARDS, INCLUDING THE RIGHT OF CHILDREN TO PARTICIPATE IN PROCEEDINGS

The particular vulnerability of migrant children, especially unaccompanied and separated children, requires that they be provided with adequate procedural safeguards in all administrative and judicial proceedings in which they take part.

One key procedural safeguard is the prompt appointment of a guardian to assist the child and to represent him or her before any administrative and judicial authorities.²⁷⁵ The guardian should be appointed as soon as the child is identified as being unaccompanied or separated and the guardianship arrangements should be maintained until the child has either reached the age of majority or has permanently left the jurisdiction of the host country. The guardian should be consulted and informed regarding all actions taken in relation to the child and should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, meetings about care arrangements and all efforts to provide the child with a durable solution. The guardian should have the necessary expertise in the field of children and should act as a link between the child and the specialist agencies or individuals who provide the continuum of care required by the child.²⁷⁶

The Committee on the Rights of the Child has stressed that agencies or individuals whose interests may potentially be in conflict with those of the child's should not be eligible for guardianship.²⁷⁷ In the case of a separated child, guardianship should be assigned to the accompanying adult family member unless there is an indication that it would not be in the best interests of the child to do so. In cases where a child is accompanied by an adult or carer who is not a family member, suitability for guardianship must be very carefully scrutinized to ensure that there is no likelihood of the child having been trafficked or being exploited. In any event, review mechanisms should be implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and to prevent abuse.²⁷⁸

In addition to a guardian, children involved in asylum procedures or administrative or judicial proceedings should also be provided with a legal representative.²⁷⁹ The Committee on the Rights of the Child²⁸⁰ has recognised that all unaccompanied or separated migrant children have a special and dependent status which creates real difficulties for them when they wish to pursue remedies if their rights are breached. Therefore, it has stated that States should provide them with the necessary access to the courts, which will mean providing them with legal and other assistance. This implies that if the migrant child is without means, he or she should be provided with free legal aid.

Furthermore, children should be informed and kept up to date about arrangements for guardian-

²⁷⁵ Committee on the Rights of the Child, General Comment No. 6, para. 21. The guardian or adviser should be appointed free of charge. General Comment No. 12, para. 124.

²⁷⁶ General Comment No. 6, para. 33.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*, paras. 34-35.

²⁷⁹ *Ibid.*, paras. 21 and 36. Special procedural safeguards for unaccompanied or separated children seeking asylum include the requirement that refugee status application filed by unaccompanied and separated children should be given priority; that the application should be determined by a competent authority fully qualified in asylum and refugee matters; that, where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made; that, wherever the child is unable to communicate directly with the qualified official in a common language, the assistance of a qualified interpreter should be sought; and that the child should be given the benefit of the doubt in case there are credibility concerns relating to his or her story. Furthermore, the guardian and the legal representative should be present during all interviews. General Comment No. 6, paras. 69-72. See also General Comment No. 12, paras. 123-124.

²⁸⁰ General Comment No. 5 (CRC/GC/2003/5, of 27 November 2003), para 24.

ship and legal representation at all times and their opinions should be taken into consideration.²⁸¹

Pursuant to article 12 of the CRC, the child's views and wishes must be elicited and taken into account when determining any measures to be adopted in relation to him or her.²⁸² In particular, the child must be provided the opportunity to be heard in any judicial and administrative proceedings affecting him or her, either directly or through a representative. If the child is to be heard through a representative, it is crucial that the representative be aware that he or she represents only the interests of the child and not the interests of other persons, institutions or bodies.²⁸³

In General Comment No. 12, on the right of the child to be heard, the Committee on the Rights of the Child has stressed that State authorities cannot begin with the assumption that a child is incapable of expressing his or her own views, but that, on the contrary, State authorities should presume that a child has the capacity to form his or her own views and should recognize that he or she has the right to express them. It is not up to the child to first prove his or her capacity.²⁸⁴ In addition, simply listening to the child is insufficient. The views of the child have to be seriously considered when the child is capable of forming his or her own views.²⁸⁵ For this reason, decision makers have to inform the child of the outcome of the procedures regarding the child and explain how the child's views were considered.²⁸⁶

The child has the right to express his or her views without pressure and can choose whether or not to exercise his or her right to be heard. This means that the child must not be manipulated or subjected to undue influence or pressure. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age, so proceedings must be both accessible and child-friendly. In addition, because the hearing of a child is a difficult process that can have a traumatic impact on the child, he or she should not be interviewed more often than necessary and the interviewer should be trained in interviewing children.²⁸⁷

Those who are responsible for hearing the child and the child's parents or guardian must inform the child about the matters at issue and possible decisions to be taken and their consequences.²⁸⁸ The child is also entitled to all relevant information regarding his or her rights, including the right to seek asylum and the right to appeal an adverse administrative or judicial decision. Such information must be provided to each individual child upon arrival or when identified,²⁸⁹ in a language that the child is able to understand and in a manner that is appropriate to his or her maturity and level of understanding. Where necessary, interpreters should be made available.²⁹⁰

Children must have access to any appeals and complaints procedures that may provide appropriate remedies if their rights are violated. They should also have the opportunity to seek the assistance of an ombudsman or a person of a comparable role in all children's institutions, including, but not limited to, schools, residential accommodation or foster placements, in order to voice any complaints.²⁹¹

²⁸¹ General Comment No. 6, para. 37.

²⁸² *Ibid.*, para. 25.

²⁸³ General Comment No. 12, para. 37.

²⁸⁴ *Ibid.*, para. 20.

²⁸⁵ *Ibid.*, para. 28.

²⁸⁶ *Ibid.*, para. 45.

²⁸⁷ *Ibid.*, paras. 22, 24 and 34. See also the Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, annex to the Report of the Intergovernmental Expert Group Meeting to Develop Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, held in Vienna on 15 and 16 March 2005 (E/CN.15/2005/14/Add.1), in particular paras. 13-14 and 30-31. The Guidelines were adopted by the Economic and Social Council in its resolution 2005/20, annex.

²⁸⁸ General Comment No. 12, para. 25.

²⁸⁹ Council of Europe Parliamentary Assembly Resolution 1810 (2011) on unaccompanied children in Europe: issues of arrival, stay and return, para. 5.6.

²⁹⁰ General Comment No. 6, para. 25. See also General Comment No. 12, para. 124.

²⁹¹ General Comment No. 12, paras. 46-47.

A. PERSISTING GAPS IN PROCEDURAL SAFEGUARDS FOR CHILDREN IN EUROPE

As remarked by the Parliamentary Assembly of the Council of Europe, the legislation of European countries often does not provide for an appropriate system of guardianship on behalf of unaccompanied and separated migrant children. Even when an adequate legal framework is in place, administrative delays may leave these children exposed to a risk of trafficking or other abuses.²⁹² It is also problematic that institutions, and not individuals, are being appointed as guardians, as this hinders the development of an individualised relationship with each child. It has also been reported that sometimes the contacts between a guardian and the children under his or her care are so rare and formal that the children do not realise that they actually have a guardian whose role is to assist them and defend their best interests.²⁹³

Furthermore, when the guardian is an officer of the local authority, which will have to bear the cost of assisting the child if he or she remains in the country, there will be a clear conflict of interests, which is very likely to be detrimental to the child. That is notably the case in Italy, as remarked during the Judicial Colloquium by Justice Joseph Moyersoen. Save for a few cases of private citizens who take charge of the child, in most cases the guardianship is entrusted to the same administrative organisation that will benefit if the guardianship ends.

There was a wide consensus among the judges in the course of the Judicial Colloquium that it is crucial to prevent the still-frequent conflicts of interests on the part of guardians or representatives appointed for the children. It was also argued that the guardians should not perform their role in a merely bureaucratic manner, but should have a clear obligation to be involved with the child and to represent the child's best interests. It was also noted by Justice Catherine Sultan that children should have the right to a guardian who actually has the opportunity to get to know them.

Additionally, it was argued that a legal representative should be appointed to assist the child from the point at which a child arrives, including during any age assessment procedure. Judge Jose Luis De Castro, of the Spanish High Court, stressed that it is critical to ensure legal assistance to the child from the very beginning of the process so as to fully guarantee that his or her rights are respected as it is critical that in cases of age assessment, there is an opportunity to appeal the decision.

Another source of concern is the fact that children do not always have an opportunity to exercise their right to be heard. In Spain, for instance, the likelihood of the child being directly heard by a judge can vary according to which judge is sitting in the case. In the United Kingdom, children accompanied by a family member are very rarely heard by the judge, who will usually take oral evidence only from the adult family members. In Italy, the judge knows about the child only through the social services' reports. In Portugal, sometimes judges prefer not to hear the child, on the grounds that the child will say only what adults told him or her to say. Kirsten Sandberg, a member of the Committee on the Rights of the Child, remarked that the duty to hear the child should prevail because children have the right to be treated as individuals. Allowing a child to be present is also a crucial part of informing the child of his or her rights.

What must also be improved is the way in which the children are heard. In this regard, it was noted that sometimes judges interrogate children almost as if they were charged with criminal offences. A general concern was expressed about the lack of adequate training for those who come into contact with migrant children. For example, Justice Anita Nagy, of the Budapest Metropolitan Court, noted that legal representatives for unaccompanied or separated children in Hungary are appointed by the Office of Immigration and Nationality from a national list of lawyers held by that office; but lawyers are not particularly motivated, because they are not specialists in child

²⁹² Council of Europe Parliamentary Assembly Recommendation 1703 on protection and assistance for separated children seeking asylum, April 2005, para. 5.

²⁹³ European Union Agency for Fundamental Rights, *Separated Asylum-Seeking Children in European Union Member States – Comparative report*, 2011, pp.51-52.

protection and they are not familiar with the appropriate international legal framework.

Nevertheless, some good practice was mentioned. Justice Marianne Rootring, of the Court of The Hague, referred to the practice adopted at that Court to amalgamate any cases in the family, administrative or criminal courts involving the same child in order to avoid an unnecessary multiplicity of hearings, so that a child attends only one hearing, and to make the hearing appropriate for the child. Justice Carlos Jorge Ribeiro, of the Family and Juvenile District Court in Braga, mentioned that in Portugal the child's testimony is recorded in order to avoid duplication of hearings and that the child is assisted by a psychologist at the court hearing. Judges also receive special training to deal with children and to be sensitive to their special needs.

B. NATIONAL CASE LAW

The age assessment cases described in chapter II illustrate the emphasis placed by national courts on ensuring that the administrative authorities comply with at least minimal procedural requirements. These requirements include the duty on the part of the authorities to give an immediate reply to any request made by a child and the duty to inform the child, in simple terms, of the purpose of the age assessment interview as well as the reasons why the interviewers consider his or her claim to be under the age of 18 to be false, so that the child is given the opportunity to respond. The child must also be informed of any decision relating to his or her age, the reasons for such a decision and his or her right to a reassessment or an appeal.

The cases in this chapter give further support to the conclusion that national courts can be very attentive to the need to respect the rights of the child and the procedural safeguards required to meet the child's specific needs and to take into account his or her special vulnerability. These rights and safeguards include the right of the child to be heard in the course of the administrative procedure, the right to be assisted by a guardian and a legal representative, the right to be assisted by an independent interpreter, whenever the child is not proficient in the language used in the interviews, and the right to be treated as a child, with due regard to his or her maturity.

1. Austria

Under Austrian law, when an unaccompanied or separated child is intercepted by the police, he or she is immediately referred to the Child Welfare Authorities, which will act as his or her guardian and provide care and legal representation to the child.²⁹⁴ However, there is no specific legal provision for the guardianship of unaccompanied migrant children. As a rule, the courts appoint the local Child Welfare Authority to act as a guardian for an unaccompanied or separated child whenever there is no suitable person, such as a close relative, to take on the role.²⁹⁵ The Supreme Court held, in 2005,²⁹⁶ that in such cases the Child Welfare Authorities are under the obligation to become the guardian for the child, but Austrian courts still do not agree on whether the Child Welfare Authorities should be considered to be guardian *ex lege* (by mere effect of the law, automatically) of every unaccompanied or separated migrant child found in Austria or if they have to wait until they are appointed as legal guardian by a court of law to start acting on behalf of the child.²⁹⁷

Moreover, there are different rules in force in respect to legal representation, depending on

²⁹⁴ Austrian report for the EMN comparative study, pp. 22-24.

²⁹⁵ In March 2005, the Committee on the Rights of the Child, in its concluding observations on the report of Austria, expressed its concern that unaccompanied and separated asylum-seeking children were not systematically assigned guardians. The Committee recommended that Austria should ensure that guardians were systematically assigned to unaccompanied and separated asylum-seeking children and that the best interests of the child were duly taken into account (Committee on the Rights of the Child, concluding observations on the report of Austria (CRC/C/15/Add.251, of 31 March 2005), paras. 47-48).

²⁹⁶ Supreme Court decision No. 7 Ob 209/05v, of 19 October 2005.

²⁹⁷ Austrian report for the EMN comparative study, pp. 31-32.

whether the child applies for asylum or whether the child remains in police custody pending deportation. The Asylum Act 2005 contains specific provisions concerning legal representation in the asylum procedure. During the initial admission stage, legal representation for unaccompanied or separated children is provided by the legal advisers at the initial reception centre where children seeking asylum will have been placed upon arrival or when intercepted by the police. After a child has been admitted to the substantive asylum-determination process, responsibility for legal representation is transferred to the Child Welfare Authorities. Additionally, the Aliens Police Act has its own procedures for entitlement to legal representation, under which only children younger than 16 years of age have to be provided with a legal representative where the Aliens Police is exercising its powers to control entry or detain or expel unaccompanied or separated children. This means that, while a 16-year-old child is entitled to assistance by a legal representative in the course of the asylum-determination procedure, he or she will not be entitled to legal representation if he or she is detained pending deportation.²⁹⁸

Administrative Court (*Verwaltungsgerichtshof*) decision no. 2005/20/0267, of 21.12.2006

The Administrative Court quashed a decision by the Independent Federal Asylum Senate on the grounds that the proper procedures had not been complied with, as a decision had been taken following a series of interviews at which the appellant, a 17-year-old child, had been questioned without the assistance of an independent interpreter and in the absence of his legal representative.

The child, a Nigerian citizen, had applied for asylum immediately upon arrival in Austria. He had been interviewed twice by the Asylum Senate, which had later dismissed his asylum application and had held that he was liable to deportation to Nigeria. The child appealed against this decision and the matter was sent back to the Asylum Senate, which conducted an oral hearing and concluded that the appellant was at least 18 years old and should be treated as an adult.

The Administrative Court noted that, while the appellant had become an adult in the course of the asylum procedure, he had been a child during the first hearings before the Asylum Senate and should not have been questioned in the absence of a legal representative. The Court dismissed the respondent administration's argument that the appellant had appeared to be an adult, holding that an initial age assessment made by the social worker, with no special professional qualification, was not sufficient to conclusively establish the age of the appellant.

Furthermore, the Administrative Court noted that the hearing before the Appellate Asylum Authority had been conducted in English and without the assistance of an independent interpreter, contrary to the legal requirement that in the event that a person to be heard is not sufficiently proficient in German, the competent authority must call in an official interpreter. The Court noted that the Asylum Act 1997 had established a quasi-judicial, impartial and independent appeal authority, as a guarantee of a fair asylum procedure and that it was incompatible with such a guarantee to entrust the function of interpreter to a social worker from the Asylum Senate.

2. France

Under French law, unaccompanied or separated migrant children who are not admitted to French territory at the border and who are detained in a transit zone pending deportation are entitled to the prompt appointment of a guardian, whose function is to assist and represent the child in all administrative and judicial procedures relating to his or her continuing presence in the transit zone and any request by him or her for admission to France.²⁹⁹

As reported by the French Ministry of Immigration, French authorities have had difficulty recruiting a sufficient number of guardians for unaccompanied or separated children owing to an apparent

²⁹⁸ Ibid., pp. 32-33.

²⁹⁹ French report for the EMN comparative study, pp. 4 and 8.

lack of individuals with appropriate experience of the needs of children able to take on this role. To address these shortages, in 2005, the French Red Cross was entrusted with the function of *guardian* for unaccompanied or separated migrant children placed in transit zones.³⁰⁰ In spite of this effort, the case law reviewed for this section indicates that a guardian is not always appointed within the necessary time frame, which results in unaccompanied or separated children remaining in transit zones without any official assistance. French courts have found this practice to be unlawful.

As an additional safeguard, unaccompanied or separated children are entitled to go to court even if they have no legal representative and the Youth Court judges have the jurisdiction to assess the personal or social risk faced by an unaccompanied or separated child held in detention in a transit zone and can place him or her under the guardianship of an adult legally residing in the country. That was the case, for instance, with the Youth Court (*Tribunal pour Enfants de Bobigny*) decision No. 104/0462, of 22 August 2004, in which the Court held that, while it could not reach a decision on the child's substantive asylum application, it was under an obligation to consider the child's personal, family and social situation in order to assess other risks the child faced if he were returned to his country of origin. Since the child, a 13-year-old boy from the Democratic Republic of the Congo, did not know the whereabouts of his parents and had an older brother residing in France with a refugee permit, the Court decided to entrust him to his brother's care for a period of six months, during which time a thorough assessment of the child's situation could be conducted and the child would have the opportunity to be heard.

Supreme Court (*Cour de Cassation, 1ère Chambre Civile*) decision no. 02-20613, of 18.05.2005

The Supreme Court annulled a decision by the Court of Appeal of Rennes on the grounds that it had violated articles 3.1 and 12.2 of the CRC by not deciding on a request by the child to be heard in the course of the proceedings, which would determine whether her place of residence was to be changed or not. The child, who was 12 years old at the time of the proceedings, had been living with her mother in the United States. In the course of the proceedings initiated by her father in order to change her place of residence, the child had written to the Court of Appeal requesting an opportunity to be heard by the Court. The Court of Appeal, however, had not responded to this request.

The Supreme Court noted that in all decisions concerning children, the best interests of the child must be a primary consideration. It also noted that whenever a child who is capable of forming his or her views requests the opportunity to be heard, the child may submit his or her request to the Court at any stage of the proceedings and even, for the first time, on appeal. The Supreme Court held furthermore that any decision not to hear the child had to be justified by the provision of reasons for the refusal.

The Supreme Court concluded that the need to give primary consideration to the child's best interests and the child's right to be heard required that the Court of Appeal take the child's request into account.

Supreme Court (*Cour de Cassation, 1ère Chambre Civile*) decision no. 06-17238, of 22.05.2007

The Supreme Court annulled a decision by the Court of Appeal of Paris, which had dismissed as irrelevant the delay in appointing a guardian to an unaccompanied child kept in a transit zone for a period of more than a week. The child, a national of Turkey, had arrived in France by plane from Istanbul with an onward ticket for Rio and had applied for asylum. He had been refused entry to French territory and had been placed in a transit zone on the same day. The decision to deny the child entry and to keep him in the transit zone had been renewed two days later. Three days after the child's arrival, a bail judge had authorised his stay in the transit zone

³⁰⁰ *Ibid.*, p. 9.

for a further period of eight days.

The Court of Appeal had dismissed an appeal against this decision and remarked that, even if there had been a delay in the appointment of the guardian, the appointment had been accepted without reservations by the Red Cross and that the delay had not had an adverse effect on the child's interests because it had not deprived him of the right to request asylum. In addition, the Court of Appeal had noted that the child had not suffered from lack of health care since the transit zone had a medical centre, which was freely accessible.

The Supreme Court held that the judge in the lower court had violated the law when reaching his decision, as the judge knew that the guardian had been appointed to the child only after a delay of 39 hours. The Supreme Court noted that this delay had not been justified by any particular circumstances. It held that any delay in fulfilling the legal obligation to appoint a guardian to an unaccompanied child was likely to have an adverse effect on the child's interests.

Constitutional Court (*Conseil Constitutionnel*) decision no. 2010-614 DC, of 04.11.2010

The Constitutional Court held that the law, which authorised the ratification of the Agreement between the French Republic and the Government of Romania regarding cooperation for the protection of Romanian unaccompanied children on French territory and their return to their country of origin, was contrary to the French Constitution, on the grounds that it did not establish an appeal procedure through which those children could challenge the decision to return them to Romania.

The Court had been asked to ascertain the constitutionality of the law by a group of MPs, who had argued that the law could not authorise the ratification of an Agreement, which instituted an exceptional procedure for the deportation of Romanian children, which did not respect the principles of equality before the law and the children's right to answer the case being brought against them. The MPs had also argued that the State was under a duty to provide the conditions necessary for a child's individual development and to guarantee their health, material safety, rest and recreation, as it was for all children.

The Court recalled that, under article 16 of the 1789 *Declaration of the Rights of Man and of the Citizen*, "a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all" and that this provision guarantees the right of every person to an effective judicial remedy.

The Court noted that the Agreement instituted a procedure for the assisted return of unaccompanied children if a request was made by the Romanian authorities and that the authorisation to return the child was to be given in France by the Public Prosecutor's Office for Children or by the Youth judge if the matter came before his or her court. The Court further noted that there was no provision, either in the Agreement or in French law, that would enable an unaccompanied or separated child or any interested person to appeal against the decision to return the child to Romania, after such decision was taken by the Public Prosecutor's Office. Therefore, the Court concluded that the provisions in the Agreement, which instituted the assisted return procedure, violated the right of unaccompanied or separated children from Romania to an effective judicial remedy.

3. Ireland

It is official policy in Ireland not to refuse any child entry to the territory, regardless of whether or not he or she claims asylum.³⁰¹ An unaccompanied child who arrives at the border or who is identified after entering Ireland, automatically falls under the protection of the Child Care Act, 1991, which means that the Health Service Executive assumes responsibility for the promotion

³⁰¹ Corona Joyce and Emma Quinn, *Policies on Unaccompanied Minors in Ireland* (The Economic and Social Research Institute, Dublin, 2009), p. 20.

of the welfare of that child. However, if the child does not obtain refugee or subsidiary protection status, or leave to remain in Ireland, he or she will have no official immigration status and, therefore, no defined independent right to be in the country.³⁰²

As a general practice, all interviews with unaccompanied or separated migrant children are conducted with the assistance of an interpreter, who is either present at the interview or at least on the other end of a telephone line and, in principle, a social worker should also be present. Children under 14 years must be interviewed by child specialist interviewers.³⁰³ While the Child Care Act, 1991 makes provision for the appointment of a guardian ad litem³⁰⁴ under certain circumstances, this happens for unaccompanied or separated children only on an ad hoc basis and there is no consistent practice or guidance on when this should happen. The failure to appoint guardians ad litem for all unaccompanied or separated migrant children has been the subject of strong criticism by NGOs in Ireland in recent years. The Committee on the Rights of the Child, in its concluding observations on Ireland, in September 2006, also expressed its concern that unaccompanied and separated children might still not receive adequate guidance, support and protection during the asylum process, particularly in relation to access to services and independent representation.³⁰⁵ In 2009, the Department of Justice, Equality and Law Reform stated that under the Child Care Act, 1991, the Health Service Executive social worker involved must regard the “welfare of the child as the first and paramount consideration”, which meant that there was no need for a guardian ad litem, but many have questioned whether the Health Service Executive has a conflict of interest in taking on such a role.³⁰⁶

Ireland has opted in to the EU Procedures Directive,³⁰⁷ which states that the best interests of the child should be a primary consideration when deciding whether to grant or withdraw refugee status. Under the Directive several procedural safeguards are established, in particular regarding legal assistance and the need to provide a clear explanation of the procedure to unaccompanied or separated children, and specific training for interviewers conducting asylum interviews with children.³⁰⁸ If a child has an asylum case, the Health Service Executive social work team assists him or her to apply to the ORAC for refugee status. Furthermore, as an asylum applicant, the child is also entitled to legal aid from the Refugee Legal Service. Nevertheless, there are still concerns among NGOs and social workers that the asylum system is an adult-oriented process, using complex legal language and the potential to again traumatise the children involved. Therefore, calls have been made for the asylum determination process to be made more child-friendly and, in particular, for its procedures to be explained in an age-appropriate and child-friendly manner.³⁰⁹

**Naruba Djimbonge [a minor] v Refugee Appeals Tribunal, Minister for Justice
and the HSE, unreported, High Court, 16 October 2006, No. 1293 JR**

N arrived in Ireland as a 15-year-old unaccompanied child from the Democratic Republic of the Congo, who had been placed in the care of the Health Service Executive. When her application for asylum was refused by the Refugee Appeals Tribunal, she decided to apply for a judicial review of the decision in the High Court. However, as she was a child, the Rules of the Superior Courts required her to bring any proceedings through a “next friend”, that is, an adult who can act for a child who does not have a legal guardian and is too young to bring a legal action herself. When

³⁰² If identified at a port of entry, some unaccompanied migrant children may even have been administratively registered as having been refused leave to land although allowed to physically enter the country. Joyce and Quinn, pp. 30 and 70.

³⁰³ Joyce and Quinn, pp. 23 and 27.

³⁰⁴ A *guardian ad litem* is an independent representative appointed by the court to both ensure that the views of the child are heard by the court and to advise the court on the best interests of the child. Guardians may be appointed by judges for the purposes of appeals or court order applications but it is uncommon. Joyce and Quinn, p. 46.

³⁰⁵ Committee on the Rights of the Child, concluding observations on the report of Ireland (CRC/C/IRL/CO/2), para. 64.

³⁰⁶ Joyce and Quinn, pp. 46-47.

³⁰⁷ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

³⁰⁸ Joyce and Quinn, p. 48.

³⁰⁹ *Ibid.*, p. 50.

the Health Service Executive refused to act as her “next friend”, she instructed her own solicitor to challenge the need for such an adult, arguing that this rule breached her rights under article 6 of the ECHR and her constitutional right to have access to the courts. The High Court accepted these arguments and granted her leave to apply for judicial review without a “next friend”.

O. [a minor] & Ors v MJELR & Ors [2010] IEHC 297

O. arrived in Ireland in December 2006 as an unaccompanied asylum seeker and applied for refugee status. At the time of the High Court’s decision, the appellant was in the care of his brother, who had been recognised as a refugee by the Minister for Justice, Equality and Law Reform.

The applicant had sought asylum status on the basis of a fear of persecution by both the Government of Afghanistan and the Taliban. His application for asylum was considered in the first instance by the Refugee Application Commissioner, who had found that the applicant had failed to establish a well-founded fear of persecution and recommended that he should not be declared a refugee. The applicant appealed against the Commissioner’s report and recommendation to the Refugee Appeals Tribunal, which held that neither aspect of his claim was credible or well-founded and, accordingly, affirmed the recommendation of the Refugee Applications Commissioner.

The child then sought a judicial review of the manner in which the Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal had reached their decisions. In particular, it was asserted that they had given insufficient weight to the fact that he was a child and had also failed to apply a liberal benefit of the doubt. At the hearing, the child’s representative also asserted that the court must have regard to the well-established principle that in the context of legal proceedings which impact on the child, the fundamental principle to which the courts must have regard is that of the best interests of the child.

The High Court found that the decisions reached in relation to future persecution by the Afghan Government were lawful but it did find that the conclusions reached on the child’s claimed fear of persecution by the Taliban were largely and unlawfully based on speculation and conjecture.

The High Court held that the proper approach would have been to consider the Appellant’s subjective credibility in relation to his claim of fear of the Taliban and being forced by them to become a child soldier. In doing so, a liberal benefit of the doubt should have been applied as he was a child. Therefore, it quashed the decision reached by the Refugee Appeals Tribunal.

4. Italy

Under the Italian Immigration Act of 1998, unaccompanied or separated migrant children can be returned to their country of origin only if it is established that it is in their best interests to do so. It is incumbent upon the Committee for Foreign Children to consider all options for a durable solution for a non-asylum-seeking child and to decide whether or not to order the assisted return of the child to his or her country of origin. If the Committee for Foreign Children concludes that the assisted return is possible and that it is in the child’s best interests, the case is taken to the Youth Court, which authorizes his or her return. The child may appeal against this decision to the ordinary or the administrative courts.³¹⁰

The Committee for Foreign Children must initiate a process of family tracing and ascertain whether the child’s family is willing to have the child returned to it and that there is no serious risk of neglect or abuse if he or she is returned. An unaccompanied or separated child must also consent to any such return. In addition, local authorities are required to report on the child’s level of integration in the local community. Nevertheless, there have been cases that indicate that a decision was

³¹⁰ Italian report for the EMN comparative study, *Unaccompanied Minors: Quantitative Aspects and Reception, Return and Integration Policies. Analysis of the Italian Case for a Comparative Study at the EU Level*, 2009, pp. 14-15.

made to enforce a child's return without these safeguards being adhered to.³¹¹ It has also been reported that sometimes an assisted return does not take place even if the child requests one.³¹²

In Italy, Youth Courts have a special composition, which is designed to reflect the diversity of competences and knowledge that is required to address the issues involving children that come before these specialised courts.³¹³ Each court is composed of two "regular judges" and two "honorary judges", who are specialised in the humanities (most commonly, pedagogy and psychology).³¹⁴ As indicated below, the Italian Supreme Court has held that the special composition and expertise of these courts is required in all cases involving children, as a safeguard to ensure proper consideration of the child's best interests.

Regional Administrative Court (*Tribunale Regionale di Giustizia Amministrativa del Trentino-Alto Adige*) decision no. 354/02, of 07.10.2002

The Administrative Court reversed the decision by the Committee for Foreign Children, which had ordered the assisted return of a child to Albania against the child's express will and held that, by doing so, the Committee had breached articles 3 and 12 of the CRC and also had not acted in accordance with the 1998 Immigration Act.

The child had entered Italy unaccompanied and illegally and had been entrusted by the Youth Court of Trento to the custody of the local Social Welfare Services, which had placed him in a host community, *Comunità Alloggio di Palazzo Onda*. After some initial integration problems, the child had started an educational programme at a local middle school, with positive results. At the time of the proceedings before the Administrative Court, the child was registered in the first year of a professional training course at the *Centro Formazione Professionale di Trento*.

One year after the child's arrival in Italy, the Committee for Foreign Children had ordered his assisted return to Albania, where his parents lived. The Administrative Court noted that the child was integrated in the local community, was progressing at school and was creating positive social ties. The Court also noted that his sister and brother-in-law were living in Italy on a lawful basis and were willing to accommodate and take care of him and that his parents wanted him to remain in Italy in order to finish his studies. Therefore, the Court held that it would not be lawful to return him to Albania.

Moreover, the Court recalled that the CRC establishes in article 3 that "in all actions concerning children...the best interests of the child shall be a primary consideration" and that, in article 12, the CRC guarantees to "the child...the right to express [his or her] 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". The Court concluded from the reports submitted to it that it was the child's wish, as well as that of his parents, to remain in Italy, a country certainly in a better situation than Albania to offer the child wider opportunities for an education and to integrate into the community and the labour market.

Supreme Court (*Corte Suprema di Cassazione*) decision no. 1349, of 26.05.2008

The Supreme Court annulled the decision by the Court of Appeal of Rome, which had ordered the extradition to Romania of a 19-year-old girl, who had been convicted of theft in Romania when she was still a child. The girl had been caught shoplifting when she was 14 years old and had been sentenced to imprisonment for two years, following which the child and her family had escaped to Italy. The judicial authorities in Romania had issued a European Arrest Warrant for

³¹¹ That was, for instance, the case with the Regional Administrative Court of Trentino-Alto-Adige decision No. 284/02 of 22 August 2002.

³¹² Italian report for the EMN comparative study, p. 30.

³¹³ See www.minoriefamiglia.it/download/santini-go.PDF [25.09.2011].

³¹⁴ See www.tribunaledeiminori.it/ [25.09.2011].

the girl, who was arrested in Rome and placed in prison pending extradition.

The Court of Appeal of Rome had granted the request for extradition on the grounds that all the legal requirements had been met, since the facts described in the European Arrest Warrant corresponded to the necessary elements of the crime of aggravated theft as established by the Italian legal system and the prison sentence to be served was not less than four months. Furthermore, the Court of Appeal considered that the Romanian legal system was capable of making an individual assessment of the child's capacity and intent, since under the Romanian Criminal Code children between 14 and 18 years of age could be held criminally responsible only if it was proved that the child was capable of forming his or her own views. The Court of Appeal had held that it should be presumed that the Romanian judicial authorities had made such an assessment in this case.

However, the Supreme Court disagreed and held that nothing in the judicial decision upon which the European Arrest Warrant was based or in any other action undertaken by the Romanian judicial authorities indicated that in practice there had been an assessment of the child's capacity to form her own views for the purpose of determining her criminal responsibility. The Supreme Court noted that the Court of Appeal should have given due consideration to this fact and should have enquired with the Romanian authorities in order to ascertain whether an assessment of the child's capacity to form her own views had been conducted.

The Supreme Court quashed the Court of Appeal's decision on the grounds that it had not considered whether the appellant could be held criminally responsible at the time of the events, which was a prerequisite for authorising the extradition, and ordered the girl's release from prison, if she was not being detained for any other reason. The Supreme Court did not, however, return the case to the Court of Appeal of Rome for a new decision, because it held that in an extradition procedure involving a child at the time of the events, the competent judicial authority should be the Youth Section of the Court of Appeal and not the Court in its ordinary composition.

The Supreme Court held that the assessment of the child's capacity to form his or her views requires the intervention of judges who are specialised in dealing with children. The Supreme Court recalled the Constitutional Court decision of 1983, which had stressed the need to submit matters pertaining to the "complex dimension of a child" to a specialised court composed of not only judges but also of experts in the areas of biology, psychiatry, anthropology, criminology, pedagogy or psychology, which had the technical expertise and the professional ability to make an adequate evaluation of the child's personality.

The Supreme Court held that the special competence of the Youth Courts should be recognised also in matters of judicial cooperation with foreign authorities, since the Italian judicial authorities had a duty to assess whether the foreign legal system establishes specific safeguards for children involved in criminal proceedings, an assessment that must necessarily be conducted by a court specialising in cases involving children.

5. Spain

Under Spanish immigration law, whenever the police authorities come across an unaccompanied or separated migrant child, they must immediately refer the child to the Child Welfare Service, which then verifies that the child has been abandoned and places him or her under its guardianship and puts in place any necessary protective measures. If the child applies for asylum, the Child Welfare Service also provides assistance and representation throughout the procedure.

There have been disputes as to whether unaccompanied or separated migrant children who apply for asylum should also be entitled to the assistance of an attorney during the asylum procedure. The High Court recognised that in some instances it may be reasonable to require that the child be assisted by an attorney, but accepted that in other cases the Child Welfare Service's interven-

tion was a sufficient guarantee that the legal protection of the child would be duly safeguarded. This was the case in the High Court's decision No. 765/2009, of 15 September 2010, in which it held that it was reasonable to require an unaccompanied or separated migrant child to be assisted by an attorney, particularly as the procedure before the Administration had taken place in French, but concluded that the provisions regarding the legal protection of the child had been duly safeguarded, since the Madrid Family and Children's Institute, under which guardianship the child had been placed, had ratified the child's request for asylum.

As noted earlier, the placement of the child under State guardianship does not prevent the child from being returned to his or her country of origin or to a third country, if it is established that such return is possible and in accordance with the child's best interests. However, children are not always given the opportunity to be heard in the course of the administrative proceedings leading to a possible deportation, and this has been held to be unlawful. Furthermore, because children are deemed to lack capacity to conduct legal proceedings for themselves, they were until recently denied the opportunity to appeal by themselves to the courts against administrative decisions that ordered their deportation, which left them completely defenceless if they did not agree with their guardian.³¹⁵ The Constitutional Court decision reviewed in this section changed that by expressly recognising the child's right to effective judicial remedies.

Constitutional Court (*Tribunal Constitucional*) decision no. 183/2008, of 22.12.2008

The Constitutional Court granted an appeal lodged by a child, of Moroccan origin, against a decision by the High Court of Madrid, which had held that the child lacked legal capacity, and ordered a fresh consideration of his case in the light of the child's fundamental right to an effective judicial remedy.

The child had been declared in "state of abandonment" by the Child Protection Services of the Community of Madrid, which had placed him under its own guardianship and had requested the central Administration to return the child to his country of origin, where his parents still lived. With the assistance of an attorney, the child, by then 17 years old, had challenged the central Government's decision to order his return to Morocco before the Administrative Court of Madrid, which had granted his appeal and annulled the deportation order. The State Attorney, the Public Prosecutor and the attorney for the Child Welfare Commission had appealed against this decision to the High Court of Madrid.

The High Court of Madrid had held that it was not necessary to rule on the substantive issue, since the case should not have been heard by the Administrative Court as the child lacked capacity and therefore could not instruct an attorney. The High Court noted that the child's attorney had not provided any evidence that he had been authorised to act on behalf of the child, who lacked capacity and had been placed under the guardianship of a public body. The High Court also noted that the judge in the lower court did not have the jurisdiction to compensate for the child's lack of capacity by appointing a defence attorney, since only the child's parents, acting as his legal representatives, or the Public Prosecutor's Office had the procedural capacity to appeal against the administrative decision on his behalf.

The Constitutional Court noted that, while it had not yet ruled on the procedural capacity of children to appeal against decisions which affected their personal integrity, it had often concluded that the child's right to effective judicial remedies had been adversely affected by the fact that he or she had not been heard in the course of the proceedings. The Constitutional Court recalled that it had constantly upheld the right of a child who was capable of forming his or her own views to be heard in all judicial or administrative proceedings which may affect him or her, as recognised by article 12 of the CRC and article 24 of the EU Charter of Fundamental Rights, as well as by

³¹⁵ Juan Ignacio de la Mata, "Dos Sentencias del TC Mejoran la Protección de la Infancia", *Abogados*, February 2009, p. 36.

domestic legal provisions on child welfare.

The Constitutional Court held that the High Court of Madrid had violated the child's right to an effective judicial remedy and, in particular, the right of access to a court and that the High Court's interpretation of the rules of procedure had been disproportionate, since it had failed to consider that it would prevent a person directly affected by an administrative decision having any means to challenge such a decision before a court. The Constitutional Court explained that the interpretation of the rules of procedure regarding legal capacity must be guided by a *pro actione* principle in order to avoid disproportionate decisions and the sacrifice of specially relevant interests, among which was the right of any child, capable of forming his or her views, to be heard by a court before the adoption of measures affecting his or her personal integrity. For this reason, any child who is capable of forming his or her views must be granted the right to address the courts, at any level, in order to defend his or her own personal integrity, even if this was not agreed by those who were responsible for providing him with legal representation.

High Court of Justice (*Tribunal Superior de Justicia de Madrid*) decision no. 291, of 10.03.2009

The High Court dismissed an appeal lodged by the State against a decision by the Administrative Court of Madrid, which had overruled an administrative order to remove a child of Moroccan origin to Morocco on the basis that several procedural safeguards had been ignored, including the right of the child to be heard in the course of the deportation procedure. The State had argued that the child had been heard, albeit not by the General State Administration, and had added that, in any case, an interview with the child was not always required.

The High Court endorsed the lower court's decision. It remarked that, under the law, it was for the General State Administration to decide on whether or not to remove the child after hearing the child and obtaining the opinion of the Child Protection Services. The High Court stressed that the only authority with competence to remove a child under State guardianship to his or her country of origin was the General State Administration and that therefore the child's views should have been heard by it. It was not sufficient for the General State Administration to rely on the fact that an interview had previously been conducted with the child by those with guardianship for the child, which was the Madrid Family and Children's Institute.

The High Court noted that the only document presented by the State had been its decision to remove the child to his country of origin and that that document made no reference to an interview with the child or to any evidence confirming that the conditions required for a reunification of the child with his family had actually been met. The High Court therefore concluded that there had been a breach of the procedural safeguards required in the repatriation procedure. It added that every child has the right to be heard in a repatriation procedure that concerns him or her and that this must take place with the best possible safeguards for the child, so the procedure must be a legally prescribed procedure and not a different one, conducted by a different authority. The High Court stressed that such procedural steps are essential and therefore indispensable in order to protect the child, given that it is the only point at which the child is able to respond to any allegations that could exert a decisive influence on the subsequent decision to return him or her.

The High Court also held that the fact that the child had not been heard by the decision maker gave rise to an effective and real lack of protection, and that it was not possible to be certain that the final decision would have been the same if the procedural safeguards had been in place. The High Court pointed out that the absence of an interview with the child produced a material lack of protection, given that it had deprived the child of the procedures that the law granted him in order to defend his rights.

6. United Kingdom of Great Britain and Northern Ireland

The United Kingdom does not have any form of guardianship despite campaigns for such provi-

sion being initiated by many NGOs over the last two decades. It is the view of the Government that unaccompanied or separated children are provided with sufficient representation and assistance by being allocated a social worker by the local authority in whose area they are accommodated and by the fact that there are regular reviews of their welfare needs, which are chaired by independent reviewing officers, who are also employed by that local authority, as are the advocates to whom the children may have access as children being looked after by a local authority.³¹⁶ However, research has indicated that “in reality, very few unaccompanied or separated migrant children received intensive personalised support from their social workers. In many cases, especially for those in semi-independent or supported accommodation, contact took place only when they called social workers to make an appointment with them”.³¹⁷ In addition, the National Association of Independent Reviewing Officers has stated that “a key feature of the IRO role is that they should provide an independent perspective unhindered by managerial or political pressure by the local authority. However, under the current arrangements, IROs are either employed directly by local authorities, or...work for them [under a] contract”.³¹⁸ The same is true of the advocates available to children in the care of a local authority. The Committee of the Rights of the Child³¹⁹ has drawn the attention of the United Kingdom Government to the fact that it had not yet considered appointing guardians for unaccompanied asylum seekers and migrant children and that it was concerned that there was no independent oversight mechanism, such as a guardianship system, for an assessment of reception conditions for unaccompanied children who have to be returned.

At present, all unaccompanied or separated children are entitled to free legal advice and representation, which is funded by the Legal Services Commission, if they apply for refugee status or any other form of international protection or a residence permit so that they can remain in the United Kingdom. However, changes to the legal aid system currently being debated by the United Kingdom Parliament³²⁰ will mean that they will not automatically be entitled to free legal aid for applications and appeals which do not relate to protection under the Refugee Convention or unlawful detention. However, they will remain entitled to free legal aid to challenge an unlawful age assessment or an unlawful decision about any accommodation or support that they may or may not be provided with by a local authority, in the Administrative Court division of the High Court and, if appropriate, in the Court of Appeal or the Supreme Court.

The UK Border Agency has also adopted child-friendly forms and procedures for determining asylum applications made by unaccompanied or separated children and a child’s age will also be taken into account in relation to any other applications. There is also guidance as to how appeals by unaccompanied children are to be conducted in the Immigration and Asylum Tribunal. In administrative courts, where claims for judicial review may be brought in relation to age assessments or actions by local authorities in relation to the accommodation and support provided to unaccompanied or separated migrant children, the child will have to act through an adult “litigation friend” and in any family court proceedings which may be initiated in relation to abuse by a parent or another adult, they will be provided with a children’s guardian for the purposes of those proceedings.

In its 2008 concluding observations,³²¹ the Committee of the Rights of the Child stated that it regretted that the principle of the best interests of the child was still not reflected as a primary

³¹⁶ This view was most recently articulated in a letter to ECPAT UK (End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes) from Damian Green M.P., Minister for Immigration, dated 25 May 2011, and from Tim Loughton, M.P., Parliamentary Under-Secretary of State for Children and Families, dated 31 May 2011.

³¹⁷ Laura Brownlees and Nadine Finch, *Levelling the Playing Field: A UNICEF UK report into provision of services to unaccompanied or separated migrant children in three local authority areas in England*, March 2010, p. 124.

³¹⁸ *Protocol for the Management of IROs within Local Authorities*, National Association of Independent Reviewing Officers website, 11 June 2011.

³¹⁹ Committee on the Rights of the Child, concluding observations on the report of the United Kingdom (CRC/C/GBR/CO/4, 20 October 2008), paras. 71 and 70.

³²⁰ The Legal Aid, Sentencing and Punishment of Offenders Bill.

³²¹ Committee on the Rights of the Child, concluding observations on the report of the United Kingdom (CRC/C/GBR/CO4), para. 26.

consideration in all legislative and policy matters affecting children in the United Kingdom.

The United Kingdom went some way towards acknowledging this when it introduced section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the Secretary of State for the Home Department to have regard to the need to safeguard and promote the welfare of all children in the United Kingdom and the Government has accepted that this applies to unaccompanied or separated children. The Government has issued guidance³²² on the implementation of that section and has also amended other policies relevant to those children to reflect that duty. However, the number of judicial reviews currently being brought asserting that section 55 has not been taken into account suggests that the policy has yet to be fully translated into consistent practice. Other cases also indicate that the policies relating to unaccompanied or separated children are not consistently applied.

R (on the application of Blerim Mlloja) v Secretary of State for the Home Department [2005] EWHC 2833 (Admin)

Blerim was an unaccompanied migrant child, who was an orphan from Albania. He applied for asylum in the United Kingdom when he was 15 years old. The UK Border Agency did not accept that he was a child and his application was considered in the adult asylum determination process. This meant that he was interviewed about his past persecution, but would not have been interviewed if he had been recognised as a child. In addition, as he was being treated as an adult, no weight was given to the fact that he was a child when his credibility was assessed. His application was refused but he was granted leave to remain until he was 18 on a discretionary basis. However, at the same time his local authority had accepted that he was a child and had placed him with a foster carer, with whom he forged a very close bond. Just after his 18th birthday, he was detained and informed that he was to be removed to Albania.

He applied for a judicial review of this decision on the grounds that the local authority had accepted that he was a child and had informed the Home Office that that was the case and it had not taken it into account, despite the fact that it was Home Office policy to rely on a local authority's assessment of a potential child's age. Mr. Justice Gibbs, sitting in the Administrative Court of the High Court, found that the fact that his asylum application had been considered on the grounds that he was an adult meant that the decision to refuse him asylum was procedurally and legally flawed and should be quashed. The Home Office was then required to interview him again even though it was accepted that he was now an adult and to make a fresh decision on his application. He was subsequently granted discretionary leave to remain in the United Kingdom for an initial period of three years on the grounds that he had established a very strong private life in the United Kingdom and that it would be disproportionate to remove him to Albania, where he no longer had any family or friends.

AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12

The Appellant was an unaccompanied child from Afghanistan, who arrived in the United Kingdom and applied for asylum. His age was initially disputed and therefore his application for asylum was determined within the adult asylum-determination process. However, at his asylum appeal the immigration judge, as they are now called, accepted that he was still a child. He had applied the wrong test when considering whether it would be safe to return the appellant to Afghanistan and found that he was not an unaccompanied child as he had an uncle in Kabul.

The Court of Appeal agreed with counsel for the appellant that a child is still an unaccompanied child, irrespective of whether or not there are adequate reception arrangements for him in his country of origin, if he or she arrives in the United Kingdom under the age of 18 unaccompanied

³²² *Every Child Matters: Change for Children - Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children* (Home Office UK Border Agency and the Department for Children, Schools and Families, November 2009).

by a responsible adult. The Court of Appeal also agreed that it was not sufficient for the Tribunal to ask whether it was “reasonably likely” that adequate reception arrangements were in place. It had to be shown that the Secretary of State was “satisfied” that that was the case.

Counsel for the appellant and also counsel for the intervener, the Medical Foundation for the Care of Victims of Torture, also relied on article 3 of the CRC and the need to give weight to that article as a guiding principle. The Court of Appeal made no finding on this submission but went on to find that the decision to dismiss his appeal had been unlawful because of the procedural errors which had taken place. It also found that he had also suffered a detriment, as the Secretary of State had not gone on to grant him discretionary leave to remain until he was 18, when it had been disclosed that he was a child. Therefore, he had deprived him of the opportunity to apply for further leave to remain as he approached 18 and a right of appeal if the application was refused.

**R (on the application of Medical Justice) v Secretary of State for
the Home Department [2010] EWHC 1925 (Admin)**

The Secretary of State for the Home Department had adopted a policy on 11 January 2010 in relation to migrants who sought a judicial review to stop their removal from the United Kingdom very shortly before they were due to be removed from the country. This policy gave individuals who had made unsuccessful applications to enter and remain in the United Kingdom and who fell within certain categories little or no notice of their removal directions. One of the classes of individuals who were affected by this policy was unaccompanied children who were being removed to a third country under Dublin II procedures. The policy given to case workers in the UK Border Agency stated that “you may not need to provide the standard notice of removal directions prior to removal where you believe that it is not in the best interests of unaccompanied children because of an abscond risk. This must be considered in liaison with Children’s Services and the receiving country”.

By the time this case came to court, the policy had been suspended after Mr. Justice Collins gave permission in a case involving two unaccompanied children who were taken from their homes at 4 a.m. for removal that same day. M managed to prevent her own removal but was injured in the process and T was actually removed to Italy (R (M & T) v Secretary of State for the Home Department [2010] EWHC 435 (Admin)). Mr. Justice Silber held that the policy was not unlawful as the UK Border Agency had been advised by social workers from the appropriate local authority and its own Children’s Champion and the child was provided with access to justice and his or her best interests were treated as a primary consideration.

C. GOOD PRACTICE

Drawing from the cases reviewed and those discussed at the Judicial Colloquium, the following can be identified as good practice:

- Finding that a child must be provided with a guardian as soon as he or she is identified as an unaccompanied or separated child
- Finding that a child must be provided with an independent interpreter, if one was needed, and a legal representative at all stages of the asylum-determination process
- Finding that the child must be given an opportunity to put his or her own account of events to a decision maker and that it was not sufficient for the decision maker to merely read what he or she had said to his or her guardian
- Finding that it was in a child’s best interests to be heard in the course of judicial proceedings if he or she had requested in writing that he or she wanted to appear in person

- Permitting a child to instruct his own legal representative if he or she had the intellectual but not the legal capacity to do so when those accommodating him or her would not act as his or her litigation friend
- Considering that a child's express wish to remain in the host country must be given due weight when deciding whether to order his or her assisted return to his or her country of origin
- Finding that when a child's application for asylum is considered by an administrative body or on appeal a liberal benefit of the doubt should have been applied when assessing the credibility of the child's account of the events on which he or she grounded his asylum request
- Finding that an asylum-determination process was invalid if the child had not been granted access to the procedures appropriate to his or her status as a child
- Finding that a child must be provided with a right of appeal if it was proposed to return him or her to his or her country of origin within a programme of assisted returns.

CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

The study and the Judicial Colloquium set out to answer several key questions (in *italics* below) about the application of article 3 (best interests of the child) developed from jurisprudence across Europe dealing with migrant children, in particular children with an irregular immigration status and unaccompanied or separated children. In doing so, the study identified good practices from judicial practice at the conclusion of each chapter. As suggested by a number of the judges participating in the Judicial Colloquium and as a key recommendation emanating from the study, OHCHR and UNICEF suggest that these cases and this study can serve as important references for courts across Europe as they address important issues for migrant children. These good practices are set out below and should be widely circulated to relevant courts, judicial bodies, administrative bodies and organisations assisting irregular migrant children.

Do courts actually apply the best interests principle when deciding cases that involve migrant children? Is article 3 of the CRC directly invoked by the courts as grounds for the decisions? If so, is it invoked alone or in conjunction with other international or domestic legal provisions? What is the weight accorded to best interests determination in reaching final decisions? Are the courts in any way influenced in their decisions by the comments and reports issued by the Committee on the Rights of the Child and other treaty bodies on the best interest principle?

National courts often apply the best interests principle when deciding cases that involve migrant children. However, there are considerable differences in the judicial interpretation and implementation of article 3 of the CRC, not only between EU member States but also within the same country. Some national jurisdictions expressly reject the direct applicability of article 3 of the CRC, on the grounds that it lacks a sufficiently precise and complete content, while national courts in France, Italy and Spain, for example, make frequent references to article 3 as the basis for their decisions.

In many instances, the principle of the best interests of the child is invoked without direct reference to article 3 of the CRC, which may be explained by the fact that the best interests principle has been incorporated into most domestic legal systems and EU Directives and Regulations.

In general, when article 3 of the CRC is invoked by national courts, it rarely stands alone as grounds for the decision, but is usually invoked in the context of other international and domestic legal provisions. It is common that article 3 of the CRC is invoked in conjunction with articles 3 (prohibition of torture) and 8 (right to respect for private and family life) of the ECHR. National courts also invoke other provisions of the CRC, such as articles 2 (non-discrimination), 9 (family unity), 24 (right to health and access to health care services), 26 (social security), 27 (adequate standard of living), 28 (right to education) and 31 (right to rest and leisure).

Not all national courts display the same understanding of the scope of the CRC, as that developed in the general comments and concluding observations issued by the Committee on the Rights of the Child. Furthermore, the Committee's comments and observations are usually not mentioned by national courts in their decisions.

When courts do apply the best interests principle, how do they go about determining its content? What are the factors that the courts consider when they have to decide what is in the best interest of an individual migrant child? When courts decide, for example, to confirm an administrative decision to return an unaccompanied child to his or her country of origin, how do they make sure that that solution is in the child's best interest? What relevance do the courts ascribe to the more substantive provisions of the CRC in determining the best interest of an individual child? Is the best interests principle a mere procedural guarantee or is it also used as a substantive standard?

National courts apply the best interests principle both as a procedural safeguard and as a sub-

stantive standard. Examples of the first are the cases in which national courts hold that the best interests principle requires that the child be given the benefit of the doubt in age assessment and asylum procedures or the cases in which national courts require that the child's right to be heard and the capacity to act before a judicial court be recognised. The principle of the best interests of the child is applied as a substantive standard when national courts consider what might be a durable solution for an individual migrant child, for example, whether to return the child to his or her country of origin or to authorise family reunification in the host country.

When courts apply the best interests principle as a substantive standard they tend to consider first and foremost the possibility of reuniting the child with his or her parents, in the country of origin or in the country of destination, whenever the parents prove to be capable of exercising their parental duties to the benefit of the child. When balancing family reunification and access by the child to better material conditions and access to schools and medical care which are not available in the country where the parents live, national courts do not always follow the same path. In some cases, material conditions are deemed irrelevant so long as they are not extremely dire, as seen in decisions from Belgian, French and Portuguese courts, while in other cases the opportunities offered for work and study in the host country supersede the child's interest in family reunification, as seen in decisions from Italian courts.

National courts consider that a child's return to his or her country of origin is unlawful when administrative authorities have failed to obtain reliable proof that there are adequate arrangements for the child's reception and care in that country. Special emphasis is placed on tracing the family in the country of origin, in particular when that country is at war. National courts are adamant that administrative decisions to return the child to his or her country of origin must offer a clear justification and must show that the individual circumstances of the child were taken into consideration.

Relying on the case law from the ECtHR, national courts tend to adopt a narrow interpretation of family life, which only exceptionally might be extended beyond the biological nuclear family. However, decisions from French, Italian and Spanish courts show an increased willingness to recognise other forms of family life, as is the case of parental rights based on *kafalah* under Islamic law and with guardianship by an aunt or uncle.

In principle, national courts prevent the removal or deportation of the parents of migrant children residing in their countries whenever such measures are deemed to be detrimental to the best interests of the child. However, national courts are also very aware of the need to ensure that migrant children are not being used by their parents in order to obtain residence permits and require verification of the family bonds being relied upon.

National courts emphasise the need to provide age-appropriate accommodation for unaccompanied or separated migrant children and to ensure that children placed in reception facilities have access to all the rights enshrined in the CRC. In some instances, national courts require that the administrative authorities continue to provide accommodation and other services to them after they become adults and until they are removed from the country. National courts tend to quash administrative decisions that attempt to limit or place conditions on the entitlements of migrant children to health care, education or social benefits by requiring the production of a valid residence permit.

National courts do not, in principle, oppose the placement of children in reception centres with their parents pending their removal or deportation, but some decisions find that it is unlawful to place very young children in reception facilities, even when they are accompanied by their parents, and equate such placement with inhuman treatment for the purpose of article 3 of the ECHR. National courts usually find that transit zones at borders do not enjoy any extraterritorial status and hold that they fall under the jurisdiction of the appropriate court and also find that any child

placed in such zones is entitled to assistance under the relevant child welfare legislation in force.

National courts are generally aware of the sensitive character of age assessment for unaccompanied and separated migrant children and are concerned about guaranteeing that age assessment procedures are conducted in an objectively sound manner and provide the necessary procedural safeguards for those whose age is disputed. National courts hold that age assessments cannot be based solely on the physical appearance of the person whose age is disputed and should be conducted on the basis of a combination of different methods, which may include cross-checking documents related to a child's identity, interviews and medical examinations. Mindful of the margin of error involved in medical examinations, national courts tend to find that the results of such examinations are inconclusive.

National courts place the appropriate emphasis on a child's right to be heard in the course of administrative and judicial proceedings and on the need to give due consideration to the child's views. Some Italian courts, for example, consider that a child's express wish to remain in the host country must be given due weight when deciding whether to order his or her assisted return to the country of origin. Some national courts also hold that in the course of administrative and judicial proceedings, the child must be assisted by a guardian and a legal representative and also by an independent interpreter, if the child is not proficient in the language being used in these proceedings. National courts show great concern about the assistance and care provided to unaccompanied and separated children, and require administrative authorities to take on a role as the child's guardians as soon as he or she is identified, as indicated by decisions of the Austrian and French courts. Some national courts hold that a child has the right to be treated as a child and stress that any assessment of the credibility of a child's statement in the course of administrative and judicial proceedings place due weight on the child's age and maturity. National courts recognise the child's right to challenge administrative decisions, appeal to the appropriate court or tribunal or bring a claim for judicial review. They also recognise that children who are capable of forming their own views must be granted the right to address the courts by themselves, at any level, even if this is not agreed by those who are responsible for providing them with legal representation or when they do not have a legal representative.

Nevertheless, national courts tend to show a reluctance to intervene and very seldom reverse administrative decisions on points of substance. Even when they do reverse administrative decisions, national courts often stress that it is up to the decision makers to make the individual assessments of what is in the best interests of the child.

ANNEX

CONSOLIDATED LIST OF GOOD PRACTICES

A. GOOD PRACTICES ON AGE ASSESSMENT

- Taking into account the wide margin of error involved in medical or dental assessment examinations and therefore finding that the results of such examinations are inconclusive or that it is appropriate to rely on the lowest age indicated within that margin of error
- Finding that the reliability of the Greulich and Pyle and other radiological methods of age assessment is extremely doubtful and should not be used to assess age
- Concluding that radiological examinations, for non-medical reasons, constitute an interference with the child's development and could only be justified in such circumstances by very strong reasons of general interest or public order. Concluding that the same medical reasons to limit radiological examination for national children should apply to all children in the territory
- Requiring experts to give full details of their professional qualifications, the methodology which they have applied and the margin of error attached to such methods
- Upholding the principle of giving the child the benefit of the doubt when expert evidence is neither conclusive nor determinative on the basis that this approach is in the best interests of the child
- Finding that age assessments cannot be based solely on the physical appearance of the person whose age is disputed and should be conducted on the basis of a combination of different methods, which may include consideration of any identity documents produced by the child, interviews with the child and others and medical examinations
- Imposing strict procedural requirements when an age assessment was undertaken by a social worker or other state employee so that the child was told the reasons for doubting his or her age and was given the opportunity to respond to any allegations about the validity of his or her identity or documents or the credibility of his or her account of past events
- Providing the child with the opportunity to appeal against or seek a judicial review of any decision to refuse to accept his or her age
- Determining that it is a task for the courts to assess the age of a child in the light of all available evidence if there is no agreement between the authorities and the child concerned

B. GOOD PRACTICES ON DURABLE SOLUTIONS

- Quashing a decision to return a child to his or her country of origin without his or her guardian and when he or she had no family members to assist him or her there and when there were no reception arrangements in place for him or her
- Finding that it would be in a child's best interests to return to live with his or her parents in his or her country of origin when they were able to provide him or her with adequate care and supported his or her return

- Deciding that a child should not be returned to a country at war, despite the fact that he or she had been sent to the country of destination by his or her mother, when it had not been possible to trace his or her mother and he or she had not had any contact with her for two years
- Deciding that it was not in the best interests of a child to be returned to his or her country of origin when his or her mother was in the country of destination and his or her father, who remained in his or her country of origin, could not care for him or her
- Finding that it would not be in a child's best interests to be returned to a country of origin with one parent if the other parent would remain in the country of destination
- Acknowledging that the best interests of any children in a family must be given particular weight when they have been in a host country for some years, whatever is alleged against their parent
- Finding that if it was proposed to return a child to his or her country of origin, his or her welfare would be safeguarded and promoted only if the State took steps to trace his or her family before any decision was taken to remove him or her
- Finding that before a child could be returned to institutional care in a country of origin, a proper assessment had to be conducted into the adequacy of the proposed reception and care arrangements
- Recognising other forms of family life besides the nuclear family for the purpose of family reunification, including parental rights based on *kafalah* under Islamic law and with guardianship by an aunt or uncle
- Protecting the child from removal or deportation whenever the child's irregular immigration status is due to his or her parents' ignorance or neglect of legal immigration procedures
- Demanding that administrative decisions to return the child to his or her country of origin must offer a clear justification and must show that the individual circumstances of the child were taken into consideration
- Finding that it is in the best interests of a child to permit him or her to make his or her own application for residence and to become a party in any subsequent court proceedings if those in whose guardianship he has been placed neglect to do so
- Demanding that the public agencies responsible for providing the child with legal guardianship act diligently in order to obtain a residence permit for any child approaching 18 years of age who otherwise would be left with an irregular immigration status upon becoming adult and therefore in an extremely vulnerable situation
- Finding that a parent would be protected from expulsion only if he or she had a close relationship with a child who was to remain in a country of destination and was contributing to his or her subsistence and development

C. GOOD PRACTICES ON ACCESS TO SERVICES

- Quashing administrative decisions to refuse migrant children access to health care or social benefits purely because a parent could not produce a valid residence permit provided that there was no risk that the parents may use these benefits for their own benefit

- Quashing a decision to refuse a child access to nursery on the basis that the mother did not have a valid residence permit
- Finding that excluding a child with an irregular immigration status from non-compulsory education was unlawful
- Recognising the entitlement to child benefits with retroactive effect to the moment when the application for asylum or residence permit was lodged
- Finding that it was not in a migrant child's best interests to be accommodated on his or her own in an adult reception centre
- Finding that a migrant child accommodated in a residential setting designed for unaccompanied asylum-seeking children should be provided with sufficient free time, in accordance with article 31 of the CRC
- Finding that when unaccompanied migrant children reached 18, they had the same entitlement to leaving care services as any other child in that host country
- Finding that transit zones at borders do not enjoy any extraterritorial status and that they fall under the jurisdiction of the appropriate court and that any child placed in such a zone is entitled to assistance under relevant child welfare legislation
- Finding that it is unlawful to place very young children in reception facilities, even when they are accompanied by their parents, and equating such placement with inhuman treatment for the purpose of article 3 of the ECHR

D. GOOD PRACTICES ON PROCEDURAL SAFEGUARDS

- Finding that a child must be provided with a guardian as soon as he or she is identified as an unaccompanied or separated child
- Finding that a child must be provided with an independent interpreter, if one were needed, and a legal representative at all stages of the asylum-determination process
- Finding that the child must be given an opportunity to put his or her own account of events to a decision maker and that it was not sufficient for the decision maker to merely read what he or she had said to his guardian
- Finding that it was in a child's best interests to be heard in the course of judicial proceedings if he or she had requested in writing that he or she wanted to appear in person
- Permitting a child to instruct his or her own legal representative if he or she had the intellectual, but not the legal capacity, to do so when those accommodating him or her would not act as his or her litigation friend
- Considering that a child's express wish to remain in the host country must be given due weight when deciding whether to order his or her assisted return to his or her country of origin
- Finding that when a child's application for asylum is considered by an administrative body or on appeal, a liberal benefit of the doubt should have been applied when assessing the credibility of the child's account of the events on which he or she based his or her asylum request

- Finding that an asylum-determination process was invalid if the child had not been granted access to the procedures appropriate to his or her status as a child
- Finding that a child must be provided with a right of appeal if it was proposed to return him or her to his or her country of origin within a programme of assisted returns.

LIST OF CASES REFERRED TO IN THE PRESENT STUDY

Austria

Supreme Court (*Oberster Gerichtshof*) decision no. 7 Ob 209/05v, of 19.10.2005
 Administrative Court (*Verwaltungsgerichtshof*) decision no. 2005/20/0267, of 21.12.2006
 Administrative Court (*Verwaltungsgerichtshof*) decision no. 2005/01/0463, of 16.04.2007
 Asylum Court (*Asylgerichtshof*) decision no. S 400.131-1/2008/2E, of 14.07.2008

Belgium

Court of First Instance (*Tribunal de Première Instance de Bruxelles, Chambre du Conseil*) decision of 16.10.2002
 Court of Arbitration (*Cour d'Arbitrage*) decision no. 189/2004, of 24.11.2004
 Court for Alien Law Litigation (*Conseil du Contentieux des Étrangers*) decision no. 8230, of 29.02.2008
 Court for Alien Law Litigation (*Conseil du Contentieux des Étrangers*) decision no. 53321, of 17.12.2010
 Court for Alien Law Litigation (*Conseil du Contentieux des Étrangers*) decision no. 58112, of 18.03.2011

France

Council of State (*Conseil d'Etat, 2ème et 6ème Sous-Sections Réunies*) decision no. 161364, of 22.09.1997
 Youth Court (*Tribunal pour Enfants de Bobigny*) decision of 01.09.2001
 Council of State (*Conseil d'Etat, 5ème Sous-Section*) decision no. 236148, of 02.06.2003
 Council of State (*Conseil d'Etat, Statuant au Contentieux*) decision no. 249369, of 24.03.2004
 Supreme Court (*Cour de Cassation, Assemblée Plénière*) decision no. 02-30.157, of 16.04.2004
 Court of Appeal (*Cour d'Appel de Lyon, Chambre Spéciale des Mineurs*) decision no. 04/97, of 26.04.2004
 Youth Court (*Tribunal pour Enfants de Bobigny*) decision no. 104/0462, of 22.08.2004
 Supreme Court (*Cour de Cassation, 1ère Chambre Civile*) decision no. 02-20613, of 18.05.2005
 Supreme Court (*Cour de Cassation, 2ème Chambre Civile*) decision no. 04-30.837, of 14.09.2006
 Supreme Court (*Cour de Cassation, 2ème Chambre Civile*) decision no. 05-12.666, of 06.12.2006
 Administrative Court of Appeal (*Cour Administrative d'Appel de Nantes*) decision no. 06NT02028, of 29.12.2006
 Supreme Court (*Cour de Cassation, 1ère Chambre Civile*) decision no. 06-17238, of 22.05.2007
 Court of Appeal of Paris (*Cour d'Appel de Paris, 24ème Chambre, Section B*) decision no. 2006/22156, of 01.06.2007
 Administrative Court of Appeal (*Cour Administrative d'Appel de Lyon*) decision no. 07LY02516, of 08.07.2008
 Court of Appeal (*Cour d'Appel de Rennes*) decision no. 271/2008 of 29.09.2008
 Supreme Court (*Cour de Cassation, 2ème Chambre Civile*) decision no. 07-11.328, of 23.10.2008
 Administrative Court (*Tribunal Administratif de Rennes*) decision no. 0900239, of 29.01.2009
 Supreme Court (*Cour de Cassation, 1ère Chambre Civile*) decision no. 08-14.125, of 25.03.2009
 Council of State (*Conseil d'Etat, 10ème et 9ème Sous-Sections Réunies*) decision no. 305031, of 09.12.2009
 Constitutional Counsel (*Conseil Constitutionnel*) decision no. 2010-614 DC, of 04.11.2010
 Supreme Court (*Cour de Cassation, Assemblée Plénière*) decisions no. 09-71.352 and 09-69.052, of 03.07.2011

Ireland

Moke v The Refugee Applications Commissioner [2005] IEHC 317
 Odunbaku (a minor) v Refugee Applications Commissioner & Ors [2006] IEHC 28
 Naruba Djimbonge [a minor] v Refugee Appeals Tribunal, Minister for Justice and the HSE, unreported, High Court, 16 October 2006, No. 1293 JR
 O. [a minor] & Ors v MJELR & Ors [2010] IEHC 297F

Italy

Regional Administrative Court (*Tribunale Regionale di Giustizia Amministrativa del Trentino-Alto Adige*) decision no.

284/02, of 22.08.2002

Regional Administrative Court (*Tribunale Regionale di Giustizia Amministrativa del Trentino-Alto Adige*) decision no. 354/02, of 07.10.2002

Court of First Instance (*Tribunale di Milano, sezione I civile*) decision no. 2380/08, of 11.02.2008

Supreme Court (*Corte de Cassazione, Sezione Prima Civile*) decision no. 7472, of 20.03.2008

Supreme Court (*Corte Suprema di Cassazione*) decision no. 1349, of 26.05.2008

Administrative Court (*Tribunale Amministrativo Regionale per il Lazio*) decision no. 32718/10, of 07.10.2010

Supreme Court (*Corte de Cassazione, Sezioni Unite*) decision no. 21799, of 25.10.2010

Labour Court (*Tribunale di Montepulciano, Giudice del Lavoro*) decision no. 27/2010, of 17.02.2011

Portugal

Court of Appeal (*Tribunal da Relação de Guimarães*) decision no. 864/08-2, of 24.04.2008

Supreme Court (*Supremo Tribunal de Justiça*) decision no. 66/06.OPJAMD-A.S1, of 17.02.2011

Spain

Constitutional Court (*Tribunal Constitucional*) decision no. 236/2007, of 07.11.2007

Constitutional Court (*Tribunal Constitucional*) decision no. 183/2008, of 22.12.2008

High Court of Justice (*Tribunal Superior de Justicia de Madrid*) decision no. 291, of 10.03.2009

Court of First Instance (*Juzgado de Primera Instancia 28, Madrid*) decision no. 202/2010, of 04.05.2010

Administrative Court (*Juzgado Contencioso Administrativo 12, Madrid*) decision no. 603/2010, of 14.09.2010

High Court (*Audiencia Nacional, Sala de lo Contencioso Administrativo*) decision no. 765/2009, of 15.09.2010

High Court of Justice (*Tribunal Superior de Justicia de Madrid*) decision no. 800/2010, of 24.09.2010

Administrative Court (*Juzgado Contencioso-Administrativo, Madrid*) decision no. 645/2010, of 29.09.2010

Court of First Instance (*Juzgado de Primera Instancia 16, Barcelona*) decision no. 406/2010, of 18.03.2011

Court of First Instance (*Juzgado de Primera Instancia 19, Barcelona*) decision no. 107/2011, of 02.05.2011

Court of First Instance (*Juzgado de Primera Instancia 51, Barcelona*) decision no. 141/2011, of 13.05.2011

Netherlands

Court in The Hague (*Voorzieningenrechter Rechtbank's-Gravenhague*) decision no. 03/284, of 23.04.2003

United Kingdom of Great Britain and Northern Ireland

R (on the application of B) v The Mayor and Burgesses of the London Borough of Merton [2003] EWHC 1689 (Admin)

R (on the application of Behre) v London Borough of Hillingdon [2003] EWHC 2075 (Admin)

R (on the application of Blerim Mlloja) v Secretary of State for the Home Department [2005] EWHC 2833 (Admin)

T v Secretary of State for the Home Department, Special Immigration Appeals Commission Appeal no. SC/31/2005

AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12

R (on the application of (1) H (2) Barhanu (3) B) v (1) Wandsworth London Borough Council (2) Hackney London Borough Council (3) Islington London Borough Council and the Secretary of State for Education and Skills [2007] EWHC 1082 (Admin)

CL (Vietnam) v Secretary of State for the Home Department [2008] EWCA Civ 1551

R (on the application of A) (FC) v London Borough of Croydon and one other action; R (on the application of M) (FC) v London Borough of Lambeth and one other action [2009] UKSC 8

R (A) v. London Borough of Croydon; R (WK) v Kent County Council [2009] EWHC 939 (Admin)

The Queen on the application of F v London Borough of Lewisham and others [2009] EWHC 3542 (Admin)

R (on the application of SO) v London Borough of Barking and Dagenham and the Secretary of State for the Home Department and the Children's Society [2010] EWCA Civ 1101

R (on the application of Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin)

ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4

R (FZ) v London Borough of Croydon [2011] EWCA Civ 59

DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305

Court of Justice of the European Union

Baumbast and R v Secretary of State for the Home Department, C-413/99, judgement of 17.09.2002

Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department, C-200/02, judgement of

19.10.2004

European Parliament v Council of the European Union, C-540/03, judgement of 27.06.2006

Dynamic Medien Vertriebs GmbH v Avides Media AG, C-244/06, judgement of 14.02.2008

Gerardo Ruiz Zambrano v Office national de l'emploi, C-34/09, judgement of 08.03.2011

European Court of Human Rights

Boultif v Switzerland, application no. 54273/00, judgement of 02.08.2001

Rodrigues da Silva and Hoogkamer v Netherlands, application no. 50435/99, judgement of 31.01.2006

Mubilanzila Mayeka and Kaniki Mitunga v Belgium, application no. 13178/03, judgement of 12.10.2006

Uner v Netherlands, application no.4641/99, judgement of 18.10.2006

Maslov v Austria, application no. 1638/03, judgement of 23.06.2008

Neulinger and Shuruk v Switzerland, application no. 41615/07, judgement of 06.07.2010

Osman v Denmark, application no. 38058/09, judgement of 14.06.2011

Nunez v Norway, application no. 55597/09, judgement of 28.06.2011

