I. Right to be heard and to participate effectively in judicial and administrative proceedings

This section includes specifically the application of the Right to be heard principle and with the main procedural guarantees

Table of Contents

Warm-up QUESTIONNAIRE FOR PARTICIPANTS
The right to be heard means a) Children must be heard in court in all matters affecting them b) Children below the age of 12 cannot be heard in court as they cannot understand the complexity of judicial proceedings c) Child's parent or legal guardian can effectively represent child's needs in court, after consulting the child beforehand
A guardian must be appointed to every unaccompanied child a) As soon as possible the child arrives to the country b) Once the child was granted international protection c) Only if the child agrees with it
Every child has a right to free legal assistance a) Once the child applies for asylum b) No, once a guardian has been appointed c) When his or her best interests are to be formally assessed d) During a return procedure
Migrant children have the right to an effective remedy a) always b) in all cases apart from when entering the territory of a country c) in expulsion proceedings
Effective appeal in expulsion cases a) must always have suspensive effect b) . c)

I. Access to justice

Access to justice is a **human right** in itself and an essential prerequisite for the protection and promotion of all other human rights.

Resolution adopted by the UN General Assembly on 24 September 2012 (A/RES/67/1)

14. We emphasize the right of equal access to justice for all, including members of vulnerable groups, and the importance of awareness-raising concerning legal rights, and in this regard we commit to taking all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.
17. We recognize the importance of the rule of law for the protection of the rights of the child, including legal protection from discrimination, violence, abuse and exploitation, ensuring the best interests of the child in all actions, and recommit to the full implementation of the rights of the child.

Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013

8. Human rights norms and standards relevant to ensuring access to justice for children are set out in a series of legally binding and non-binding international and regional human rights instruments. (…) Elements of access to justice for children in particular include the rights to relevant information, an effective remedy, a fair trial, to be heard, as well as to enjoy these rights without discrimination. In addition, the responsibility of States Parties to realize the rights of all children requires structural and proactive interventions to enable access to justice.

Migrant children are entitled to a broad range of rights and safeguards, starting from universal human rights. The reality, however, is that rights are illusory if there is no way to claim their implementation. A national legal system that can provide **effective access to justice and remedies** for violations of human rights is therefore essential. The whole apparatus of legal standards, lawyers, judges, prosecutors, legal practitioners and activists must operate effectively to provide migrants with legal remedies for violations of their human rights.

The procedural rights have specifics in case of children and should be adapted to them. For instance what is not unduly prolonged for an adult, might be unduly prolonged for a child. What is not inhumane or degrading treatment for an adult, might be it for a child.

1. The need for child-sensitive justice

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 Nov 2010

For the purposes of these guidelines (…)

(c.) "child-friendly justice" refers to justice systems which guarantee the respect and the effective

implementation of all children's rights, giving due consideration to the child's level of maturity and understanding and to the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

2. Barriers to children' s access to justice

Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35)

13. In spite of the comprehensive legal framework ensuring and protecting children's rights and due to their special and dependent status, access to justice remains a tremendous challenge for children. There are several reasons for this situation.

14. The complexity of justice systems makes them difficult to understand for children. Children are often unaware of their rights and the existence of services, lacking information about where to go and whom to call to benefit from advice and assistance. Moreover, legislation and procedures concerning the treatment and participation of children in proceedings, including criminal, administrative and civil proceedings, are often not adapted to children's rights and needs or may even be discriminatory towards children based on their age and gender. States have also highlighted that specialized judges, prosecutors, lawyers and other personnel working with children, as well as sufficient resources to provide specialized training, are frequently lacking.

15. The justice system is often intimidating for children. They may be afraid to make complaints out of fear of harassment, further stigmatization, abandonment or reprisals against them or their families. They may also lack trust and confidence that their complaints will be taken seriously and fairly assessed. (…)

Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul – Protecting children's rights in the justice system, 1 April 2015

30. As children are particularly vulnerable to violations of their rights and to abuses of all sorts, their access to justice should be facilitated and reinforced. In reality, while many obstacles impede both adults' and children's access to justice, children are often disproportionately affected. They also face specific barriers owing to their status as minors.

31. Various factors and circumstances impede appropriate and equal access to justice for children; they can be clustered in six categories. First, children can face physical barriers, which include geographical distance from courts or other relevant institutions or lack of adequate facilities at those institutions' premises. Second, psychological factors can also play an important role in undermining children's access to justice. Children may be unable or reluctant to seek justice because they are too young or too traumatized to articulate what happened to them; or they are afraid of, dependent on or love the alleged perpetrator(s); or they do not perceive what happened to them as a violation of their rights. Third, children also face social and/or cultural barriers when trying to access justice; these can be related to their difficulties to communicate, fear of social stigma associated with the formal justice system, dependency on adults, or mistrust of the justice system.

32. Fourth, barriers relating to information also seriously hamper access to justice for children. Information on fundamental rights, available remedies and procedures to follow to claim their rights is not always available and, when available, often difficult to understand, even for adults. Fifth, while children lack financial autonomy and means, court proceedings often represent a heavy financial burden, as can the costs of initiating and pursuing proceedings, including lawyers' fees. Lastly, children encounter legal obstacles on their path to justice, such as lack of legal capacity or standing, lack of legal identity (especially relevant for

children who are unregistered migrants, refugees or asylum seekers, or street children), or dependence on parents or a legal guardian. Dependence on adults often compounds the other obstacles for children trying to access justice.

3. International and European legal framework

International law

International Covenant on Civil and Political Rights (ICCPR)
Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Convention on the Rights of the Child (CRC)
Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Council of Europe

European Convention on Human Rights (ECHR)
Article 6
Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court

in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 13
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

European Convention on the Exercise of Children's Rights *(not ratified by IR, BG)*

Article 3 Right to be informed and to express his or her views in proceedings

A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:
A to receive all relevant information;
B to be consulted and express his or her views;
C to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

Article 4 Right to apply for the appointment of a special representative

1. Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.
2. States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.

Article 6 Decision-making process

In proceedings affecting a child, the judicial authority, before taking a decision, shall:
A. consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities;
B. in a case where the child is considered by internal law as having sufficient understanding:
– ensure that the child has received all relevant information;
– consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;
–allow the child to express his or her views;

C. give due weight to the views expressed by the child.

Under both the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, states are required to ensure that their domestic legal framework is consistent with the rights and obligations provided, including the adoption of appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.

Human Rights Committee, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that **individuals also have accessible and effective remedies to vindicate those rights**. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. (…)

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. (…)

Convention on the Rights of the Child, General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child (CRC/GC/2003/527 November 2003)

V. JUSTICIABILITY OF RIGHTS

"(…) States need to give particular attention to ensuring that there are **effective, child-sensitive procedures available to children and their representatives**. These should include the provision of child-sensitive information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. [… In case of violations of rights] there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [of the Convention]".

While all the fair trial guarantees provided in the International Covenant on Civil and Political Rights are equally applicable to children, the Convention on the Rights of the Child additionally provides a list of fundamental safeguards to ensure fair treatment of children, including the rights to information (Art 17), expeditious decisions (Art 10), prompt access to legal assistance and to prompt decisions by the court (Art 37(d)).

Advisory Opinion - OC–21/14 of the Inter-American Court from 2014 on Rights and Guarantees of children in the context of migration and/or in need of international

protection

116. (…) the Court will now refer to the guarantees that, under international human rights law, must govern **any immigration proceedings that involve children, referring especially, when appropriate, to those guarantees that are critically important in this type of proceedings**. Consequently, the Court will refer to the following aspects:
(i) the right to be notified of the existence of proceedings and of the decision adopted during the immigration proceedings;
(ii) the right that immigration proceedings are conducted by a specialized official or judge;
(iii) the right of the child to be heard and to participate in the different stages of the proceedings;
(iv) the right to be assisted without charge by a translator or interpreter;
(v) effective access to communication with consular authorities and to consular assistance;
(vi) the right to be assisted by a legal representative and to communicate freely with the representative;
(vii) the obligation to appoint a guardian in the case of unaccompanied or separated children;
(viii) the right that the decision adopted has assessed the child's best interest and is duly reasoned;
(ix) the right to appeal the decision before a higher court with suspensive effect, and
(x) reasonable time for the duration of the proceedings.

Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration

93. The **passing of time is not perceived in the same way by children and adults**. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.

Article 6[1] is also applicable to other not strictly pecuniary matters such as … **the fostering of children** (McMichael v. the United Kingdom); **children's schooling arrangements** (Ellès and Others v. Switzerland,§§ 21-23); the **right to have paternity established** (Alaverdyan v. Armenia(dec.), § 33);

EU law

EU Charter on fundamental rights

Article 47 Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Other relevant EU legislation:

- **Art 6 Dublin Regulation (UAC must be represented)**

[1] ECHR Guide on Article 6, http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

- **Art 31 QD (Unaccompanied minors)**
- **Art 25 APD (limitations – age conditions)**
- **Art 8 Victims Directive**

II. Right to a fair hearing

Article 14 ICCPR

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being

reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

ARTICLE 6 ECHR

---EU CHARTER

Children and other vulnerable parties must be accorded special protection. Specific rights apply only to those accused of criminal charges (Article 6 (3) *a* to *e*) but comparable guarantees where relevant have been found by the Court to be required in civil cases if the proceedings are to be adjudged "fair". In the case *T and V v. United Kingdom*, the court ruled that the procedure needs to adapt criminal proceedings to children's needs. Under Article 6(1), the accused must enjoy the right to understand what is happening at the trial and to play an active role in their defence, at least to the extent, which could reasonably be expected of a child. Physical presence alone would not be sufficient. As the applicants were unable to do so they were denied a fair hearing in breach of Article 6. A child aged 11 would likely find the highly formal setting of the courtroom intimidating, whether involved as a witness or a defendant.

Case of V. v. The United Kingdom (Application no. 24888/94) 16 December1999

88. The Court notes that the applicant's trial took place over three weeks in public in the Crown Court. Special measures were taken in view of the applicant's young age and to promote his understanding of the proceedings: for example, he had the trial procedure explained to him and was taken to see the courtroom in advance, and the hearing times were shortened so as not to tire the defendants excessively. Nonetheless, the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public. The trial generated extremely high levels of press and public interest, both inside and outside the courtroom, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing their evidence (see paragraph 14 above).

1. The right to be heard

See an introduction to the right to be heard in Module 0 of this handbook.

Article 12 CRC

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

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

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

46. As stated earlier, the "best interests of the child" is a right, a principle and a rule of procedure based on an assessment of all elements of a child's or children's interests in a specific situation. When assessing and determining the best interests of the child in order to make a decision on a specific measure, the following steps should be followed:
(a) First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;
(b) Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right.
47.Assessment and determination of the child's best interests are two steps to be followed when required to make a decision. The "best-interests assessment" consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team –, and requires the participation of the child. The "best-interests determination" describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment.

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 Nov 2010

44. Judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Means used for this purpose should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.
45. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity.
46. The right to be heard is a right of the child, not a duty of the child.
47. A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.
48. Children should be provided with all necessary information on how effectively to use the right to be heard. However, it should be explained to them that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision.
49. Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's

views and opinions have not been followed.

Committee on the Rights of the Child, General Comment No. 12 on the right of the child to be heard

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:
– First, in its recommendations following the day of general discussion on implementing child rights in early childhood in 2004, the Committee underlined that the concept of the child as rights holder is "... anchored in the child's daily life from the earliest stage". Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences;
–Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter;
– Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language;
– Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.

34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms. ***(in module 0 already)***

Advisory Opinion - OC–21/14 of the Inter-American Court from 2014 on Rights and Guarantees of children in the context of migration and/or in need of international protection

129. The Court has established that "the circumstances of a particular case or proceedings – the significance, legal character, and context in a particular legal system – are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing."
130. The Court considers that States have the obligation to ensure to any child involved in immigration proceedings the right of legal counsel by the offer of free State legal representation services.
131. Moreover, this type of legal assistance must be specialized, as regards both the rights of the migrant and, specifically, as regards age, in order to guarantee true access to justice to the child migrant and to ensure that the child's best interest prevails in every decision that concerns the child.

Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013

59. States must also ensure that the views of children, including children from the youngest age, even when they may be unable to express themselves verbally, are given due consideration. Moreover, in order to avoid (re-)victimization of children participating in judicial processes, States should make sure that their privacy and confidentiality are safeguarded at all times. States also must ensure that children are protected from all forms of violence when coming into contact with the justice system.

Under CoE law, the ECtHR does not interpret the right to respect for private and family life (Article 8 of the ECHR) as always requiring the child to be heard in court. As a general rule, it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts. Domestic courts are not always required to hear a child in court.

The ECtHR will often ensure, under the procedural limb of Article 8, that the authorities have taken appropriate steps to accompany their decisions with the necessary safeguards.

ECtHR, Sahin v. Germany [GC], No. 30943/96, 8 July 2003

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

CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010

66. In other words, whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of Regulation No 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to **ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity** to express his or her views.

The unaccompanied or separated child: Appointment of guardian

The guardian plays a central role in ensuring access to legal assistance for unaccompanied children or in supporting the child in finding an advisor.

The guardian is considered to be an independent person who safeguards the child's best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way that parents do.

The guardian differs from a qualified lawyer or other legal professional who provides legal assistance, speaks on behalf of the child and legally represents him or her in written statements and in person before administrative and judicial authorities in criminal, migration or other legal proceedings as provided for in national law.

FRA, Guardianship for children deprived of parental care, 2014

For appointment of a guardian for unaccompanied children, see also section V. Vulnerable groups (General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005)

Varied practice in EU Member States:

In Belgium, Bulgaria, Italy, the Netherlands and Spain, **guardianship is entrusted to a single entity**, an independent body or governmental authority or an assigned individual. In Austria and Denmark, the **guardianship system** is divided into **different levels**. There is **no guardianship system** in the UK and instead other actors such as social workers support children in the process.

(HERE we could rather include info on countries in our project)

Good practice:

In some countries, like Belgium, the guardian is legally obliged to appoint a lawyer for the child. In Italy, no legal assistance can be provided without prior authorisation of the guardian.

Guardian in EU law

With regards to guardians, there is no definition available within EU legislation, even though the term has been introduced in the EU Anti Trafficking Directive. EU law mostly refers either to "legal representative" or "special representative" to describe a person supporting and assisting an unaccompanied child. In the scope of different instruments, such term indicates more of a guardianship role than that of a legal representative by way of a lawyer. Only "legal representative" is defined in the EU asylum acquis.

REPORT: Right to justice, ECRE

Art 31 Qualification Directive

1. As soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.
2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.
3. Member States shall ensure that unaccompanied minors are placed either:
    - with adult relatives; or
    - with a foster family; or
    - in centres specialised in accommodation for minors; or
    - in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.
5. If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.

Public hearing

Public delivery of the judgement

ECtHR, *B. and P. v United Kingdom*, Nos. 36337/97 and 35974/97, 24 April 2001

37. However, the requirement to hold a public hearing is subject to exceptions. This is apparent from the text of Article 6 § 1 itself, which contains the proviso that "the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". Moreover, it is established in the Court's case-law that, even in a criminal-law context where there is a high expectation of publicity, it may on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice (see, for example, Doorson v. the Netherlands, judgment of 26 March 1996, Reports 1996-II, p. 470, § 70; Jasper v. the United Kingdom [GC], no. 27052/95, § 52, 16 February 2000, unreported; Z v. Finland, judgment of 25 February 1997, Reports 1997-I, p. 348, § 99; and T. v. the United Kingdom [GC], no. 24724/94, §§ 83-89, 16 December 1999, unreported).

38. The proceedings which the present applicants wished to take place in public concerned the residence of each man's son following the parents' divorce or separation. The Court considers that such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment.

47. The Court notes that anyone who can establish an interest may consult or obtain a copy of the full text of the orders and/or judgments of first-instance courts in child residence cases, and that the judgments of the Court of Appeal and of first-instance courts in cases of special interest are routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. It is noteworthy in this respect that the first applicant, despite his desire to share information about his son with the child's grandparents, never made any application either for the grandparents to be present in the county court or for leave to disclose the residence judgment to them.

The press and public may be excluded

Moser v. Austria

97. Moreover, the case of B. and P. v. the United Kingdom concerned the parents' dispute over a child's residence, thus, a dispute between family members, i.e. individual parties. The present case concerns the transfer of custody of the first applicant's son to a public institution, namely the Youth Welfare Office, thus, opposing an individual to the State. The Court considers that in this sphere, the reasons for excluding a case from public scrutiny must be subject to careful examination. This was

not the position in the present case, since the law was silent on the issue and the courts simply followed a long-established practice to hold hearings in camera without considering the special features of the case

102. It is not disputed that none of the courts' decisions was pronounced publicly. Therefore, it remains to be examined whether publicity was sufficiently ensured by other means. In the case of B. and P. v. the United Kingdom (cited above, §§ 46-48), the Court found that alternative means of giving the public access to the courts' decisions, similar to those referred to by the Government in the present case, were sufficient. In doing so, it relied on the fact that the courts were entitled to hold proceedings in camera. In the case of Sutter v. Switzerland (cited above, p. 14, §§ 33-34) to which the Government referred, the Court found that the publicity requirement was satisfied by the fact that anyone who established an interest could consult or obtain a copy of the full text of the Military Court of Cassation, together with the fact that that court's most important judgments were published in an official collection. However, in that case a public hearing had been held by the lower instance and the Court had regard to the particular nature of the issues dealt with by the military Court of Cassation.

103. The Court finds that in the present case, in which ***dispensing with a public hearing was not justified in the circumstances,*** *the above means of rendering the decisions public, namely giving persons who establish a legal interest in the case access to the file and publishing decisions of special interest, mostly of the appellate courts or the Supreme Court, did not suffice to comply with the requirements of Article 6 § 1.*

104. Consequently there has been a ***violation of Article 6 on account of the failure*** *to pronounce the courts' decisions publicly.*

2. Access to court

Article 6 (1) ECHR

In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 17 Nov 2010

D. Child-friendly justice during judicial proceedings
1. Access to court and to the judicial process
34. **As bearers of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights**. The domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice.

35. Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.

36. In cases of certain specific crimes committed against children, or certain aspects of civil or family law, access to court should be granted for a period of time after the child has reached the age of majority where necessary. Member states are encouraged to review their statutes of limitations.

Beles and others v. the Czech Republic

49. The Court has already stated on a number of occasions that the right to a fair trial, as guaranteed by Article 6 § 1 of the Convention, must be construed in the light of the rule of law, one of the fundamental aspects of which is the principle of legal certainty, which requires that all litigants should have an **effective judicial remedy** enabling them to assert their civil rights (...). It further reiterates that the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring the proper administration of justice and compliance, in particular, with the aforementioned principle of legal certainty. That being so, the rules in question, or the manner in which they are applied, should not prevent litigants from using an available remedy (...).

Bellet v. France, §36, 38

36. The fact of having access to domestic remedies, only to be told that one's actions are barred by operation of law does not always satisfy the requirements of Article 6 para. 1 (art. 6-1). The degree of access afforded by the national legislation must also be sufficient to secure the individual's "right to a court", having regard to the principle of the rule of law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights (...).

(...) 38. Having regard to all the circumstances of the case, the Court finds that **the applicant did not have a practical, effective right of access to the courts** in the proceedings before the Paris Court of Appeal. There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

Cañete de Goñi v. Spain, § 36

36. In that connection, the Court reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of procedural rules, such **as time-limits for filing documents or for lodging appeals** (...). Furthermore, the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal or an application for judicial review are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of **legal certainty**. Litigants must be entitled to expect those rules to be applied.

Zvolsky and Zvolska v. the Czech Republic, § 51

51. The Court observes that **rules setting time-limits for bringing appeals must not be applied in a way which prevents litigants from using an available remedy**. The issue raised in the present case is legal certainty. The problem is not simply one of interpretation of substantive rules, but that a procedural rule **has been construed in such a way as to prevent the applicants' action being examined on the merits**, with the attendant risk that their right to the effective protection of the courts would be infringed (...). In deciding to lodge an application for leave with the Supreme Court, the applicants were merely making use of a procedure available to them under Article 239 § 2 of the Code of Civil Procedure and should not be prejudiced as a result. Nor can they be said to have been at fault in not lodging their constitutional appeal before 12 November 1997, as the issue of the starting-point was unresolved.

3. Right to a defence

Access to legal aid

Legal aid **shall be made available to those who lack sufficient resources in so far as such aid**

is necessary to ensure effective access to justice.

Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul – Legal aid, 9 April 2013

"Legal aid is an essential element of a fair, humane and efficient system of administration of justice that is based on the rule of law. It is a foundation for the enjoyment of other rights, including the right to a fair trial and the right to an effective remedy, a precondition to exercising such rights and an important safeguard that ensures fundamental fairness and public trust in the administration of justice."

Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

Report of the UN High Commissioner for Human Rights on Access to justice for children (A/HRC/25/35), 16 December 2013

40. As children are usually at a disadvantage in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.

Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul – Protecting children's rights in the justice system, 1 April 2015

Child-friendly legal aid

35. The right to access justice is inextricably **connected to the right to legal assistance**. As highlighted in previous reports, the purpose of legal aid is "to contribute to the elimination of obstacles and barriers that impair or restrict access to justice by providing assistance to people who would otherwise be unable to afford legal representation and access to the court system" (…). Accordingly, the Special Rapporteur has advocated for a **definition of legal aid that is as broad as possible**, including "not only the right to free legal assistance in criminal proceedings, as defined in article 14 (3) (d) of the International Covenant on Civil and Political Rights, but also the provision of effective legal assistance in any judicial or extrajudicial procedure aimed at determining rights and obligations"(ibid). A broad definition and application of legal aid is all the more important when dealing with children and children's rights.

36. As already noted by the Special Rapporteur, legal systems can be immensely confusing and difficult, if not impossible, to navigate for children, especially without the help of a legal professional. "Legal assistance provides children with the means to understand legal proceedings, to defend their rights and to make their voices heard" (…). The right of children to have access to legal assistance is recognized in a number of international instruments, including the Convention on the Rights of the Child (in particular, in articles 12 and 40), and the Principles and Guidelines

on Access to Legal Aid in Criminal Justice Systems.

37. In its general comment No. 10, the Committee on the Rights of the Child further explained that, when preparing his/her defence, a child in conflict with the law must be guaranteed free and appropriate legal and other appropriate assistance. Indeed, by virtue of their age, dependent status and economic circumstances most children are unable to pay for legal aid. The Special Rapporteur considers that given this reality, "children must have access to free legal assistance in criminal and in civil proceedings and administrative fees must be waived".

38. As noted in a 2011 study, "the provision of timely, competent, and developmentally appropriate legal assistance directly advances a child's right to a fair, just, and participatory legal process. Child-friendly legal aid also has the potential to promote children's substantive rights". In this respect, lawyers have a professional responsibility towards children and should therefore acquire the special skills to be able to take into account the unique attributes and needs of child clients and effectively deliver child-friendly legal aid.

CRC

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time

they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be **informed promptly and directly** of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the **free assistance of an interpreter** if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Committee on the Rights of the Child, General Comment No. 10 on Children's rights in juvenile justice

49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of States parties to determine how this assistance is provided but it should be **free of charge**.

ICCPR

Art 24(1)

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to **such measures of protection as are required by his status as a minor, on the part of his family, society and the State.**

International Covenant on Economic, Social and Cultural Rights

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. (…)

3. Special measures of **protection and assistance** should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

***General Comment No. 6*: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005**

36. In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.

Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, PACE

5.8 (…) All unaccompanied children in asylum proceedings must be represented by a lawyer in addition to a guardian, provided free of charge by the state and be able to challenge before a court decisions regarding their protection claims.

ECtHR, *Quaranta v. Switzerland*, No. 12744/87, 24 May 1991

32. In order to determine whether the "interests of justice" required that the applicant receive **free legal assistance, the Court will have regard to various criteria**. (...).

33. In the first place, consideration should be given to the seriousness of the offence of which Mr Quaranta was accused and the severity of the sentence which he risked. (…)

34. An additional factor is the complexity of the case. (…)

35. Such questions, which are complicated in themselves, were even more so for Mr Quaranta on account of his personal situation: a **young adult of foreign origin from an underprivileged background**, he had no real occupational training and had a long criminal record. He had taken drugs since 1975, almost daily since 1983, and, at the material time, was living with his family on social security benefit.

36. In the circumstances of the case, his appearance in person before the investigating judge, and then before the Criminal Court, **without the assistance of a lawyer, did not therefore enable him to present his case in an adequate manner**.

ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008

67. The Court notes that the applicant was 17 years old at the material time. In its case-law on Article 6 the Court has held that **when criminal charges are brought against a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings** (see T. v. the United Kingdom [GC], no. 24724/94, 16 December 1999, § 84). The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police. The authorities must take steps to **reduce as far as possible his feelings of intimidation and inhibition** (see, mutatis mutandis, T. v. the United Kingdom, cited above, § 85) and ensure that the **accused minor has a broad understanding of the nature of the investigation, of what is at stake for him or her, including the significance of any penalty which may be imposed as well as of his rights of defence and, in particular, of his right to remain silent** (mutatis mutandis, S.C. v. the United Kingdom, no. 60958/00, § 29, ECHR 2004-IV). It means that he or she, if necessary with the assistance of, for example, an **interpreter, lawyer, social worker or friend**, should be able to understand the general thrust of what is said by the arresting officer and during his questioning by the police (ibid).

68. The Court reiterates that a waiver of a right guaranteed by the Convention – in so far as it is permissible – must not run counter to any important public interest, must be established in an unequivocal manner and must be attended by minimum safeguards commensurate to the waiver's importance (Håkansson and Sturesson v. Sweden, 21 February 1990, Series A No. 171, § 66, and most recently Sejdovic v. Italy [GC], no. 56581/00, § 86, ECHR 2006-...). Moreover, before an accused can be said to have impliedly, through his conduct, waived an important right under Article 6, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Talat Tunç v. Turkey, no. 32432/96, 27 March 2007, § 59, and Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003). The Court considers that given the vulnerability of an accused minor and the **imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right under Article 6 can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence** and can appreciate, as far as possible, the **consequence of his conduct**.

The Council of Europe Guidelines on Human Rights Protection in the Context of Accelerated Asylum Procedures, 1 July 2009

IV. Procedural guarantees
1. When accelerated asylum procedures are applied, asylum seekers should enjoy the following minimum procedural guarantees: (…)(f) the **right to access legal advice and assistance**, it being understood that legal aid should be provided according to national law;

Asylum Procedures Directive

Article 20

Free legal assistance and representation in appeals procedures

1. Member States shall ensure that free legal assistance and representation is granted on request in the appeals procedures provided for in Chapter V. It shall include, at least, the preparation of the required procedural documents and participation in the hearing before a court or tribunal of first instance on behalf of the applicant.

2. Member States may also provide free legal assistance and/or representation in the procedures at first instance provided for in Chapter III. In such cases, Article 19 shall not apply.

3. Member States may provide that free legal assistance and representation not be granted where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority which is not a court or tribunal, Member States shall ensure that the applicant has the right to an effective remedy before a court or tribunal against that decision.

In the application of this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

4. Free legal assistance and representation shall be subject to the conditions laid down in Article 21.

Article 22

Right to legal assistance and representation at all stages of the procedure

1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

Reception Conditions Directive

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), L180/96 O.J. 29.6.2013 (recast Reception Conditions Directive)

Article 26

2. In cases of an appeal or a review before a judicial authority referred to in paragraph 1, Member States shall ensure that free legal assistance and representation is made available on request in

so far as such aid is necessary to ensure effective access to justice. This shall include, at least, the preparation of the required procedural documents and participation in the hearing before the judicial authorities on behalf of the applicant. Free legal assistance and representation shall be provided by suitably qualified persons, as admitted or permitted under national law, whose interests do not conflict or could not potentially conflict with those of the applicant.

3. Member States may also provide that free legal assistance and representation are granted:

(a) only to those who lack sufficient resources; and/or

(b) only through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants.

Member States may provide that free legal assistance and representation not be made available if the appeal or review is considered by a competent authority to have no tangible prospect of success. In such a case, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

Dublin Regulation

Article 26 Notification of a transfer decision

1. Where the requested Member State accepts to take charge of or to take back an applicant or other person as referred to in Article 18(1)(c) or (d), the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection. If a legal advisor or other counsellor is representing the person concerned, Member States may choose to notify the decision to such legal advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned.

2. The decision referred to in paragraph 1 shall contain information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits applicable for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means. Member States shall ensure that information on persons or entities that may provide legal assistance to the person concerned is communicated to the person concerned together with the decision referred to in paragraph 1, when that information has not been already communicated.

3. When the person concerned is not assisted or represented by a legal advisor or other counsellor, Member States shall inform him or her of the main elements of the decision, which shall always include information on the legal remedies available and the time limits applicable for seeking such remedies, in a language that the person concerned understands or is reasonably supposed to understand.

Article 27(6)

6. Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.

Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation not be granted where the appeal or review is considered by

the competent authority or a court or tribunal to have no tangible prospect of success.

Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision.

In complying with the requirements set out in this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation. Procedures for access to legal assistance shall be laid down in national law.

Access to a Lawyer Directive 2013/48/EU

Article 5 The right to have a third person informed of the deprivation of liberty

2. If the suspect or accused person is a child, Member States shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto, unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child.

4. Where Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child.

A small number of States provide legal aid to children automatically where a particular type of legal action is covered by the legal aid system. Belgium has exceptionally strong and clear rules automatically exempting a child from paying all costs related to judicial proceedings, including legal fees. Typically, though, eligibility criteria relating to the financial status of applicants will limit the coverage of free legal aid. It is common for these rules to take into account the financial position of a child's parents, provisions that may prevent children from wealthier families that do not support heir legal action from approaching the courts. Lithuania and Luxembourg have both sidestepped this barrier by excluding a child's parents' income from the decision on whether to grant legal aid to a child, while Finland only considers parental income where the parents are assisting the child in bringing the case.

CRIN: Rights, Remedies and Representation: A global report on access to justice for children , p. 29

Legal assistance in return decisions

Twenty Guidelines on Forced Return, Committee of Ministers, Council of Europe

Guideline 9(2)

This remedy shall be readily accessible and effective and legal aid should be provided for in

accordance with national legislation.

EU law

The Asylum procedures Directive (Art 2(n)) and Reception Conditions Directive (Art 2(j)) provide for a definition of a legal representative **as follows:**

A person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive.

Return Directive

Article 13 Remedies
(…)
3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.
4. Member States shall ensure that the necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in Article 15(3) to (6) of Directive 2005/85/EC.

Anti Trafficking Directive Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA L 101/1 O.J. 15.4.2011

Article 15 Protection of child victims of trafficking in human beings in criminal investigations and proceedings

1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a representative for a child victim of trafficking in human beings where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim.

Good practice:

In Austria and Denmark, **unaccompanied children** or their guardian do not need to specifically request or apply for legal assistance, as legal advisors are appointed automatically to unaccompanied children by the authorities, for all or some of the procedures.[2]

For instance, in Slovenia, children have the **right to a refugee counselor**, who provides support and legal aid to them.

[2] ECRE, Right to Justice: Quality legal assistance for unaccompanied children, comprarative report, p. 51

4. Right to interpretation

Interpretation is key to the effective delivery of legal assistance in asylum and migration procedures as migrants and asylum seekers rarely speak the language of the host country. It is important that interpretation is not only available for meeting with the authorities but also for meetings between the child and their legal advisor.

Building trust and effectively informing the child is crucial for legal advisors to be able to provide quality assistance. This is significantly challenging if they cannot interact through an interpreter. Insufficient qualifications, skills or disrespectful attitude of an interpreter, can undermine the quality of legal assistance provided and the respect for the child's rights.

Right to interpretation and translation Directive 2010/64/EU

Article 2 - Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

(…)

Article 3 - Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

5. The reasonable time requirement

Child custody cases must be dealt with speedily. All the more so where the passage of time may have irreversible consequences for the parent-child relationship. Cases concerning parental responsibility and contact rights call for particular expedition.

Hokkanen v. Finland

72. Although it **is essential that custody cases be dealt with speedily**, the Court sees no reason to criticise the District Court for having suspended the proceedings twice in order to obtain expert opinions on the issue before it.

As regards the six months' delay the difficulties which the social welfare authorities encountered as a result of the grandparents' refusal to allow Sini to be subjected to investigation and to take part in related interviews must not be overlooked (see paragraph 24 above). Irrespective of whether there were sufficient reasons for suspending the hearing for as long as six months, it has to be noted that the overall length of the proceedings was approximately eighteen months. In itself this is not excessive for proceedings comprising three judicial levels.

Having regard to the particular circumstances of the case, the Court, like the Commission, finds that the length of the second custody proceedings did not exceed a "reasonable time" and that there was thus no violation of Article 6 para. 1 (art. 6-1) of the Convention.

Promising practice: Speeding up proceedings

In the Espoo area of Finland, criminal courts implemented so-called 'Joukodays', during which children's cases are prioritised and automatically placed towards the front of the queue. This results in shorter proceedings and less stress for the children involved.

Source: FRA (2015), Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, p. 35.

Tsikakis v. Germany

68. Compte tenu de l'enjeu du litige pour ***le requérant, qui n'a pas pu voir son enfant tout au long de la procédure de reconnaissance de paternité****, et de la célérité particulière qui s'imposait en l'espèce en raison des conséquences irrémédiables que le passage du temps* ***risquait de faire peser sur la relation entre l'enfant et le requérant****, la Cour estime que les juridictions allemandes* ***n'ont pas fait preuve de la diligence nécessaire et que la durée de la procédure n'était pas raisonnable au sens de l'article 6 § 1*** *de la Convention.*

Niederböster v. Germany

39. The Court reiterates that the reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, and the conduct of the parties and of the authorities. On the latter point, what is at stake for the applicant in the litigation has to be taken into account. It is thus essential that **custody cases be dealt with speedily** *(…).*

Paulsen-Medalen and Svensson v. Sweden

39. According to the Court's case-law, the reasonableness of the length of proceedings is to be assessed, in particular, in the light of the complexity of the case and the conduct of the applicant and that of the relevant authorities. In cases concerning ***restrictions on access between a parent and a child taken into public care****, the nature of the interests at stake for the applicant and the* ***serious and irreversible consequences*** *which the taking into care may have on his or her enjoyment of the right to respect for family life require the authorities to* ***act with exceptional diligence*** *in ensuring progress of the proceedings (…).*

Laino v. Italy [GC]

22. The Court observes at the outset that the respondent State cannot be considered responsible for the delay caused by the attempt to reach an out-of-court settlement, since Mr Laino had himself requested and been granted three adjournments of the hearing (see paragraph 8 above).

The Court notes further that the case was not particularly complex and that the preparation for trial consisted essentially in hearing evidence from four witnesses at the hearing on 22 April 1993 (ibid.).

As to the conduct of the authorities dealing with the case, the Court considers that, having regard to what was at stake for the applicant (judicial separation and determination of the arrangements for custody of the children and access rights), the domestic courts failed to act with the special diligence required by Article 6 § 1 of the Convention in such cases (see the Maciariello and Paulsen-Medalen and Svensson judgments cited above, pp. 10 and 142, §§ 18 and 39, respectively). The various periods of inactivity attributable to the State, in particular the ones from 25 November 1993 to 15 December 1994 and from the latter date to 10 July 1997, ***failed to satisfy the "reasonable time" requirement****.*

Having regard also to the total duration of the proceedings, the Court concludes that there has been a violation of Article 6 § 1.

Souza Ribiero v. France (Application no. 22689/07), 13 December 2012

95. While the urgent proceedings could in theory have been an opportunity for the court to examine the applicant's arguments and, if necessary, to stay the execution of the removal order, any possibility of that actually happening was extinguished because of the excessively short time between his application to the court and the execution of the removal order. In fact, the urgent-applications judge was powerless to do anything but declare the application devoid of purpose. So the applicant was deported solely on the basis of the decision of the administrative authority.

Consequently, in the circumstances of the present case the Court considers that the haste with which the removal order was executed had the effect of **rendering the available remedies ineffective in practice and therefore inaccessible**. While the Court is aware of the importance of swift access to a remedy, **speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of it, or take priority over its practical effectiveness**.

6. Evidence: Expert opinion

Sommerfeld v. Germany

71. As regards the issue of ordering a psychological report on the possibilities of establishing contact between the child and the applicant, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means to ascertain the relevant facts (see Vidal v. Belgium, judgment of 22 April 1992, Series A no. 235-B, p. 32, § 33). It would be going ***too far to say that domestic courts are always required to involve a psychological expert*** *on the issue of access to a parent not having custody, but this issue* ***depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.***

7. Due process in expulsion proceedings or when entering a country

Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[3]

Article 1 Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
a) to submit reasons against his expulsion,
b) to have his case reviewed, and
c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

ICCPR

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Geneva Refugee Convention

Article 32 Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order and in pursuance of a decision reached in accordance with the process of law.
2. Each refugee shall be entitled, in accordance with the established law and procedure of the country, to submit evidence to clear himself and to be represented before the competent authority.
3. The Contracting States shall allow such refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

International human rights law affords limited procedural protection to migrants entering a country: in particular, the right to a fair hearing is unlikely to apply to decisions on entry to the territory. It has been expressly excluded by the European Court of Human Rights in relation to decisions regarding other aspects of immigration control (*Maaouia v. France)*, while the UN Human Rights Committee has left the question open. Expulsion procedures thus are not subject to the full protection of the right to fair trial and its consequent guarantees. However, Article 13 of the ICCPR and Article 1 of *Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, respectively, guarantee procedural rights in expulsion proceedings in terms similar to Article 32 of the *Geneva Refugee Convention*. They require that a non-national lawfully in the territory of a State (ICCPR) or "lawfully resident" there (Protocol 7 ECHR) may be expelled only in pursuance of a decision reached in accordance with law. In addition, the non-national must be allowed, prior to expulsion, to submit reasons against expulsion and to have his or her case reviewed by, and be represented before, the competent authority or a person or persons especially designated by the competent authority. Exceptions to these guarantees are provided in case of national security or public order.

[3] **Germany**, the Netherlands and the United Kingdom are not parties to Protocol 7 ECHR (as of 7 July 2016).

Maaouia v. France, ECtHR, GC, Application No. 39652/98, Judgment of 5 October 2000

36. The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection, the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take "further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...". Taken together, those provisions show that **the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere.** That construction is supported by the explanatory report on Protocol No. 7 in the section dealing with Article 1, the relevant passages of which read as follows:

> "6. In line with the general remark made in the introduction ..., it is stressed that an alien lawfully in the territory of a member state of the Council of Europe already benefits from certain guarantees when a measure of expulsion is taken against him, notably those which are afforded by Articles 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life), in connection with Article 13 (right to an effective remedy before a national authority) of the ... Convention ..., as interpreted by the European Commission and Court of Human Rights ...
>
> 7. Account being taken of the rights which are thus recognised in favour of aliens, the present article has been added to the ... Convention ... in order to afford minimum guarantees to such persons in the event of expulsion from the territory of a Contracting Party. The addition of this article enables protection to be granted in those cases which are not covered by other international instruments and allows such protection to be brought within the purview of the system of control provided for in the ... Convention ...
>
> ...
>
> 16. The European Commission of Human Rights has held in the case of Application No. 7729/76 that a decision to deport a person does 'not involve a determination of his civil rights and obligations or of any criminal charge against him' within the meaning of Article 6 of the Convention. The present article does not affect this interpretation of Article 6."

37. The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their **intention not to include such proceedings within the scope of Article 6 § 1 of the Convention**.

III. Access to effective remedy

1. Access to effective remedy

European Convention on Human Rights (ECHR)

Article 13
Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Protocol 7 ECHR[4]

[4] The Protocol 7 has been signed and ratified by all EU Member states, apart from Germany, the Netherlands and the UK

Article 1
Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a) to submit reasons against his expulsion,
b) to have his case reviewed, and
c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

EU Charter on Human Rights

Article 47
Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Al-Nashif v. Bulgaria, ECtHR, Application No. 50963/99, Judgment of 20 June 2002

132. As the Court has stated on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they comply with to their Convention obligations under this provision.

Giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, Article 13 establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights.

The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (…).

International human rights bodies agree that the remedy must be prompt, effective, accessible,

impartial and independent, must be enforceable, and lead to cessation of or reparation for the human rights violation concerned. In certain cases, the remedy must be provided by a judicial body, but, even if it is not, it must fulfill the requirements of effectiveness and independence, set out above. The remedy must be effective in practice as well as in law, and must not be unjustifiably hindered by the acts of State authorities.

***Muminov v. Russia*, ECtHR**

100. As to the merits of the complaint, the Court reiterates that the remedy required by Article 13 must be effective both in law and in practice, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (…). The Court is not called upon to review in abstracto the compatibility of the relevant law and practice with the Convention, but to determine whether there was a remedy compatible with Article 13 of the Convention available to grant the applicant appropriate relief as regards his substantive complaint (…). Even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so (…). The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (...).

Jabari v. Turkey, ECtHR, Application No. 40035/98, Judgment of 11 July 2000, paras. 39-42.

39. The Court further observes that, having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3 (…).

40. The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the applicant's **failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears a bout being removed to Iran** (…). In the Court's opinion, the **automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention**. It fell to the branch office of the UNHCR to interview the applicant about the background to her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged. The Ankara Administrative Court, on her application for judicial review, limited itself to the issue of the formal legality of the applicant's deportation rather than the more compelling question of the substance of her fears, even though by that stage the applicant must be considered to have had more than an arguable claim that she would be at risk if removed to her country of origin.

41. The Court for its part must give due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which the applicant would face if her deportation were to be implemented. It is to be observed in this connection that the UNHCR interviewed the applicant and had the opportunity to test the credibility of her fears and the veracity of her account of the criminal proceedings initiated against her in Iran by reason of her adultery. It is further to be observed that the Government have not sought to dispute the applicant's reliance on the findings of Amnesty International concerning the punishment meted out to women who are found guilty of adultery (…). Having regard to the fact that the material point in time for the assessment of the risk faced by the applicant is the time of its own consideration of the case (…), the Court is not persuaded that the situation in the applicant's country of origin has evolved to the extent that adulterous behaviour is no longer considered a reprehensible affront to Islamic law. It has taken judicial notice of recent surveys of the current situation in Iran and notes that punishment of adultery by stoning still remains on the statute book and may be resorted to by the authorities (…).

42. Having regard to the above considerations, the Court finds it substantiated that there is a real risk of the applicant being subjected to treatment contrary to Article 3 if she were to be returned to Iran.
Accordingly, the order for her deportation to Iran would, if executed, give rise to a violation of Article 3.

Rahimi v. Greece, Application no. 8687/08, Council of Europe: European Court of Human Rights, 5 April 2011

Case Summary:
Background:
The complainant in this case was 15 years old when he arrived in Greece from Afghanistan as an unaccompanied minor. Upon his arrival, he was arrested and sent to a detention camp for refugees pending deportation. While being detained, he was offered no information on the possibility to seek asylum and his other legal rights in a language that he could understand and he was placed among adults in poor conditions with regard to accommodation, hygiene and infrastructure. Following his release, as he was not appointed a legal guardian or offered any other assistance, the complainant was living on the streets until he received help by local NGOs.

Issue and resolution:
Unaccompanied minors. The Court found that there had been a violation of the prohibition against torture or inhumane or degrading treatment, as well as the rights to liberty and to an effective remedy.

The Court underlined the **extremely vulnerable position** in which the complainant was found and also concluded that several other rights had been violated, namely, the right to be free from torture, inhumane or degrading treatment in so far as the conditions in the detention centre were so poor that they went against human dignity; the **right to seek review of unlawful detention before a court** as the complainant **was not provided legal assistance or translation** while being detained; and the **right to an effective remedy.**

2. Access to effective remedy in expulsion proceedings, the right to an appeal with a suspensive effect

The European Court of Human Rights (*M.S.S. v. Belgium and Greece*, para. 301, *Hirsi Jamaa and Others v. Italy*, paras. 202-204.) has held that, in order to comply with the right to a remedy, a person threatened with an expulsion which arguably violates another Convention right must have:

- access to relevant documents and accessible information on the legal procedures to be followed in his or her case;
- where necessary, translated material and interpretation;
- effective access to legal advice, if necessary by provision of legal aid;
- the right to participate in adversarial proceedings;
- reasons for the decision to expel (a stereotyped decision that does not reflect the individual case will be unlikely to be sufficient) and a fair and reasonable opportunity to dispute the factual basis for the expulsion.

Where the State authorities fail to communicate effectively with the person threatened with expulsion concerning the legal proceedings in his or her case, the State cannot justify a removal on the grounds of the individual's failure to comply with the formalities of the proceedings.

I.M. v. France, ECtHR, Application no. 9152/09, 2 February 2012
132. Par ailleurs, l'effectivité implique des exigences de qualité, de rapidité et de suspensivité, compte tenu en particulier de l'importance que la Cour attache à l'article 3 et de la nature irréversible du dommage susceptible d'être causé en cas de réalisation du risque de torture ou de mauvais traitements.

142. Certes, la Cour est consciente de la nécessité pour les Etats confrontés à ***un grand nombre de demandeurs d'asile*** *de disposer des moyens nécessaires pour faire face à un tel contentieux, ainsi que des risques d'engorgement du système évoqués par le Gouvernement. A cet égard,* ***la Cour reconnaît, comme le soulignent le Gouvernement et l'UNHCR, que les procédures d'asile accélérées****, dont se sont dotés de nombreux Etats européens,* ***puissent faciliter le traitement des demandes clairement abusives*** *ou manifestement infondées. Elle a d'ailleurs déjà eu l'occasion d'estimer que le réexamen d'une demande d'asile selon le mode prioritaire ne privait pas l'étranger en rétention d'un examen circonstancié dès lors qu'une première demande avait fait l'objet d'un examen complet dans le cadre d'une procédure d'asile normale (…).*

147. […] ***Si la Cour reconnaît l'importance de la rapidité des recours, elle considère que celle-ci ne devrait pas être privilégiée aux dépens de l'effectivité de garanties procédurales essentielles visant à protéger le requérant contre un refoulement arbitraire*** *vers le Soudan.*

148. […] la Cour estime au contraire que le classement de la demande d'asile du requérant en procédure prioritaire a abouti à un traitement extrêmement rapide, voire sommaire de cette demande par l'OFPRA. Pour la Cour, l'ensemble des contraintes imposées au requérant tout au long de cette procédure, alors qu'il était privé de liberté et qu'il s'agissait d'une première demande d'asile, ont affecté en pratique la capacité du requérant à faire valoir le bien-fondé de ses griefs tirés de l'article 3 de la Convention.

154. […] la Cour constate que ***si les recours exercés par le requérant étaient théoriquement disponibles, leur accessibilité en pratique a été limitée par plusieurs facteurs, liés pour l'essentiel au classement automatique de sa demande en procédure prioritaire, à la brièveté des délais de recours à sa disposition et aux difficultés matérielles et procédurales*** *d'apporter des preuves alors que le requérant se trouvait en détention ou en rétention.*

Twenty Guidelines on Forced Return, Committee of Ministers, Council of Europe

Guideline 5. Remedy against the removal order

1. In the removal order, or in the process leading to the removal order, the subject of the removal order shall be afforded an **effective remedy before a competent authority** or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the **power to review the removal order,** including the possibility of **temporarily suspending** its execution.

2. The remedy shall offer the required procedural guarantees and present the following characteristics:

– the time-limits for exercising the remedy shall not be unreasonably short;

– the remedy shall be accessible, which implies in particular that, where the subject of the removal order does not have sufficient means to pay for necessary legal assistance, he/she should be given it free of charge, in accordance with the relevant national rules regarding legal aid;

– where the returnee claims that the removal will result in a violation of his or her human rights as set out in Guideline 2.1, the remedy shall provide rigorous scrutiny of such a claim.

CEDAW, General Recommendation No. 26 on women migrant workers

21. Access to justice may be limited for women migrant workers. In some countries, restrictions are imposed on the use of the legal system by women migrant workers to obtain remedies for discriminatory labour standards, employment discrimination or sex- and gender-based violence. Further, women migrant workers may not be eligible for free government legal aid, and there may be other impediments, such as unresponsive and hostile officials and, at times, collusion

between officials and the perpetrator. In some cases, diplomats have perpetrated sexual abuse, violence and other forms of discrimination against women migrant domestic workers while enjoying diplomatic immunity. In some countries, there are gaps in the laws protecting migrant women workers. For example, they may lose their work permits once they make a report of abuse or discrimination and then they cannot afford to remain in the country for the duration of the trial, if any. In addition to these formal barriers, practical barriers may prevent access to remedies. Many do not know the language of the country and do not know their rights. Women migrant workers may lack mobility because they may be confined by employers to their work or living sites, prohibited from using telephones or banned from joining groups or cultural associations. They often lack knowledge of their embassies or of services available, due to their dependence on employers or spouses for such information. For example, it is very difficult for women migrant domestic workers who are scarcely ever out of sight of their employers to even register with their embassies or file complaints. As such, women may have no outside contacts and no means of making a complaint, and they may suffer violence and abuse for long periods of time before the situation is exposed. In addition, the withholding of passports by employers or the fear of reprisal if the women migrant worker is engaged in sectors that are linked to criminal networks prevent them from making a report.
22. Undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation. They may be exploited as forced labour, and their access to minimum labour rights may be limited by fear of denouncement. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centres, where they are vulnerable to sexual abuse, and then deported.

26. States parties in countries where migrant women work should take all appropriate measures to ensure non-discrimination and the equal rights of women migrant workers, including in their own communities. Measures that may be required include, but are not limited to, the following:

(c) Access to remedies: States parties should ensure that women migrant workers have the ability to access remedies when their rights are violated. Specific measures include, but are not limited to, the following (articles 2 (c), (f) and 3):
ii) Repeal or amend laws that prevent women migrant workers from using the courts and other systems of redress. These include laws on loss of work permit, which results in loss of earnings and possible deportation by immigration authorities when a worker files a complaint of exploitation or abuse and while pending investigation. States parties should introduce flexibility into the process of changing employers or sponsors without deportation in cases where workers complain of abuse;

The analysis of CEDAW can also be applied to all other categories of migrants. According to this approach, expulsion has both direct and indirect effects on migrants' right to a remedy:

- Direct effect: the expulsion, once carried out, can render the remedy meaningless or ineffective, as the person, once expelled, may not have access to it, or access to it might be impracticable due to the situation in the country to which they have been expelled. In this case, an important factor will be whether the State provides the migrant with effective mechanisms to claim his or her remedy once abroad.
- Indirect effect: The threat of expulsion constitutes a powerful deterrent for migrants to decide to access a remedy against their human rights violations. As all rights must be interpreted so as to make their protection meaningful and effective, States must create conditions for both regular and undocumented migrants to avail themselves of a remedy, without fear of expulsion.

Isakov v. Russia, ECtHR

136. The Court notes that the scope of a State's obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. **Given the irreversible nature of the harm that might occur if the alleged risk of torture or ill-treatment** materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) **independent and rigorous scrutiny of a claim that there are substantial grounds for believing that there was a real risk of treatment contrary to Article 3** in the event of the applicant's expulsion to the country of destination, and (ii) the provision of an **effective possibility of suspending the enforcement** of measures whose effects are potentially irreversible (or "a remedy with automatic suspensive effect" as it is phrased in Gebremedhin [Gaberamadhien] v. France, no. 25389/05, §66 in fine, ECHR 2007-V, which concerned an asylum seeker wishing to enter the territory of France; see also Jabari v. Turkey, no.40035/98, §50, ECHR 2000-VIII; Shamayev and Others, cited above, §460; Olaechea Cahuas v.Spain, no. 24668/03, §35, ECHR 2006-X; and Salah Sheekh v.theNetherlands,no.1948/04, §154, ECHR 2007 -I (extracts)).
137. Judicial review proceedings constitute, in principle, an effective remedy within the meaning of Article 13 of the Convention in relation to complaints in the context of expulsion and extradition, provided that the courts can effectively review the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate (see Slivenko v. Latvia (dec.) [GC], no.48321/99, §99, ECHR 2002-II). Turning to the circumstances of the present case, the Court observes that the decision of the Prosecutor General's office to extradite the applicant was upheld on appeal by the Tyumen regional court and the Supreme Court. In their decisions the domestic courts did not conduct a detailed examination of the applicant's allegation of the risk of ill-treatment in Uzbekistan and only referred in general termsto the assurances provided by the Uzbek authorities (…). Consequently, the courts failed to rigorously scrutinise the applicant's claims of the risk of ill-treatment in the event of his extradition to Uzbekistan.

M.S.S. v. Belgium and Greece, ECtHR, para. 318. And 320

318. However, the Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of "persons of no known address" reported by the Council of Europe Commissioner for Human Rights and the UNHCR (see paragraph 187 above), makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.

320. Lastly, the Court cannot consider, as the Government have suggested, that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (see paragraph 293 above). In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection 320. Lastly, the Court cannot consider, as the Government have suggested, that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents (see paragraph 293 above). In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious

consideration at first instance, statistically has virtually no chance of being offered any form of protection

Jabari v. Turkey, ECtHR, Application No. 40035/98, Judgment of 11 July 2000, paras. 39-42.

50. In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13. **Accordingly, there has been a violation of Article 13 of the Convention.**

Čonka v. Belgium, ECtHR, para. 79; and 81-85.

79. The Court considers that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and **whose effects are potentially irreversible** (see, mutatis mutandis, Jabari, cited above, § 50). Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision (see Chahal, cited above, p. 1870, § 145).

81. An application for a stay of execution under the extremely urgent procedure is not suspensive either. The Government stressed, however, that the president of the division may at any time – even on bank holidays and on a few hours' notice, as frequently occurred in deportation cases – summon the parties to attend so that the application can be considered and, if appropriate, an order made for a stay of the deportation order before its execution. It will be noted that the authorities are not legally bound to await the Conseil d'Etat's decision before executing a deportation order. It is for that reason that the Conseil d'Etat has, for example, issued a practice direction directing that on an application for a stay under the extremely urgent procedure the registrar shall, at the request of the judge, contact the Aliens Office to establish the date scheduled for the repatriation and to make arrangements regarding the procedure to be followed as a consequence. Two remarks need to be made about that system.

82. Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.

83. Secondly, even if the risk of error is in practice negligible – a point which the Court is unable to verify, in the absence of any reliable evidence – it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention (see, mutatis mutandis, Iatridis v. Greece [GC], no. 31107/96, § 58, ECHR 1999-II).

However, it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide the application. Furthermore, the onus is in practice on the Conseil d'Etat to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the Conseil d'Etat, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the Conseil d'Etat and the authorities will comply in every case with that practice, that the Conseil d'Etat will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace.

Each of those factors makes the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied.

84. As to the overloading of the Conseil d'Etat's list and the risks of abuse of process, the Court considers that, as with Article 6 of the Convention, Article 13 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet its requirements (see, mutatis mutandis, Süßmann v. Germany, judgment of 16 September 1996, Reports 1996-IV, p. 1174, § 55). In that connection, the importance of Article 13 for preserving the subsidiary nature of the Convention system must be stressed (see, mutatis mutandis, Kudła, cited above, § 152).

85. In conclusion, the **applicants did not have a remedy available that satisfied the requirements of Article 13** to air their complaint under Article 4 of Protocol No. 4. Accordingly, there has been a violation of Article 13 of the Convention and the objection to the complaint of a violation of Article 4 of Protocol No. 4 (see paragraph 57 above) must be dismissed.

See also: Garayev v. Azerbaijan, ECtHR, paras. 82 and 84; Vilvarajah and Others v. United Kingdom, ECtHR, Yuldashev v. Russia, ECtHR, para. 110-111; C.G. and Others v. Bulgaria, ECtHR, para. 56, Gebremedhin v. France, ECtHR, Application No. 25389/05, Judgment of 26 April 2007, paras. 58, 66; Muminov v. Russia, ECtHR, para. 101; De Souza Ribeiro v. France, ECtHR, GC, Application No. 22689/07, Judgment of 13 December 2012, para. 82; Hirsi Jamaa and Others v. Italy, ECtHR, GC, para. 206, Mohammed v. Austria, ECtHR, para. 80. And 83

3. Positive obligations to protect and to provide effective remedy

Council of Europe, Convention on Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 2007

Article 14 – Assistance to victims

1. Each Party shall take the necessary legislative or other measures to assist victims, in the short and long term, in their physical and psychosocial recovery. Measures taken pursuant to this paragraph shall take due account of the child's views, needs and concerns.
2. Each Party shall take measures, under the conditions provided for by its internal law, to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.
3. When the parents or persons who have care of the child are involved in his or her sexual exploitation or sexual abuse, the intervention procedures taken in application of Article 11,

paragraph 1, shall include:
– the possibility of removing the alleged perpetrator;
– the possibility of removing the victim from his or her family environment. The conditions and duration of such removal shall be determined in accordance with the best interests of the child.
4. Each Party shall take the necessary legislative or other measures to ensure that the persons who are close to the victim may benefit, where appropriate, from therapeutic assistance, notably emergency psychological care.

ECtHR, *P. and S. v. Poland*, No. 57375/08, 30 October 2012

165. The Court has been particularly struck by the fact that the authorities decided to institute criminal investigation on charges of unlawful intercourse against the first applicant who, according to the prosecutor's certificate and the forensic findings referred to above should have been considered to be a **victim of sexual abuse**. The Court considers that this approach fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse (…). The investigation against the applicant was ultimately discontinued, but the mere fact that they were instituted and conducted shows a profound lack of understanding of her predicament.

166. On the whole, the Court considers that **no proper regard was had to the first applicant's vulnerability and young age and her own views and feelings**.

167. In the examination of the present complaint it is necessary for the Court to assess the first applicant's situation as a whole, having regard in particular to the cumulative effects of the circumstances on the applicant's situation. In this connection, it must be borne in mind that the Court has already found, having examined the complaint under Article 8 of the Convention about the determination of the first applicant's access to abortion, that **the approach of the authorities was marred by procrastination, confusion and lack of proper and objective counselling and information** (…). Likewise, the fact that the first applicant was separated from her mother and deprived of liberty in breach of the requirements of Article 5 § 1 of the Convention must be taken into consideration.

168. The Court concludes, having regard to the circumstances of the case seen as a whole, that the first applicant was treated by the authorities in a deplorable manner and that her suffering reached the minimum threshold of severity under Article 3 of the Convention.

169. The Court concludes that there has therefore been a breach of that provision.

Article 1 of the ECHR obliges states to secure the human rights of those within their jurisdiction. This obligation, read together with other Articles – such as Article 2 (the right to life) and Article 3 (the prohibition of torture and inhuman and degrading treatment) – requires states to take positive measures to ensure that individuals rights are not violated by state representatives. These positive obligations include preventing serious violations of human rights by private individuals. They require states to provide effective protection, particularly for children and other vulnerable persons, and to prevent ill-treatment of which they have or ought to have knowledge. (ECtHR, *Z and Others v. the United Kingdom*).

ECtHR, *Z and Others v. the United Kingdom*, No. 29392/95, 10 May 2001

3. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment.

The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see A. v. the United Kingdom, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2699, § 22). These measures should provide **effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledg**e (…).

Victims must be given practical support to enable them to access justice. This includes providing victim support, raising victims' awareness of their rights, and sufficient training of law enforcement personnel. The CJEU has addressed cases involving the Framework Decision on the standing of victims: In Criminal proceedings against *Maria Pupino (*CJEU, C-105/03, Criminal proceedings against Maria Pupino, 16 June 2005), Mrs Pupino, a nursery school teacher, was charged with inflicting serious injuries on her pupils. Article 8 of the Framework Decision contained specific protections for "vulnerable" victims. A preliminary reference on the provision's application was made to the CJEU. The CJEU held that **young children allegedly mistreated by their teacher are "vulnerable" victims within the meaning of the Framework Decision**. Therefore, they were entitled to the specific protection provided by it. The national court had to interpret national law "so far as possible, in the light of the wording and purpose of the Framework Decision".

IV. Access to information

***Twenty Guidelines on Forced Return*, Committee of Minister, Council of Europe**

Guideline 4. Notification of the removal order

1. The removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate:
   - the legal and factual grounds on which it is based;
   - the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised.
2. Moreover, the authorities of the host state are encouraged to indicate:
   - the bodies from whom further information may be obtained concerning the execution of the removal order;
   - the consequences of non-compliance with the removal order.

All rights and remedies available cannot be effective without a timely and appropriate access to information by migrant children.

Being aware of, and having access to, information about their rights and how to obtain a remedy is a key element of ensuring access to justice for children. Information should be age-appropriate and adapted to the needs of children. It should be presented in ways that children accept and understand. **In addition, information should be made available to**

parents and other persons acting as legal representatives of children.

Right to **be informed**/access to information

a. Article 3 and 6, European Convention on the Exercise of Children's Rights
b. Right to information Directive 2012/13/EU

Access to information for unaccompanied children: See section V. Vulnerable groups (Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, PACE)

V. Vulnerable groups

Guarantees for unaccompanied minors

- Appointment of a guardian to an UAM is the first measure to be taken and an obligation on the State.
- Free legal counsel must be provided to the UAM, in addition to the appointment of a guardian
- In all steps of the procedure, measures must be taken to assure that the views of the child are taken into due consideration

Appointment of a guardian:

General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC, UN Doc. CRC/GC/2005/6, 1 September 2005

21. Subsequent steps, such as the appointment of a competent guardian as expeditiously as possible, serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child. Therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian.

Appointment of a guardian or adviser and legal representative (arts. 18 (2) and 20 (1))

33. States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. Therefore, **States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements** until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child. Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role.

Access to information:

Resolution 1810 (2011): Unaccompanied children in Europe: issues of arrival, stay and return, PACE

5.3. no child should be denied access to the territory or be summarily turned back at the borders of a member state. Immediate referral to assistance and care should be arranged by specialised services with a view to identifying if the migrant is a minor, ascertaining his or her individual circumstances and protection needs and ultimately identifying a durable solution in the child's best interest;

5.6. legal, social and psychological assistance should be provided without delay to unaccompanied children. Children should be informed immediately upon arrival or interception, individually and in a language and form that they can understand, about their right to protection and assistance, including their right to seek asylum or other forms of international protection, and the necessary procedures and their implications;

5.7. all interviews with an unaccompanied child concerning his or her personal details and background should be conducted individually by specialised and well-trained staff and in the presence of the child's guardian;" *possibilities should be extended beyond 5.14. family reunification the country of origin and approached from a humanitarian perspective exploring wider family links in the host country and third countries, guided by the principle of the child's best interest. The Dublin II Regulation should only be applied to unaccompanied children if transfer to a third country is in the child's best interests;*

Asylum seeking children

***General Comment No. 6*: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,* CRC, UN Doc. CRC/GC/2005/6, 1 September 2005**

66. Asylum-seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age. In the case that facts become known during the identification and registration process which indicate that the child may have a well-founded fear, or even if unable to explicitly articulate a concrete fear, may objectively be at risk of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or, otherwise be in need of international protection, such a child should be referred to the asylum procedure and/or, where relevant, to mechanisms providing complementary protection under international and domestic law.

69. An asylum-seeking child should be **represented by an adult** who is familiar with the child's background and who is competent and able to represent his or her best interests (see section V (b), "Appointment of a guardian or adviser or legal representative"). The unaccompanied or separated child should also, in all cases, **be given access, free of charge, to a qualified legal representative**, including where the application for refugee status is processed under the normal procedures for adults.

70. Refugee status applications filed by unaccompanied and separated children shall be given priority and every effort should be made to render a decision promptly and fairly.

71. Minimum procedural guarantees should include that the application will be determined by a competent authority fully qualified in asylum and refugee matters. 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. 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. Moreover, the child should be given the "benefit of the doubt", should there be credibility concerns relating to his or her story as well as a possibility to appeal for a formal review of the decision.

72. The interviews should be conducted by representatives of the refugee determination authority who will take into account the special situation of unaccompanied children in order to carry out the refugee status assessment and apply an understanding of the history, culture and background of the child. The assessment process should comprise a case-by-case examination of the unique combination of factors presented by each child, including the child's personal, family and cultural background. The guardian and the legal representative should be present during all interviews.

Sources:

- COMMITTEE ON THE RIGHTS OF THE CHILD: GENERAL COMMENT No. 12 (2009), The right of the child to be heard
- UNICEF, Save the children: Every childs right to be heard http://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf
- UNICEF Child and Youth Participation Resource Guide http://www.jrf.org.uk/sites/default/files/jrf/migrated/files/1859351395.pdf
- Training materials and modules from the University College Cork
- Council of Europe guidelines on child-friendly justice http://www.coe.int/en/web/children/child-friendly-justice
- FRA, Handbook on European law relating to the rights of the child, 2015 http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights
- Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Human Rigths Council, 1 April 2015

Warm-up QUESTIONNAIRE FOR PARTICIPANTS	**Notes FOR THE TRAINER (that wont be first shared with participants)**
The right to be heard means d) Children must be heard in court in all matters affecting them e) Children below the age of 12 cannot be heard in court as they cannot understand the complexity of judicial proceedings f) Child's parent or legal guardian can effectively represent child's needs in court, after consulting the child beforehand	a) No. The right to be heard should be respected. Children should be consulted. But it must be taken into consideration as well as specific circumstances of the case – children need to be protected from negative consequences of an inconsiderate practice of the right. ECtHR: **It would be going too far to say that domestic courts are always required to hear a child in court** b) No. They can. No age limit is set in international law. Due weight should be given to the child's views and opinion in accordance with his or her age and maturity. **States must also ensure that the views of children, including children from the youngest age, even when they may be unable to express themselves verbally, are given due**

	consideration. c) Generally no. Only in specific circumstances.
A guardian must be appointed to every unaccompanied child d) As soon as possible the child arrives to the country e) Once the child was granted international protection **f)** Only if the child agrees with it	a) Yes as a key procedural safeguard (GC 6), as soon as the unaccompanied child is identified b) Qualification Directive: Article 31: ass soon as possible after the granting of international protection c)
Every child has a right to free legal assistance a) Once the child applies for asylum b) No, once a guardian has been appointed c) When his or her best interests are to be formally assessed d) During a return procedure	a) GC 6 CRC: yes for asylum seeking UAM, 36 b) CRC, GC 10: Appropriate assistance, does not have to be legal, must be free of charge c) GC 14, CRC d) Twenty guidelines on forced return
Migrant children have the right to an effective remedy d) always e) in all cases apart from when entering the territory of a country f) in expulsion proceedings	a) yes, Article 47 EU Charter b)
Effective appeal in expulsion cases d) must always have suspensive effect e) . f)	