

ICM Spotlight on the EU: Procedural safeguards

WHAT'S AT THE HEART OF THE MATTER?

Children in migration may be involved in diverse administrative or judicial procedures in the EU, at the border, on the territory and when transfer to another country is being addressed. These procedures should be adapted to the needs and rights of children. This typically involves the following elements:

- Ensuring the best interests are a primary consideration in all decisions affecting them
- Appropriate identification procedures (identification as unaccompanied or separated; registration; age assessment if necessary; identification of (risk of) statelessness)
- Provision of child friendly information
- Guardianship for unaccompanied and separated children
- Interpreters/ cultural mediators
- Legal assistance and representation
- Access to procedures (ability to make an application in their own name)
- Participation of children, including opportunities to be heard in interviews
- Individual needs assessment, including but not limited to risk assessments, and best interests assessments
- Restoring family contacts
- Involvement of child specific expertise and information in proceedings
- Involvement of qualified and trained personnel
- Multidisciplinary approaches
- Status determination procedures which are informed by Best Interests Determinations
- Access to birth registration and the right to a nationality, regardless of the status of the parents
- Exclusion from certain procedures, such as border procedures
- Effective remedies, including appeal rights with suspensive effect and child-friendly complaints mechanisms
- Prohibition of detention
- Cross border cooperation on information and transfers
- Data protection

However, procedures which apply to migrant children frequently are not adapted to the needs and rights of children.

In particular, children with adult family members are often treated as dependent on the procedures and decisions concerning adult family members, with limited examination of their individual circumstances and limited consideration of any independent claims of the children.

Further, although typically there are legislative provisions which explicitly concern unaccompanied children, many of these are set out in general terms without proper implementation processes (e.g. ensuring the best interests of the child). Equally, they may establish one or another important safeguard but rarely establish all the necessary procedural safeguards (e.g. there may be a guardianship provision but inadequate provision of legal representation and assistance, or vice versa). They frequently fail to address children's needs and rights in a comprehensive way (e.g. a child may have access to asylum procedures, but no access to a process to identify a durable solution where there is no claim – or a rejected claim - to international protection).

More generally, effective procedural safeguards often depend on an inter-agency and multidisciplinary approaches involving different actors. Although there is increased recognition that this is the case, in practice, effective inter-agency work in this field remains challenging and limited in many important contexts.

WHAT CHILD RIGHTS ARE AT STAKE?

As noted above, there are many different kinds of safeguards that are necessary to ensure children can access and enjoy their rights under the CRC, including safeguards to ensure they are identified and treated as a child, have their best interests taken as a primary consideration in all actions and ensuring their right to be heard.

*CRC rights are organised by the [UN Child Rights Clusters used for country reporting to the Committee on the Rights of the Child \(periodic review\)](#). The CRC Clusters are used by national governments when reporting to the UN Committee on the Rights of the Child and are a useful point of reference. The following clusters are in particular focus in relation to procedural safeguards: *definition of the child, the general principles, violence against children, civil rights and freedoms, family environment and alternative care and special protection measures*.*

Guidance of particular relevance to procedural safeguards can also be drawn from the [General Comments of the UN Committee on the Rights of the Child](#) and in particular:

[General Comment No. 6 \(2005\)](#): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin

[General Comment No 12 \(2009\)](#): The right of the child to be heard

[General Comment No 13 to Article 19 CRC](#): the rights of the child to freedom from all forms of violence

[General Comment No. 14 \(2013\)](#) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)

[Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration](#): General principles

[Joint General Comment No. 4 of the CMW and No. 23 of the CRC in the context of International Migration](#): States parties' obligations in particular with respect to countries of transit and destination

WHAT EU POLICIES & INSTRUMENTS ARE RELEVANT?

Children are subject to most immigration and asylum procedures, either as unaccompanied or separated children, children travelling with their families, or children trying to reunite with or join

their family members in another country. Therefore, any EU laws and policies that regulate procedures that address a child's status and treatment (e.g. in terms of access to procedures, protection and services, etc.) are relevant.

Provisions may apply to all persons (so are not child-specific but equally apply to children), apply to parents of children (and so impact children) and/or specifically deal with children, including provisions which focus on safeguards for unaccompanied children.

Relevant EU policy frameworks also generate developments in procedures and practice. Work of the EU agencies is important in this field, both in terms of studies and practical measures of support for Member States, including guidance and training.

Operational procedures of the EU agencies should also respect child rights, such as during Frontex involvement in border management activities or EASO and Frontex involvement in hotspots in Greece and Italy.

All

- [European Commission Communication on the protection of children in migration](#) - *“Appropriate safeguards must be applied to all children present on the territory of the European Union, including at all stages of the asylum and return procedure. Currently, a number of key protection measures, notably as regards access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessments, needs to be stepped up”* (page 9)
- Various EU funding instruments can be used by governments to advance the rights of children in migration. Ahead of the 2016 EU Forum on the rights of the child, which was dedicated to children in migration, the European Commission prepared a [background document](#) with an overview of the different EU funds and their scope, with examples of recent EU contributions.

Border procedures

- [Schengen Border Code](#)
For example, people – including families with children - refused entry at a border because they do not fulfil all the conditions, should be provided a substantiated written decision stating the precise reasons for the refusal, and have the right to appeal (without suspensive effect) (Article 14). See also Article 6 on special attention to be paid to both accompanied and unaccompanied children during border checks to ensure they do not leave the territory against the wishes of parents/ legal guardians.
- [European Border and Coast Guard Regulation](#):
For example, the Agency shall make forced-return monitors available upon request to participating Member States to monitor, on their behalf, the correct implementation of the return operation and return interventions throughout their duration. It shall make available forced-return monitors with specific expertise in child protection for any return operation involving children”. (art. 29.4). Likewise, “the Agency shall make forced-return escorts available upon request to participating Member States to escort returnees on their behalf and to take part in return operations and interventions. It shall make available forced-return escorts with specific expertise in child protection for any return operation involving children” (art.30.4).

EBCG Regulation is currently being renegotiated on the basis of proposals from the Commission made in 2016

- [Schengen Information System](#) There are no specific provisions for children. General provisions apply, like the right of information (art. 42), the right of access, correction of inaccurate data and deletion of unlawfully stored data or the right to a remedy (art. 43).
- [Eurodac Regulation](#) states in art. 29 that the collection, transmission and comparison of fingerprint data shall be done in an age-appropriate manner where the person concerned is a child.

EURODAC Regulation is currently being renegotiated on the basis of proposals from the Commission made in 2016.

- [Frontex VEGA Handbook: children at airports \(2015\)](#) - operational guidelines for border guards to assist trafficked children or children at risk of trafficking at air borders. The handbook covers entry, transit and exit controls in cases of irregular migration and cross-border crime involving children at airports.

Children of regularly residing migrants including beneficiaries of international protection:

- [EU Directive on long-term residents](#) - covers status and rights of non-EU migrants who have resided regularly and continuously for 5 years, who meet certain criteria. Procedural safeguards also relevant to include the right to a reasoned decision and right to appeal (see art. 10) and protection against expulsion (art. 12).
- [Family Reunification Directive](#) – covers conditions under which family reunification is granted to regularly residing non-EU migrants, establishes procedural guarantees and provides rights for the family members, including an obligation for Member States to have due regard to the best interests of the child when examining applications (art. 5.5) and the right of reunified children to obtain an autonomous resident permit from their sponsor once having reached age of majority (art.15).
- [EU ‘Blue Card’ Directive](#), [EU Directive on researchers, students, etc.](#) and the [EU Intra-Corporate Transferees Directive](#) address aspects of the situation of family members of workers admitted for highly qualified employment (Blue Card holders), researchers and intra-corporate transferees respectively, and include similar procedural safeguards that include, e.g. that the permits of family members (including children) shall be granted where conditions are met, within 90 days for researchers and intra-corporate transferees, and no later than 6 months for Blue Card holders, after the application was lodged, and that as a rule their residence permits should have the same duration as the primary permit holder.
- [EU Single Permit Directive](#) - sets down a single application procedure including procedural guarantees, such as written notification and the right to appeal, for applicants for permits allowing work, including family members not admitted for work, but does not include provisions related to the residence of dependent children.

Children seeking or granted international protection:

- [Asylum Procedures Directive](#) includes safeguards for unaccompanied children, such as the right to be represented and assisted by a qualified professional who performs his/her duties in the best interests of the child and whose interests do not conflict with the ones of the unaccompanied child (art.25.1) or the right to receive free legal and procedural information (art. 25.4).

- [Dublin III Regulation](#) includes safeguards such as “Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation.” (art. 6.2). Member States shall closely cooperate to determine the best interests of the child, taking into account family reunification possibilities, the minor’s well-being and social development, safety and security considerations (in particular, risk of human trafficking) and the views of the child, according to her/his age and maturity (art. 6.3). Assistance of international and regional organisations may be sought and the child’s access to the tracing services of such organisations should be facilitated (art.6.4). *The existing international protection legislation is currently being renegotiated on the basis of proposals from the Commission made in 2016.*
- [EU resettlement scheme](#) provides the possibility for children outside of the EU in need of international protection to be granted it in the EU. *There is also a proposal under negotiation for a Regulation establishing a Union Framework for Resettlement.*
- [EASO Practical Guide on the best interests of the child in the asylum procedure](#) – published in 2019. Consult [EASO website](#) for other kinds of support and guidance that may be relevant to procedural safeguards, including “permanent support: supporting and stimulating the common quality of the asylum process through common training, common asylum training material, common quality and common Country of Origin Information (COI).” See also [EASO Practical Guide on age assessment](#) and [EASO Practical Guide on family tracing](#).

Trafficked children:

- [EU Trafficking Directive](#) - affects children who have been trafficked – see in particular Articles 13-16 on assistance and support to child victims, protection of child victims of trafficking in human beings in criminal investigations and proceedings and assistance, support and protection for unaccompanied child victims of trafficking in human beings.
- [FRA Guardianship Handbook](#) - provides detailed guidance on both the management of the guardianship system and the tasks of guardians for unaccompanied and separated children.
- Upcoming FRA Practical guide to enhance transnational cooperation: EU child victims of trafficking or in need of protection

Children who may be subject to return proceedings:

- [EU Return Directive](#) (2008/115/EC) – procedures and rights of children identified by immigration authorities as irregularly residing - see in particular Article 5 requiring member states to take due account of the best interests of the child, family life and health status, Article 10 requiring the assistance to unaccompanied minors by appropriate bodies other than the authorities enforcing return and a best interests determination procedure before removal to make sure appropriate custodial arrangements are in place in the country of return; Article 17 limiting the capacity of States to detain children (should be “a measure of last resort and for the shortest appropriate period of time” and “the best interests of the child shall be a primary consideration in the context of detention”). Moreover children, as the rest of TCNs subject to return, must be afforded an effective remedy to appeal against a return decision before a competent judicial or administrative authority (Art. 13.1).

The Return Directive is currently being revised on the basis of a proposal from the Commission from September 2018.

- [European Commission Recommendation on making returns more effective](#), 7 March 2017 – see in particular para 12 (c) (“Member States should ensure that the automatic suspensive effect of appeals against return decisions is granted only when this is necessary to comply with Articles 19(2) and 47 of the Charter”) and para. 12 (b) (“Member States should provide for the shortest possible deadline for lodging appeals against return decisions established by national law in comparable situations, to avoid misuse of rights and procedures”).

- [EU Return Handbook](#), revised 27 September 2017 (EC Communication) - the Handbook is intended to guide implementation of the Return Directive, and was revised to reflect the EC Recommendation on making returns more effective of 7 March 2017. The Handbook states:

“Return is one of the options to be examined when identifying a durable solution for unaccompanied minors and any Member State's action must take into account as key consideration the best interests of the child. Before deciding to return an unaccompanied minor, and in accordance with Article 12(2) of the Convention on the Rights of the Child, the minor s concerned must be heard, either directly or through a representative or an appropriate body, and an assessment of the best interests of the child shall always be carried out on an individual basis, including on the particular needs, on the current situation in the family and on the situation and reception conditions in the country of return. Such assessment should systematically look at whether return to the country of origin, including reunification with the family, is in the minor's best interests. The assessment should be carried out by the competent authorities on the basis of a multidisciplinary approach, involving the minor's appointed guardian and/or the competent child protection authority....”

Stateless Children/Children at risk of statelessness

- [Council Conclusion on Statelessness](#) - *Recalling that the right to acquire a nationality has been reiterated in a number of instruments of international human rights law such as the International Covenant on Civil and Political Rights, the Convention on the Elimination of Discrimination against Women and the Convention on the Rights of the Child.*
- [Council Conclusion on the Promotion and Protection of the Rights of the Child](#) – *Calls on member states to ...”continuously raise awareness of the importance of birth registration at the national, regional and local levels”.*

Other relevant international standards

- [European Convention on Nationality](#) – provides principles and rules applying to all aspects of nationality and is designed to ensure that acquiring a nationality is easier, nationality can not be arbitrarily withdrawn, procedures governing nationality applications are just and fair. See in particular Article 6 on the acquisition of nationality, which states that national law should enable nationality to be acquired by children who would otherwise be stateless at birth, and children who have remained statelessness on the territory.
- [1961 Convention on the Reduction of Statelessness](#) – the leading international instrument that sets out rules to prevent cases of statelessness from arising

Note: For an overview of legal provisions and guidance concerning unaccompanied children as of June 2014, see www.connectproject.eu.

Jurisprudence

Important international and European jurisprudence has been handed down on grounds that can establish a right of residence in a country based on human (and child) rights, and international protection. Often this is in relation to appeals against return decisions or removal orders.

Jurisprudence can be very helpful to support advocacy. Consult the websites of:

- the [Court of Justice of the European Union](#)
- the [European Court of Human Rights](#)
- the [UN Committee on the Rights of the Child Optional Protocol No 3 Complaint Procedure](#)
- <http://www.europeanmigrationlaw.eu/>
- [Asylum Information Database \(AIDA\)](#)
- [PICUM's Case Law Tool](#).

WATCH THIS SPACE: *Updated as of March 2019*

In a nutshell:

- **The ongoing revision of the EU international protection instruments are proving protracted and contentious. Key procedural issues under the spotlight include: guardianship, age assessment and access to legal assistance.**
- **A proposal to revise the Return Directive restricts key procedural rights, including regarding access to, and suspensive effect, of appeals, which will impact children in families**
- **The EU is funding the development of a European network of guardians**

RESOURCES FOR ADVOCACY

Several organisations have been actively commenting on the revision of the international protection legislation, including the Procedures Directive and the Dublin III Regulation.

ECRE has published detailed comments on the Proposal for an Asylum Procedures Regulation (available [here](#)) and the Proposal for a Dublin IV Regulation (available [here](#)). It has also published several Policy Notes on the reform of and compliance with Dublin available here:

The Road out of Dublin: Reform of the Dublin Regulation: <http://www.ecre.org/wp-content/uploads/2016/10/Policy-Note-02.pdf>

To Dublin or not to Dublin: <https://www.ecre.org/wp-content/uploads/2018/11/Policy-Note-16.pdf>

The Asylum Information Database (AIDA) includes a comparative report on the concept of vulnerability in European asylum processes, which you can find [here](#). AIDA provides detailed information on legal frameworks, policies and practices affecting children in the asylum process, be they related to reception conditions, integration or procedural matters.

The Commission [proposal](#) for a “recast” of the Return Directive specifically reduces key procedural rights and safeguards against children being issued a return decision, detained, and subject to removal. For example, the proposed broadening of the definition of the “risk of absconding” (Art. 6) will result in more people, including parents, being detained, considered ineligible for voluntary departure, and issued entry bans. The immediate and automatic issuance of a return decision

together with a rejection or termination of regular residence (Art. 8) will result in more children being issued orders to leave the territory and at risk of removal, even if this would violate their rights. Restrictions on appeals and their suspensive effect (Art. 14) directly limit access to effective remedy and the right to be heard. The new border procedures (Art. 22) have simplified procedures and extremely limited appeal possibilities. The proposal is subject to triologue negotiations, so the European Parliament now has the opportunity to table amendments to the proposal, for negotiation with the European Council (who can also suggest amendments) and European Commission. No changes to the provisions specifically addressing unaccompanied children have been proposed by the Commission.

23 civil society and UN organisations issued a [joint statement](#) in February 2018 against the EURODAC proposal, which would allow the use of coercion to take the fingerprints and facial images of children. They concluded that “coercion of children in any manner or form in the context of migration related procedures, violates children’s rights, which EU Member States committed to respect and uphold”. The European Parliament’s [position on the proposal](#) states that member states shall not use coercion against children to obtain their fingerprints or facial image. It also includes child-specific provisions including around age-appropriate information for children, training of officials and referral to competent national child protection authorities (Amendment 44). The EURODAC Regulation is still under negotiation between the European Parliament, European Council and European Commission.

Other

[Council of Europe Guidelines on Child Friendly Justice](#) – these guidelines from the Council of Europe (and not the European Union) explain procedural safeguards which are vital to ensure child-sensitive proceedings. They provide valuable support to advocacy recommendations. They also may support organisations in considering what safeguards are generally in place for children in justice and advocating that equivalent procedures be in place for children in migration (e.g. involvement of lawyers trained in child rights).

[Council of Europe child friendly information handbook](#) for frontline professionals: guidance on how to convey child friendly information to children in migration

[UNHCR’s observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum - Lithuanian Supreme Court](#) (June 2015) refer to the applicable principles and standards on age assessments.

The [#StatelessnessIndex](#) is a comparative tool developed and maintained by the [European Network on Statelessness](#) that assesses European countries’ law, policy and practice on the protection of stateless people and the prevention and reduction of statelessness, against international norms and good practice. It is a tool created for civil society, government, researchers, the media and other interested individuals. Under the theme of ‘[prevention and reduction of statelessness](#)’, the Index allows users to assess the adequacy of safeguards in nationality laws to prevent and reduce statelessness, including protections for otherwise stateless children born on the territory or to nationals abroad, foundlings and adopted children. It examines law, policy and practice on birth registration, including access to late birth registration, and measures taken by states to promote birth registration among groups at high risk of remaining unregistered, including children in migration.

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[#StatelessKids – None of Europe’s Children should be Stateless](#) – the European Network on Statelessness has developed a number of resources highlighting the issue of childhood statelessness in Europe, and the fact that many European countries don’t have the necessary safeguards in place to protect children from statelessness. [Ending Childhood Statelessness – A Comparative Study of Safeguards to Ensure the Right to a Nationality for Children Born in Europe.](#) complements the European Network on Statelessness’ 2015 report [No Child Should Be Stateless](#) and provides an in-depth analysis of the nationality laws of 45 Council of Europe states against international norms granting nationality to otherwise stateless children. There are also three useful infographics on childhood statelessness, which cover [what it means for a child to be stateless](#), [why children become stateless](#), and [birth registration](#).

*Initiative
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