

HANDBOOK

# Handbook on European law relating to the rights of the child



COUNCIL OF EUROPE



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# Handbook on European law relating to the rights of the child



## Foreword

This handbook on European law relating to the rights of the child is jointly prepared by the European Union Agency for Fundamental Rights (FRA) and the Council of Europe together with the Registry of the European Court of Human Rights. It is the fourth in a series of handbooks on European law jointly prepared by our organisations. Previous handbooks were dedicated to European law relating to non-discrimination law, asylum, borders and immigration, and data protection.

We embarked on this new joint project in the context of the celebrations of the 25<sup>th</sup> anniversary of the United Nations Convention on the Rights of the Child – which all European states have ratified – to shed light on the role of European legal standards in securing the enjoyment by children of their universal rights.

Children are full-fledged holders of rights. This handbook thus aims to raise awareness and improve the knowledge of the legal standards that protect and promote these rights in Europe. The Treaty on European Union (TEU) sets forth the Union's obligation to promote the protection of the rights of the child. The Charter of Fundamental Rights of the European Union (EU), EU regulations and directives, as well as the jurisprudence of the Court of Justice of the EU (CJEU), have contributed to further determining the protection of the rights of children. In the Council of Europe, a large number of conventions focus on specific aspects of the protection of the rights of the child, ranging from their rights and safety in cyberspace to the adoption of children. These conventions contribute to enriching the protection granted to children under the European Convention on Human Rights and the European Social Charter, including the jurisprudence of the European Court of Human Rights (ECtHR) and the decisions of the European Committee of Social Rights (ECSR).

This handbook is designed for non-specialist legal professionals, judges, public prosecutors, child protection authorities, and other practitioners and organisations responsible for ensuring the legal protection of the rights of the child.

We would like to thank Prof. Ton Liefwaard, LL.M. Simona Florescu, JD. Margaret Fine, Prof. Karl Hanson, Prof. Ursula Kilkelly, Dr. Roberta Ruggiero, Prof. Helen Stalford and Prof. Wouter Vandenhoele for their contribution in drafting this handbook. We would also like to thank all those who provided input and support throughout its preparation.

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# Acronyms

<b>CJEU</b>	Court of Justice of the European Union (prior to December 2009, European Court of Justice, ECJ)
<b>CoE</b>	Council of Europe
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment
<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>CRD</b>	Consumer Rights Directive
<b>CRPD</b>	United Nations Convention on the Rights of Persons with Disabilities
<b>ECHR</b>	Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as European Convention on Human Rights, ECHR)
<b>ECOSOC</b>	United Nations Economic and Social Council
<b>ECtHR</b>	European Court of Human Rights
<b>ECPT</b>	European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment
<b>ECSR</b>	European Committee of Social Rights
<b>EEA</b>	European Economic Area
<b>EEC</b>	European Economic Community
<b>ESC</b>	European Social Charter
<b>EU</b>	European Union
<b>FCNM</b>	Council of Europe Framework Convention for the Protection of National Minorities
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GC</b>	Grand Chamber (of the European Court of Human Rights)
<b>GPSD</b>	Directive on General Product Safety
<b>GRETA</b>	Group of Experts on Action against Trafficking in Human Beings
<b>ICCPR</b>	United Nations International Covenant on Civil and Political Rights

<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ILO</b>	International Labour Organization
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>TCN</b>	Third-country nationals
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TSD</b>	Directive on the safety of toys
<b>UCPD</b>	Directive concerning unfair business-to-consumer commercial practices in the internal market
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees

## How to use this handbook

This handbook provides an overview of the fundamental rights of children in the European Union (EU) and the Council of Europe (CoE) member states. It is broad in scope. It acknowledges children as beneficiaries of all human/fundamental rights, as well as subjects of special regulation given their specific characteristics. Children's rights is a cross-sectorial field of law. In this handbook the emphasis is on the areas of law which are of specific importance to children.

This handbook is designed to assist legal practitioners who are not specialised in the field of children's rights. It is intended for lawyers, judges, prosecutors, social workers and others working with national authorities, as well as non-governmental organisations (NGOs) and other bodies that may be confronted with legal questions relating to these subjects. It is a point of reference on both EU and CoE law related to these subject areas, explaining how each issue is regulated under EU law as well as under the European Convention on Human Rights (ECHR), the European Social Charter (ESC) and other instruments of the CoE. Each chapter first includes a single table of applicable law under the two separate European legal systems. Then the law under each system is presented consecutively in relation to each topic covered. This allows the reader to see where the two legal systems converge and where they differ. Where relevant, there are also references to the United Nations (UN) Convention on the Rights of the Child (CRC) and other international instruments.

Practitioners in non-EU states that are member states of the CoE and thereby parties to the ECHR can access the information relevant to their own country by going straight to the CoE sections. Practitioners in EU Member States will need to use both sections as those states are bound by both legal orders. For readers who need more information on a particular issue, a list of references to more specialised material can be found in the 'Further reading' section of the handbook.

ECHR law is presented through short references to selected European Court of Human Rights (ECtHR) cases related to the handbook topic covered. These have been chosen from existing ECtHR judgments and decisions on children's rights issues.

EU law is found in legislative measures that have been adopted, in relevant provisions of the Treaties and in particular in the Charter of Fundamental Rights

of the European Union, as interpreted in the case law of the Court of Justice of the European Union (CJEU – known before December 2009 as the European Court of Justice (ECJ)).

The case law described or cited in this handbook provides examples of an important body of both ECtHR and CJEU case law. The handbook includes, as far as possible given its limited scope and introductory nature, legal developments until 1 January 2015, although later developments have also been included when possible.

The handbook includes an introductory chapter, which briefly explains the role of the two legal systems as established by CoE and EU law, and contains 10 substantive chapters covering the following issues:

- civil rights and freedoms;
- equality;
- personal identity issues;
- family life;
- alternative care and adoption;
- child protection against violence and exploitation;
- economic, social and cultural rights;
- migration and asylum;
- consumer and data protection;
- children’s rights within criminal justice and alternative proceedings.

Each chapter covers a distinct subject while cross-references to other topics and chapters provide a fuller understanding of the applicable legal framework. Key points are presented at the beginning of each section.



# 1

## Introduction to European children's rights law: context and key principles

EU	Issues covered	CoE
Free Movement Directive (2004/38/EC), Article 2 (2) (c)	'Child' as a legal person	Convention on Action against Trafficking in Human Beings, Article 4 (d) Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), Article 3 (a) ECtHR, <i>Marckx v. Belgium</i> , No. 6833/74, 1979 (the applicant child was six years old when the Court delivered judgment)
Young Workers Directive (94/33/EC), Article 3	Protection of young people at work	ESC (revised), Article 7 (right of children and young persons to protection)
Charter of Fundamental Rights, Article 14 (2) (right to education)	Right to receive free compulsory education	
Charter of Fundamental Rights, Article 21 (non-discrimination)	Prohibition of discrimination on grounds of age	
Charter of Fundamental Rights, Article 32 (prohibition of child labour and protection of young people at work) Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU) Anti-Trafficking Directive (2011/36/EU)	Prohibition of exploitative child labour	ESC (revised), Article 7 (right of children and young persons to protection)

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 24 (rights of the child) Treaty on European Union, Article 3 (3)	<b>Protection of children’s rights (general)</b>	
Charter of Fundamental Rights, Article 7 (respect for private and family life)	<b>Right to respect for private and family life</b>	ECHR, Article 8 (right to respect for private and family life) Convention on the Legal Status of Children born out of Wedlock Convention on the Adoption of Children (revised) Convention on Contact Concerning Children Convention on the Exercise of Children’s Rights ECtHR, <i>Maslov v. Austria</i> [GC], No. 1638/0323, 2008 (deportation of the applicant, convicted of criminal offences as a child)
CJEU, C-413/99, <i>Baumbast and R v. Secretary of State for the Home Department</i> , 2002 CJEU, C-200/02, <i>Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department</i> , 2004 CJEU, C-148/02, <i>Carlos Garcia Avello v. Belgian State</i> , 2003 CJEU, C-310/08, <i>London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department</i> , 2010 CJEU, C-480/08, <i>Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department</i> , 2010	<b>Freedom of movement</b>	

This introductory chapter explains how children’s rights law has developed at the European level, which key principles guide its application, and which key aspects of children’s rights European law addresses. It sets the background for the subject-specific analysis of the following chapters.

## 1.1. Core concepts

### Key point

- European children's rights law builds on existing measures at the national and international level.

### 1.1.1. Scope of European children's rights law

In referring to 'European children's rights law', the focus is on primary sources of law (treaties, conventions, secondary legislation and case law) introduced by the Council of Europe (CoE) and the European Union (EU). Where relevant, reference is made to other European sources that influence the development of European children's rights law, including key policy documents, guidelines or other non-binding/soft-law instruments.

Children are holders of rights, rather than just objects of protection. They are beneficiaries of all human/fundamental rights and subjects of special regulations, given their specific characteristics. Much European case law derives from litigation initiated by parents or other legal representatives of children, given the limited legal capacity of children. While this handbook aims to illustrate how the law accommodates the specific interests and needs of children, it also illustrates the importance of parents/guardians or other legal representatives and makes reference, where appropriate, to where rights and responsibilities are most prominently vested in children's carers. In such instances, the United Nations (UN) Convention on the Rights of the Child (CRC)<sup>1</sup> approach is adopted, namely that parental responsibilities need to be exercised with the best interests of the child as their primary concern and in a manner consistent with the evolving capacities of the child.

### 1.1.2. 'Child' as a legal person

Under international law, the CRC establishes in its Article 1 that "a child means every human being below the age of eighteen years". This is the legal parameter currently used, also in Europe, to define what a child is.

<sup>1</sup> UN, General Assembly (1989), [Convention on the Rights of the Child](#), 20 November 1989.

**Under EU law**, there is no single, formal definition of ‘child’ set out in any of the treaties, their subordinate legislation or case law. The definition of a child can vary considerably under EU law, depending on the regulatory context. For example, EU law governing the free movement rights of EU citizens and their family members defines ‘children’ as “direct descendants who are under the age of 21 or are dependent”,<sup>2</sup> essentially endorsing a biological and economic notion as opposed to one based on minority.

Some EU laws ascribe different rights to children according to their age. Directive 94/33/EC on the protection of young people at work (Young Workers Directive),<sup>3</sup> for example, which regulates children’s access to and conditions of formal employment across the EU Member States, distinguishes between ‘young people’ (a blanket term for all persons under the age of 18 years), ‘adolescents’ (any young person of at least 15 years of age, but less than 18 years of age – who is no longer subject to compulsory full-time schooling) and ‘children’ (defined as those under the age of 15 – who are largely prohibited from undertaking formal employment).

Other areas of EU law, particularly those areas in which EU action complements that of Member States (such as social security, immigration and education), defer to national law to determine who is a child. In these contexts the CRC definition is generally adopted.

**Under CoE law**, most instruments relating to children adopt the CRC definition of a child. Examples include Article 4 (d) of the Council of Europe Convention on Action against Trafficking in Human Beings<sup>4</sup> or Article 3 (a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).<sup>5</sup>

2 [Directive 2004/38/EC](#) of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004 and OJ L 158, 29 April 2004, Art. 2 (2) (c).

3 [Directive 94/33/EC](#) of 20 August 1994 on the protection of young people at work, OJ 1994 L 216, Art. 3.

4 Council of Europe, [Convention on Action against Trafficking in Human Beings](#), CETS No. 197, 15 May 2005.

5 Council of Europe, [Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#), CETS No. 201, 25 October 2007.

The European Convention on Human Rights (ECHR) does not contain a definition of a child, but its Article 1 obliges states to secure Convention rights to “everyone” within their jurisdiction. Article 14 of the ECHR guarantees the enjoyment of the rights set out in the Convention “without discrimination on any ground”, including grounds of age.<sup>6</sup> The European Court of Human Rights (ECtHR) has accepted applications by and on behalf of children irrespective of their age.<sup>7</sup> In its jurisprudence, it has accepted the CRC definition of a child,<sup>8</sup> endorsing the “below the age of 18 years” notion.

The same applies to the European Social Charter (ESC) and its interpretation by the European Committee of Social Rights (ECSR).<sup>9</sup>

## 1.2. Background to European children's rights law

The majority of European children's rights law to date has been developed by the EU and the CoE. In addition to the UN, other international institutions, such as the Hague Conference on Private International Law, have also adopted important instruments that continue to inform the development of European law. Although these international frameworks have operated separately from one another, links are increasingly being drawn between them.<sup>10</sup> Inter-institutional cooperation is particularly strong between the CoE and the EU.

6 ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010. See also FRA and ECtHR (2010), p. 102.

7 See, for example, ECtHR, *Marckx v. Belgium*, No. 6833/74, 13 June 1979, where the applicant child was six years old when the Court delivered the judgment.

8 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009; ECtHR, *Çoşelav v. Turkey*, No. 1413/07, 9 October 2012.

9 ECSR, *Defence for Children International (DCI) v. the Netherlands*, No. 47/2008, 20 October 2009, para. 25.

10 See, for instance, [Chapter 5](#), which illustrates how EU family law regulating cross-border child abduction works with the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention).

## 1.2.1. European Union: development of children's rights law and the areas of protection covered

In the past, children's rights developed in the EU in a piecemeal fashion. Historically, European child law was largely aimed at addressing specific child-related aspects of broader economic and politically driven initiatives, for example in the field of consumer protection<sup>11</sup> and the free movement of persons.<sup>12</sup> More recently, however, children's rights have been addressed as part of a more coordinated EU agenda, based on three key milestones:

- the introduction of the Charter of Fundamental Rights of the European Union;
- the entry into force of the Treaty of Lisbon in December 2009;
- the adoption of the European Commission Communication on a special place for children in EU external action, and of the Council EU Guidelines for the promotion and protection of the rights of the child.

The first milestone was the introduction of the EU Charter of Fundamental Rights in 2000.<sup>13</sup> With the entry into force of the Treaty of Lisbon, on 1 December 2009, the Charter enjoys the same legal status as the EU treaties (Article 6 of the Treaty on European Union (TEU)). It obliges the EU and its Member States to protect the rights enshrined in it when implementing EU law. The EU Charter of Fundamental Rights contains the first detailed references to children's rights at the EU constitutional level, including through the recognition of children's right to receive free compulsory education (Article 14 (2)), a prohibition of discrimination on grounds of age (Article 21), and a prohibition of exploitative child labour (Article 32). Significantly, the Charter contains a dedicated provision on children's rights (Article 24). This articulates three key children's rights principles: the right to express their views freely in accordance with their age and maturity (Article 24 (1)); the right to have their best interests taken as

11 For example, [Directive 2009/48/EC](#) of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ 2009 L 170, which enforces safety measures for children's toys.

12 For example, [Directive 2004/38/EC](#).

13 EU (2012), Charter of Fundamental Rights of the European Union, OJ 2012 C 326.

a primary consideration in all actions relating to them (Article 24 (2)); and the right to maintain on a regular basis a personal relationship and direct contact with both parents (Article 24 (3)).

The second key milestone was the Lisbon Treaty, which, as noted above, entered into force on 1 December 2009.<sup>14</sup> This instrument made important institutional, procedural and constitutional changes to the EU by amending the TEU and the former European Community Treaty (now the Treaty on the Functioning of the European Union (TFEU)).<sup>15</sup> These changes enhanced the EU's potential to advance children's rights, not least by identifying the "protection of the rights of the child" as a general stated objective of the EU (Article 3 (3) of the TEU) and as an important aspect of the EU's external relations policy (Article 3 (5) of the TEU). More specific references to children are included within the TFEU as well, enabling the EU to enact legislative measures aimed at combating sexual exploitation and human trafficking (Article 79 (2) (d) and Article 83 (1)).

This has led to the adoption of the directives on combating child sexual abuse, child sexual exploitation and child pornography,<sup>16</sup> and on preventing and combating trafficking in human beings and protecting its victims,<sup>17</sup> which also contain provisions addressing specific needs of child victims. The more recent directive establishing minimum standards on the rights, support and protection of victims of crime similarly devotes many of its provisions to children.<sup>18</sup>

The third important milestone occurred at a more strategic, policy level, initially in the context of the EU's external cooperation agenda and latterly in relation to internal issues. Specifically, the Council of the EU adopted 'EU Guidelines for the promotion and protection of the rights of the child'<sup>19</sup> and the European Commission adopted its Communication on *A special place*

14 EU (2007), *Treaty of Lisbon* amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, OJ 2007 C 306, pp. 1-271.

15 See consolidated versions of European Communities (2012), *Treaty on European Union (TEU)* and *Treaty on the Functioning of the European Union (TFEU)*, OJ 2012 C 326.

16 *Directive 2011/93/EU*, OJ 2011 L 335, p. 1.

17 *Directive 2011/36/EU*, OJ 2011 L 101, p. 1.

18 *Directive 2012/29/EU*, OJ 2012 L 315, p. 57.

19 Council of the European Union (2007), *EU Guidelines for the promotion and protection of the rights of the child*, Brussels, 10 December 2007.

*for children in EU external action*<sup>20</sup> to mainstream children's rights into all EU activities with non-EU Member States. Similarly, in 2011, the European Commission adopted the EU Agenda for the rights of the child, setting out key priorities for the development of children's rights law and policy across the EU Member States.<sup>21</sup> The agenda also included the targeting of the legislative processes relevant to child protection, such as the aforementioned adoption of the directive on victim's rights.

Most recently, this has been complemented with the Commission's adoption of a comprehensive strategy to support Member States in addressing poverty and social exclusion through a range of early-years interventions (for children of pre-school and primary school age).<sup>22</sup> While this particular initiative, like the agenda, is not legally binding, both are significant insofar as they establish the blueprint for the EU's normative and methodological approach to children's rights law – a blueprint that is firmly associated with the CRC and located within an ethic of child protection, participation and non-discrimination.

The EU may legislate only where it has been given competence under the treaties (Articles 2 to 4 of the TFEU). As children's rights is a cross-sectorial field, EU competence needs to be determined on a case-by-case basis. To date, areas relevant for children's rights where the EU has extensively legislated are:

- data and consumer protection;
- asylum and migration;
- cooperation in civil and criminal matters.

Articles 6 (1) of the TEU and 51 (2) of the EU Charter of Fundamental Rights provide that the Charter does not extend the competences of the EU, nor does it modify or establish a new power or task for the EU. The Charter provisions

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20 European Commission (2008), *A special place for children in EU external action: Communication from the Commission to the Council, the European Parliament, the European Economic And Social Committee and the Committee of the Regions*, COM (2008) 55 final, Brussels, 5 February 2008.

21 European Commission (2011), *An EU agenda for the rights of the child: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2011) 0060 final, Brussels, 15 February 2011.

22 European Commission (2013), *Investing in children: breaking the cycle of disadvantage*, Recommendation 2013/112/EU, Brussels.



are addressed to the EU institutions and to Member States only when they are implementing EU law. While always binding on the EU, the Charter provisions become legally binding for the Member States only where they act within the scope of EU law.

Each of the following chapters includes a brief overview of the EU's competence in areas dealt with under the respective chapter.

## 1.2.2. Council of Europe: development of children's rights law and the areas of protection covered

In contrast to the EU, ever since its establishment, the CoE has a clear mandate to protect and promote human rights. Its primary human rights treaty, ratified by all CoE member states, is the Convention for the Protection of Human Rights and Fundamental Freedoms, or European Convention on Human Rights (ECHR), which contains specific references to children. The main ones are as follows: Article 5 (1) (d) provides for the lawful detention of a child for the purposes of educational supervision; Article 6 (1) restricts the right to a fair and public hearing where this is in the interest of juveniles; Article 2 of Protocol No. 1 provides for the right to education and requires states to respect parents' religious and philosophical convictions in the education of their children. Moreover, all the other general provisions of the ECHR are applicable to everyone, including children. Some have been shown to have particular relevance to children, namely Article 8, which guarantees the right to respect for private and family life, and Article 3, which prohibits torture, inhuman and degrading treatment and punishment. By using interpretative approaches that focus on the positive obligations inherent in the ECHR provisions, the ECtHR has developed a large body of case law dealing with children's rights, including frequent references to the CRC. That said, the ECtHR analyses applications on a case-by-case basis and therefore does not offer a comprehensive overview of children's rights under the ECHR.

The CoE's other main human rights treaty, the European Social Charter (ESC<sup>23</sup> – revised in 1996<sup>24</sup>), provides for the protection of social rights, with specific pro-

23 Council of Europe, [European Social Charter](#), CETS No. 35, 18 October 1961.

24 Council of Europe, [European Social Charter \(revised\)](#), CETS No. 163, 3 May 1996.

vision for children's rights. It contains two provisions of particular importance for children's rights. Article 7 sets out the obligation to protect children from economic exploitation. Article 17 requires states to take all appropriate and necessary measures designed to ensure that children receive the care, assistance, education and training they need (including free primary and secondary education), to protect children and young persons from negligence, violence or exploitation and to provide protection for children deprived of their family's support. Implementation of the ESC is overseen by the European Committee of Social Rights (ECSR), which is composed of independent experts who rule on the conformity of national law and practice with the ESC either by way of a collective complaints procedure or a national reporting procedure.

In addition, the CoE has adopted a number of treaties that address a range of specific children's rights issues. These include the:

- Convention on the Legal Status of Children born out of Wedlock;<sup>25</sup>
- Convention on the Adoption of Children, revised in 2008;<sup>26</sup>
- Convention on Contact Concerning Children;<sup>27</sup>
- Convention on the Exercise of Children's Rights;<sup>28</sup>
- Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).<sup>29</sup>

Finally, at the policy level it is important to note that in 2006, the CoE launched its programme 'Building a Europe for and with Children' – a transversal plan of action for addressing children's rights issues, including the adoption of

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25 Council of Europe, [European Convention on the Legal Status of Children born out of Wedlock](#), CETS No. 85, 15 October 1975.

26 Council of Europe, [Convention on the Adoption of Children \(Revised\)](#), CETS No. 202, 27 November 2008.

27 Council of Europe, [Convention on Contact concerning Children](#), CETS No. 192, 15 May 2003.

28 Council of Europe, [European Convention on the Exercise of Children's Rights](#), CETS No. 160, 25 January 1996.

29 Council of Europe, [Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#), CETS No. 201, 25 October 2007.

standard setting instruments across a range of areas.<sup>30</sup> Current priorities are focused on four key areas:<sup>31</sup>

- promoting child-friendly services and systems;
- eliminating all forms of violence against children;
- guaranteeing the rights of children in vulnerable situations;
- promoting child participation.

The principal aim of the CoE's children's rights programme is to support the implementation of international standards in the field of children's rights by all CoE member states, and in particular to promote the implementation of the CRC, highlighting its main principles: non-discrimination, the right to life and development, the best interests of the child as a primary consideration for decision-makers, and the right of children to be heard.<sup>32</sup>

The programme has overseen the adoption of several children's rights instruments offering practical guidance to complement binding European legal measures, including:

- Guidelines on child-friendly justice;<sup>33</sup>
- Guidelines on child-friendly healthcare;<sup>34</sup>
- Recommendation on integrated national strategies for the protection of children from violence;<sup>35</sup>

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30 For more information, see <http://www.coe.int/t/dg3/children/>.

31 Council of Europe, Committee of Ministers (2011), *Council of Europe Strategy for the Rights of the Child (2012–2015)*, CM (2011)171 final, 15 February 2012.

32 *Ibid.*

33 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010.

34 Council of Europe, Committee of Ministers (2011), *Guidelines on child-friendly health care*, 21 September 2011.

35 Council of Europe, Committee of Ministers (2009), *Recommendation CM/Rec(2009)10 of the Committee of Ministers to member states on integrated national strategies for the protection of children from violence*, 18 November 2009.

- Recommendation on children’s rights and social services friendly to children and families;<sup>36</sup>
- Recommendation on participation of children and young people under the age of 18.<sup>37</sup>

In doing so, the programme has ensured that Europe is at the heart of standard-setting in children’s rights and has also led the way, through various means, to ensure that children’s voices are central to that process. The programme also aims to support the implementation of the ECHR and of the ESC and to promote other existing CoE legal instruments in relation to childhood (participation, protection and rights), youth and family.<sup>38</sup>

### 1.3. European children’s rights law and the UN Convention on the Rights of the Child

#### Key point

- European children’s rights law is largely based on the UN Convention on the Rights of the Child (CRC).

The fact that all EU and CoE member states are parties to the CRC gives the CRC important standing at the European level. It effectively imposes common legal obligations on European states with a knock-on effect on the way European institutions develop and apply children’s rights.

In this way, the CRC has become the touchstone for the development of European children’s rights law, with the result that the CoE and the EU increasingly draw on its influence. In particular, the integration of CRC principles and provisions into

36 Council of Europe, Committee of Ministers (2011), *Recommendation Rec (2011)12 on children’s rights and social services friendly to children and families*, 16 November 2011.

37 Council of Europe, Committee of Ministers (2012), *Recommendation Rec(2012)2 on the participation of children and young people under the age of 18*, 28 March 2012.

38 Council of Europe, Committee of Ministers (2011), *Council of Europe Strategy for the Rights of the Child (2012–2015)*, CM (2011)171 final, 15 February 2012.

binding instruments and case law at the European level gives the CRC greater force, and opens up more effective channels of enforcement for those seeking to invoke children's rights in Europe. Specific examples of this are provided throughout this handbook.

The EU is not and cannot become a party to the CRC, since there is no legal mechanism within the CRC to allow entities other than states to accede to it. However, the EU relies on "general principles of EU law" (written and unwritten principles drawn from the common, constitutional traditions of the Member States) to supplement and guide interpretations of the EU Treaties (Article 6 (3) of the TEU). Court of Justice of the European Union (CJEU) rulings have confirmed that any obligation arising from EU membership should not conflict with Member States' obligations derived from their domestic constitutions and international human rights commitments.<sup>39</sup> As all EU Member States have ratified the CRC, the EU is bound to adhere to the principles and provisions enshrined therein, at least in relation to matters that fall within the scope of the EU's competence (as defined by the EU treaties).

This obligation is reinforced by other EU treaties and in particular by the EU Charter of Fundamental Rights. Article 24 of the Charter is directly inspired by CRC provisions, including some that have acquired the rank of 'CRC principles', notably the best interests of the child principle (Article 3 of the CRC), the child participation principle (Article 12 of the CRC) and the child's right to live with and/or enjoy a relationship with his or her parents (Article 9 of the CRC).

The importance of the CRC in guiding the development of EU children's rights is expressed in the Commission's Agenda for the Rights of the Child, which asserts that "the standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child".<sup>40</sup> In this spirit, child-related legislative instruments, almost without exception, are accompanied by either explicit reference to the CRC or more implicit reference to children's rights principles, such as 'best interests', the child's right to participate in decisions that affect him or her, or the right to be protected from discrimination.

39 For example CJEU, C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, 14 May 1974.

40 European Commission (2011), *An EU Agenda for the Rights of the Child*, COM (2011) 0060 final, Brussels.

The CoE, similarly to the EU, is not as an organisation legally bound to the CRC, although all CoE member states are individual parties to this convention. Nevertheless, the ECHR cannot be interpreted in a vacuum, but must instead be interpreted in harmony with the general principles of international law. Any relevant rules of international law applicable in the relations between the States Parties to the ECHR should be taken into account, in particular the rules concerning the universal protection of human rights. The obligations that the ECHR lays on its States Parties in the field of children's rights more specifically must be interpreted in light of the CRC.<sup>41</sup> The ECSR has also explicitly referred to the CRC in its decisions.<sup>42</sup> Moreover, the standard-setting and treaty-making activities of the CoE are influenced by CRC principles and provisions. For example, the *Guidelines on child friendly justice*<sup>43</sup> are directly informed by a range of CRC provisions, not to mention the accompanying General Comments of the UN Committee on the Rights of the Child.<sup>44</sup>

## 1.4. Role of the European courts in interpreting and enforcing European children's rights

### 1.4.1. The Court of Justice of the European Union

The CJEU issues decisions regarding many types of legal actions. In children's rights cases, the CJEU has so far mainly reviewed preliminary references (Article 267 of the TFEU).<sup>45</sup> These are procedures where a national court or tribunal asks the CJEU for an interpretation of primary EU law (i.e. treaties) or secondary

41 ECtHR, *Harroudj v. France*, No. 43631/09, 4 October 2012, para. 42.

42 ECSR, *World Organisation against Torture (OMCT) v. Ireland*, Complaint No. 18/2003, 7 December 2004, paras. 61–63; ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009.

43 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010.

44 See UN, Committee on the Rights of the Child (2007), *General Comment No. 10 (2007): Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007; UN, Committee on the Rights of the Child (2009), *General Comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, 1 July 2009; and UN, Committee on the Rights of the Child (2013), *General Comment No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (art.3, para.1)*, CRC/C/GC/14, 29 May 2013.

45 The only exception is an action for annulment: CJEU, C-540/03, *European Parliament v. Council of the European Union* [GC], 27 June 2006.

EU law (i.e. decisions and legislation) that is of relevance to a national case pending before that national court or tribunal.

Until recent years, the CJEU had only adjudicated a few children's rights cases. With the adoption of more explicit children's rights legislative measures and a more prominent children's rights agenda, however, it is likely that children's rights will feature more regularly on the CJEU's listings in the future.

The CJEU has delivered most of its judgments concerning children's rights in the context of free movement and EU citizenship – areas in which the EU has enjoyed long-standing competence. Here the CJEU has expressly acknowledged that children enjoy the benefits associated with EU citizenship in their own right, thereby extending independent residence as well as both social and educational entitlement to children, on grounds of EU nationality.<sup>46</sup>

There is only one instance in which the CJEU directly used the CRC to determine how EU law should be interpreted in relation to children, namely in the *Dynamic Medien GmbH v. Avides Media AG* case. This case concerns the lawfulness of German labelling restrictions on imported DVDs and videos, which were already subject to similar controls in the United Kingdom. The CJEU concluded that the German labelling checks constituted a lawful restriction of the EU's free movement of goods provisions (which otherwise preclude double regulatory processes of this nature), given that they aimed to protect the welfare of children. The CJEU supported its decision by reference to Article 17 of the CRC, which encourages signatory states to develop appropriate guidelines for the protection of children from media-generated information and material injurious to their well-being.<sup>47</sup> Requirements of proportionality apply, however, with regard to the examination procedures established to protect children, which should be readily accessible, and possible to complete within a reasonable period.<sup>48</sup>

46 See CJEU, C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002; CJEU, C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004; CJEU, C-148/02, *Carlos Garcia Avello v. Belgian State*, 2 October 2003; CJEU, C-310/08, *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department* [GC], 23 February 2010; CJEU, C-480/08, *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*, 23 February 2010. These cases are revisited in Chapters 8 and 9.

47 CJEU, C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 14 February 2008, paras. 42 and 52.

48 *Ibid.*, paras. 49 and 50.

In other cases, the CJEU has alluded to general children's rights principles also encapsulated in CRC provisions (such as the child's best interests and the right to be heard) to inform its judgments, particularly in the context of cross-border child abduction cases.<sup>49</sup>

That aside, the EU has traditionally been circumspect in attaching decisive force to the CRC, particularly in more politically sensitive areas such as immigration control,<sup>50</sup> although this is changing in recent jurisprudence, as discussed in the chapters that follow. Since the adoption of the EU Charter of Fundamental Rights, CJEU references to its articles on children's rights often resonate with references to the CRC, given the similarity between provisions.

## 1.4.2. The European Court of Human Rights

The ECtHR mainly decides on individual applications lodged in accordance with Articles 34 and 35 of the ECHR. ECtHR jurisdiction extends to all matters concerning the interpretation and application of the ECHR and its Protocols (Article 32 of the ECHR).

In contrast to the CJEU, the ECtHR has a vast jurisprudence on children's rights. Although many cases under Article 8 of the ECHR on the right to respect for private and family life are considered from a parents' rather than children's rights perspective, cases under other substantive provisions do not necessarily involve parents and have a clearer focus on the rights of the children concerned, such as the right to protection from inhuman and degrading treatment (Article 3 of the ECHR) or the right to a fair trial (Article 6 of the ECHR).

Although the ECtHR often refers to the CRC when addressing claims pursued either by or on behalf of children, it does not systematically attach decisive weight to it. In some cases, the children's rights principles, as articulated by the CRC, have had a profound influence on the ECtHR's reasoning, notably as concerns the Court's interpretation of Article 6 of the ECHR (right to a fair trial) in relation to the treatment of children in conflict with the law (see [Chapter 11](#)). In other areas, the approach of the ECtHR may vary slightly from that of the CRC,

49 CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010. See further [Chapter 5](#).

50 CJEU, C-540/03, *European Parliament v. Council of the European Union* [GC], 27 June 2006.



for example as regards hearing children in court (see [Chapter 2](#)). And in some cases, the ECtHR has explicitly relied on the CRC.

Example: *Maslov v. Austria*<sup>51</sup> concerns the deportation of the applicant, who had been convicted of a number of criminal offences as a minor. The ECtHR held that where expulsion measures against a juvenile offender were concerned, the obligation to take the best interests of the child into account included an obligation to facilitate the child's reintegration, in line with Article 40 of the CRC. In the ECtHR's view, reintegration would not be achieved by severing the child's family or social ties through expulsion.<sup>52</sup> The CRC is thus one of the grounds used to find that the expulsion was a disproportionate interference with the applicant's rights under Article 8 of the ECHR (respect for family life).

## 1.5. European Committee of Social Rights

The ECSR comprises 15 independent and impartial experts who rule on the conformity of national law and practice with the ESC, either through the collective complaints procedure or the national reporting procedure.<sup>53</sup> Designated national and international organisations can engage in collective complaints against states that are party to the ESC and have accepted the complaints procedure. To date, complaints have involved whether states have violated children's rights under the ESC on issues including the economic exploitation of children,<sup>54</sup> the physical integrity of children,<sup>55</sup> the health rights of migrant children<sup>56</sup> and access to education by children with disabilities.<sup>57</sup>

51 ECtHR, *Maslov v. Austria* [GC], No. 1638/0323, 23 June 2008.

52 *Ibid.*, para. 83.

53 For more information, see the ECSR website: [www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp).

54 ESCR, *International Commission of Jurists (ICJ) v. Portugal*, Complaint No. 1/1998, 9 September 1999.

55 ESCR, *World Organisation Against Torture (OMCT) v. Greece*, Complaint No. 17/2003, 7 December 2004.

56 ESCR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 23 October 2012.

57 ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, 3 June 2008, para. 35.

Example: In *International Commission of Jurists (ICJ) v. Portugal*,<sup>58</sup> it was alleged that although Portuguese legislation respected the minimum age of 15 years for admission to employment established by Article 7 (1) of the ESC, it was not adequately enforced. The ECSR held that the aim and purpose of the ESC was to protect rights not only in theory but also in fact, and thus that legislation must be applied effectively. Noting that a large number of children were employed illegally in Portugal, it found this situation to be in violation of Article 7 (1) of the ESC.

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58 ESCR, *International Commission of Jurists (ICJ) v. Portugal*, Complaint No. 1/1998, 9 September 1999.

# 2

## Basic civil rights and freedoms

EU	Issues covered	CoE
Charter of Fundamental Rights, Articles 10 (freedom of religion) and 14 (right to education)	Freedom of thought, conscience and religion	<p>ECHR, Articles 9 (freedom of religion) and 14 (prohibition of discrimination); Article 2 of Protocol No. 1 (right of parents to ensure teaching of their children in conformity with their convictions)</p> <p>ECtHR, <i>Dogru v. France</i>, No. 27058/05, 2008 (wearing of Islamic headscarf at a state secondary school)</p> <p>ECtHR, <i>Kervanci v. France</i>, No. 31645/04, 2008 (wearing of Islamic headscarf at a state secondary school)</p> <p>ECtHR, <i>Grzelak v. Poland</i>, No. 7710/02, 2010 (alternatives to religious education in primary and secondary schools)</p> <p>ECtHR, <i>Lautsi and Others v. Italy</i> [GC], No. 30814/06, 2011 (display of crucifixes in state schools)</p>
Charter of Fundamental Rights, Article 11 (freedom of expression)	Freedom of expression and information	<p>ECHR, Article 10 (freedom of expression)</p> <p>ECtHR, <i>Handyside v. the United Kingdom</i>, No. 5493/72, 1976 (banning of a book for children)</p> <p>ECtHR, <i>Gaskin v. the United Kingdom</i>, No. 10454/83, 1989 (access to case-file kept during childhood)</p>

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 24 (rights of the child) CJEU, C-491/10 PPU, <i>Joseba Andoni Aguirre Zarraga v. Simone Pelz</i> , 2010 (right to be heard, international child abduction)	<b>Right to be heard</b>	ECHR, Article 6 (fair trial) European Convention on the Exercise of Children’s Rights, Articles 3, 4, 6 and 7 ECtHR, <i>Sahin v. Germany</i> [GC], No. 30943/96, 2003 (hearing a child in court in access proceedings)
Charter of Fundamental Rights, Article 12 (freedom of assembly and association)	<b>Right to freedom of assembly and of association</b>	ECHR, Article 11 (freedom of peaceful assembly and association) ECtHR, <i>Christian Democratic People’s Party v. Moldova</i> , No. 28793/02, 2006 (attending gatherings in public space)

All persons enjoy the civil rights and freedoms laid down in various instruments, most notably the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR). Other than the Charter, no EU legal instrument deals specifically with the civil rights discussed in this chapter as they apply to children. At CoE level, however, the scope and interpretation of these civil rights have been developed extensively over the years, in particular through ECtHR case law.

This chapter presents an overview of the freedoms listed in Title II of the EU Charter of Fundamental Rights insofar as they have an impact on children’s rights. It analyses the right of the child to freedom of thought, conscience and religion (Section 2.1), to freedom of expression and information (Section 2.2), the child’s right to be heard (Section 2.3), and the right to freedom of assembly and of association (Section 2.4).

## 2.1. Freedom of thought, conscience and religion

### Key points

- Freedom of thought, conscience and religion, as guaranteed under the EU Charter of Fundamental Rights and the ECHR, includes the right to change religion or belief and the freedom to manifest religion or belief in worship, teaching, practice and observance.
- Parents have the right to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions.
- Parents have the right and duty to provide direction to the child in the exercise of the child's right to freedom of thought, conscience and religion in a manner consistent with the evolving capacities of the child.

### 2.1.1. The child's right to freedom of religion

**Under EU law**, Article 10 of the EU Charter of Fundamental Rights guarantees to everyone the freedom of thought, conscience and religion. This right includes the freedom to change one's religion or belief and the freedom, either alone or in community with others and in public or in private, to manifest one's religion or belief in worship, teaching, practice and observance. The right to conscientious objection is recognised in accordance with the national laws (Article 10 (2) of the Charter).

**Under CoE law**, Article 9 of the ECHR provides the right to freedom of thought, conscience and religion. Three dimensions of the right to freedom of religion have been distilled from the ECtHR's case law: the internal dimension; the freedom to change one's religion or belief; and the freedom to manifest one's religion or belief. The first two dimensions are absolute, and states may not limit them under any circumstance.<sup>59</sup> The freedom to manifest one's religion or belief may be limited if such limitations are prescribed by law, pursue a legitimate aim and are necessary in a democratic society (Article 9 (2) of the ECHR).

In its case law, the ECtHR has dealt with children's freedom of thought, conscience and religion, mainly in relation to the right to education and the state school system. A topic of much public debate in European countries is religion in schools.

<sup>59</sup> ECtHR, *Darby v. Sweden*, No. 11581/85, 23 October 1990.

Example: The cases of *Dogru v. France* and *Kervanci v. France*<sup>60</sup> concern the exclusion from the first year of a French state secondary school of two girls, aged 11 and 12 years, as a result of their refusal to remove their headscarves during physical education classes. The ECtHR observed that the purpose of the restriction on the applicants' right to manifest their religious convictions was to adhere to the requirements of secularism in state schools. According to the national authorities, wearing a veil, such as the Islamic headscarf, was incompatible with sports classes for health and safety reasons. The ECtHR deemed this reasonable, as the school balanced the applicants' religious convictions against the requirements of protecting the rights and freedoms of others and the public order. Accordingly, it concluded that the interference with the freedom of the pupils to manifest their religion was justified and proportionate to the aim pursued. It therefore found no violation of Article 9 of the ECHR.

Example: The case *Grzelak v. Poland*<sup>61</sup> concerns the failure to provide a pupil excused from religious instruction with ethics classes and associated marks. During his entire schooling at primary and secondary level (between the ages of seven and 18 years), the applicant did not receive religious instruction, in conformity with the wishes of his parents, who were declared agnostics. As too few pupils were interested, no class in ethics was ever organised, and he received school reports and certificates that contained a straight line instead of a mark for 'religion/ethics'. According to the ECtHR, the absence of a mark for 'religion/ethics' on the boy's school reports fell within the ambit of the negative aspect of freedom of thought, conscience and religion, as the reports could point to his lack of religious affiliation. It therefore amounted to a form of unwarranted stigmatisation. The difference in treatment between non-believers who wished to follow ethics classes and pupils who followed religious classes was thus not objectively and reasonably justified, nor was there a reasonable relationship of proportionality between the means used and the aim pursued. The state's margin of appreciation was exceeded in this matter, as the very essence of the applicant's right not to manifest his religion or convictions was infringed, in violation of Article 14 of the ECHR taken in conjunction with Article 9 of the ECHR.

60 ECtHR, *Dogru v. France*, No. 27058/05, 4 December 2008; ECtHR, *Kervanci v. France*, No. 31645/04, 4 December 2008 (available in French).

61 ECtHR, *Grzelak v. Poland*, No. 7710/02, 15 June 2010.

## 2.2. Parents' rights and the freedom of religion of their children

The rights of parents in the context of the freedom of religion of their children are addressed differently in European law compared to the CRC.

**Under EU law**, due respect must be given to the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions, in particular in the context of the freedom to found educational establishments (Article 14 (3) of the Charter).

**Under CoE law**, in particular Article 2 of Protocol No. 1 to the ECHR, states must take into account the parent's (religious) convictions in the exercise of every function they undertake in the sphere of education and teaching. According to the ECtHR, this duty is broad, as it applies not only to the content and implementation of school curricula, but also to the performance of all functions a state assumes.<sup>62</sup> It includes the organisation and financing of public education, the setting and planning of the curriculum, the conveying of information or knowledge included in the curriculum in an objective, critical and pluralistic manner (hence forbidding the state to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions), as well as the organisation of the school environment, including the presence of crucifixes in state-school classrooms.

Example: The case *Lautsi and Others v. Italy*<sup>63</sup> concerns the display of crucifixes in state-school classrooms. A parent complained that the presence of crucifixes in the classrooms of the state school attended by her children infringed the principle of secularism according to which she sought to educate her children. The ECtHR Grand Chamber found that it was up to the state, as part of its functions in relation to education and teaching, to decide whether or not crucifixes should be present in state-school classrooms, and that this fell within the scope of the second

62 See the relevant ECtHR case law: ECtHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Nos. 5095/71, 5920/72 and 5926/72, 7 December 1976; ECtHR, *Valsamis v. Greece*, No. 21787/93, 18 December 1996; ECtHR, *Folgerø and Others v. Norway* [GC], No. 15472/02, 29 June 2007; ECtHR, *Hasan and Eylem Zengin v. Turkey*, No. 1448/04, 9 October 2007; ECtHR, *Lautsi and Others v. Italy* [GC], No. 30814/06, 18 March 2011.

63 ECtHR, *Lautsi and Others v. Italy* [GC], No. 30814/06, 18 March 2011.

sentence of Article 2 of Protocol No. 1 to the ECHR. The Court argued that in principle this decision falls within the margin of appreciation of the respondent state, and that there is no European consensus on the presence of religious symbols in state schools. It is true that the presence of crucifixes in state-school classrooms – a sign which undoubtedly refers to Christianity – gives visible prominence in the school environment to a country’s majority religion. However, this is not in itself sufficient to denote a process of indoctrination on the respondent state’s part. In the ECtHR’s view, a crucifix on a wall is an essentially passive symbol that cannot be deemed to have an influence on pupils comparable to that of speech or participation in religious activities. Accordingly, the Grand Chamber concluded that, in deciding to keep crucifixes in the state-school classrooms the applicant’s children attended, the authorities had acted within the limits of their margin of appreciation and thus respected the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions.

Under international law, Article 14 (2) of the CRC requires States Parties to respect the rights and duties of parents to provide direction to their child in the exercise of his/her right to freedom of thought, conscience and religion in a manner consistent with the evolving capacities of the child. Thus, as opposed to Article 14 (3) of the EU Charter of Fundamental Rights, the CRC focuses on the exercise of the freedom of the child him/herself. Under the CRC, parents have the right to provide guidance and direction not in accordance with their own convictions, but in accordance with the convictions held by the children. The wording of Article 14 (2) of the CRC is in line with the CRC’s general conception of parental responsibilities: that parental responsibilities must be exercised consistently with the evolving capacities of the child (Article 5 of the CRC), and based on the best interests of the child (Article 18 (1) of the CRC).



## 2.3. Freedom of expression and information

### Key points

- Both the EU Charter of Fundamental Rights and the ECHR guarantee the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities.
- The right to freedom of information does not include the right of access to childcare records.
- Making access to childcare records dependent on the consent of the contributor of the information may be compatible with Article 8 (the right to respect for private and family life) of the ECHR, provided that an independent authority has the final say in deciding whether access should be granted.

**Under EU law**, the right to freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (Article 11 of the EU Charter of Fundamental Rights).

**Under CoE law**, freedom of expression is guaranteed by Article 10 of the ECHR and may be limited only if the limitation is prescribed by law, pursues one of the legitimate aims listed in Article 10 (2) and is necessary in a democratic society.

In its case law, the ECtHR stressed that “[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man [...] it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population”.<sup>64</sup>

<sup>64</sup> See, for example, ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, 7 December 1976, para. 49.

Example: In *Handyside v. the United Kingdom*,<sup>65</sup> the ECtHR found that a ban imposed by the authorities on a book called *Little Red School Book* was in accordance with the exception laid down in Article 10 (2) of the ECHR on the protection of morals. The case deals with the right to receive information appropriate for a child's age and maturity – an aspect of the right to freedom of expression that is particularly relevant for children. The book, which was translated from Danish, was written for school-age children and questioned a series of social norms, including sexuality and drugs. Young people could interpret certain passages of the book at a critical stage of their development as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences. Therefore, according to the ECtHR, the competent English judges "were entitled, in the exercise of their discretion, to think at the relevant time that the book would have pernicious effects on the morals of many of the children and adolescents who would read it".<sup>66</sup>

Other child cases referencing Article 10 of the ECHR concern the right of access to information of children placed in care.

Example: The case *Gaskin v. the United Kingdom*<sup>67</sup> concerns a person who was placed in care for most of his childhood, during which period the local authority kept confidential records. These included various reports by medical practitioners, school teachers, police and probation officers, social workers, health visitors, foster parents and residential school staff. When the applicant sought access to those records for the purpose of proceeding for personal injuries against the local authority, he was refused. The confidentiality of such records had been warranted in the public interest for the proper operation of the childcare service, which would be jeopardised if contributors to the records were reluctant to be frank in their reports in the future. The ECtHR accepted that persons who were in state care as children had a vital interest "in receiving the information necessary to know and to understand their childhood and early development".<sup>68</sup> While the confidentiality of public records needs to be guaranteed, a system like the British one, which made access to records dependent on the consent of

65 *Ibid.*

66 *Ibid.*, para. 52.

67 ECtHR, *Gaskin v. the United Kingdom*, No. 10454/83, 7 July 1989.

68 *Ibid.*, para. 49.

the contributor, could in principle be compatible with Article 8 of the ECHR if the interests of the individual seeking access to records were secured when a contributor to the records was unavailable or improperly refused consent. In such a case, an independent authority should ultimately decide whether access should be granted. No such procedure was available to the applicant in the present case and the Court found a violation of the applicant's rights under Article 8 of the ECHR. The ECtHR, however, found no violation of Article 10 of the ECHR, reiterating that the right to freedom to receive information prohibits a government from restricting a person from receiving information that others wish or may be willing to impart, but does not oblige a state to impart the information in question to the individual.

## 2.4. Right to be heard

### Key points

- Under EU law, children have the right to express their views freely. Their views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- Under the ECHR, there is no absolute requirement to hear a child in court. Whether or not to do so has to be assessed in light of the specific circumstances of each case and is dependent on the child's age and maturity.
- Under UN law, children's right to express their own views freely in all matters affecting them has been recognised as one of the general principles of the Convention on the Rights of the Child.

**Under EU law**, Article 24 (1) of the EU Charter of Fundamental Rights provides that children may express their views freely, and that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. This provision is of general applicability, and is not restricted to particular proceedings. The CJEU interpreted the meaning of this provision in conjunction with the Brussels II bis Regulation.

Example: *Joseba Andoni Aguirre Zarraga v. Simone Pelz*<sup>69</sup> concerns the removal of a minor child from Spain to Germany in breach of custody rulings. The CJEU was asked whether the German court (i.e. the court of the country the child was removed to) could oppose the enforcement order by the Spanish court (the country of origin) on the basis that the child had not been heard, thereby infringing Article 42 (2) (a) of Regulation No. 2201/2003 (Brussels II bis) and Article 24 of the EU Charter of Fundamental Rights. The child had opposed the return when she expressed her views within proceedings before the German court. The CJEU reasoned that hearing a child is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Charter and Brussels II bis Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the court to obtain those views. The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case. According to the CJEU's ruling, however, the authorities of the country the child had been removed to (Germany) could not oppose a return of the child on the basis of a breach of the right to be heard in the country of origin (Spain).

**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 on the issue of access to a parent who does not have custody rights. This issue has to be assessed in light of the specific circumstances of each case, having due regard to the age and maturity of the child concerned. Moreover, 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.

<sup>69</sup> CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010; see also [Section 5.4](#), which discusses further details of this ruling and the operation of the Brussels II bis regulation.

Example: In the case of *Sahin v. Germany*,<sup>70</sup> the mother prohibited all contact between the applicant and his four-year old daughter. The German regional court decided that granting the father access to his daughter would be harmful to the child because of the serious tensions between the parents. It did so without hearing the child whether she wanted to continue seeing her father. On the question of hearing the child in court, the ECtHR referred to the expert's explanation before the regional court in Germany. After several meetings with the child, her mother and the applicant, the expert considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to obliging the direct questioning of the child on her relationship with her father.

Example: In *Sommerfeld v. Germany*,<sup>71</sup> the applicant's 13-year-old daughter had expressed a clear wish not to see the applicant and had done so for several years. The domestic courts were of the view that forcing her to see the applicant would seriously disturb her emotional and psychological balance. The ECtHR accepted that the decision-making process provided the applicant with the required protection of her interests.<sup>72</sup>

The European Convention on the Exercise of Children's Rights deals with the right of children to express their views freely.<sup>73</sup> This convention aims to promote children's rights by granting them specific procedural rights in family proceedings before a judicial authority, in particular for proceedings involving the exercise of parental responsibilities, such as residence and access to children. Article 3 of the convention grants children the right to be informed and to express their views in proceedings as a procedural right. In Article 4, the child is granted the right to apply for the appointment of a special representative in proceedings before a judicial authority affecting her or him. In line with Article 6, authorities must ensure that the child has received all relevant in-

70 ECtHR, *Sahin v. Germany* [GC], No. 30943/96, 8 July 2003, para. 73. On the specific aspect of national courts having to assess the evidence they have obtained, as well as the relevance of the evidence that defendants seek to adduce, see also ECtHR, *Vidal v. Belgium*, No. 12351/86, 22 April 1992, para. 33.

71 ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003.

72 *Ibid.*, paras. 72 and 88.

73 Council of Europe, *European Convention on the Exercise of Children's Rights*, CETS No. 160, 1996.

formation, consult her or him in person, if appropriate, and allow the child to express her or his views.

Under international law, Article 12 (1) of the CRC affirms that a child who is capable of forming her or his own views has the right to express these views freely in all matters affecting her or him. The child's views should be given due weight in accordance with her or his age and maturity. Article 12 (2) of the CRC furthermore prescribes that the child must be provided the opportunity to be heard in any judicial and administrative proceedings affecting her or him, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The UN Committee on the Rights of the Child stressed that States Parties should either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.<sup>74</sup> Furthermore, they must ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests. The committee also notes that a child has the right not to exercise this right; expressing views is a choice, not an obligation.

## 2.5. Right to freedom of assembly and association

### Key points

- Both the EU Charter of Fundamental Rights and the ECHR guarantee the freedom of peaceful assembly and association.
- This right enables and protects individuals to further their causes together with others.

**Under EU law**, Article 12 of the EU Charter of Fundamental Rights provides that everyone has the right to freedom of peaceful assembly and association at all levels, in particular in political, trade union and civic matters. This implies the

<sup>74</sup> 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 interest taken as a primary consideration (art.3, para.1)*, CRC/C/GC/14, 29 May 2013.

right of everyone to form and to join trade unions for the protection of his or her interests.

**Under CoE law**, Article 11 (1) of the ECHR guarantees the right to freedom of assembly and association subject to the restrictions of Article 11 (2).

The ECtHR has explicitly asserted the right of children to attend gatherings in a public space. As the Court noted in *Christian Democratic People's Party v. Moldova*, it would be contrary to the parent's and children's freedom of assembly to prevent them from attending events, in particular to protest against government policy on schooling.

Under international law, individual children as well as children's organisations can rely on the protection offered by Article 15 of the CRC, which contains the right to freedom of association and of peaceful assembly. A large variety of associational forms in which children are engaged have been granted international protection based on this provision.





# 3

## Equality and non-discrimination

EU	Issues covered	CoE
Charter of Fundamental Rights, Title III (Equality), including Articles 20 (equality before the law), 21 (non-discrimination) and 23 (equality between men and women)	Equality and non-discrimination	ECHR, Article 14; Protocol No. 12 to the ECHR, Article 1 (non-discrimination) ESC (revised), Article E (non-discrimination)
Racial Equality Directive (2000/43/EC)	Non-discrimination based on race and ethnic origin	ECtHR, <i>D.H. and Others v. the Czech Republic</i> [GC], No. 57325/00, 2007 (placement of Roma children in special schools) ECtHR, <i>Oršuš and Others v. Croatia</i> , No. 15766/03, 2010 (Roma-only classes in primary schools) Framework Convention for the Protection of National Minorities (FCNM), Articles 4 and 12
Charter of Fundamental Rights, Article 45 (freedom of movement and of residence) CJEU, C-200/02, <i>Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department</i> , 2004 (residence rights of third-country national parents)	Non-discrimination based on nationality and immigration status	ECtHR, <i>Ponomaryovi v. Bulgaria</i> , No. 5335/05, 2011 (school fees for temporary residents) FCNM, Articles 4 and 12, para. 3
Employment Equality Directive (2000/78/EC)	Non-discrimination based on age	ECHR, Article 14; Protocol No. 12 to the ECHR, Article 1 (non-discrimination)
CJEU, C-303/06, <i>S. Coleman v. Attridge Law and Steve Law</i> [GC], 2008	Non-discrimination based on other protected grounds	ECtHR, <i>Fabris v. France</i> [GC], No. 16574/08, 2013 (inheritance rights for children born out of wedlock)

Freedom from discrimination is one of the basic principles of a democratic society. Both the EU and the CoE have been instrumental in interpreting this principle. EU institutions have adopted a series of directives which are highly relevant for children's issues. The European Court of Human Rights (ECtHR) has developed a substantial body of case law on the freedom from discrimination under Article 14 of the ECHR on the prohibition of discrimination, in conjunction with other Convention articles.

The European Committee of Social Rights (ECSR) considers the function of Article E of the European Social Charter (ESC) on non-discrimination to be similar to that of Article 14 of the European Convention on Human Rights (ECHR): it has no independent existence and must be combined with one of the ESC's substantive provisions.<sup>75</sup>

This chapter addresses the principles of equality and non-discrimination, with a focus on those grounds where child-specific case law has been developed. It first provides general information on European non-discrimination law ([Section 3.1](#)), and then presents the issue of equality and discrimination of children based on ethnic origin ([Section 3.2](#)), nationality and immigration status ([Section 3.3](#)), age ([Section 3.4](#)), and other protected grounds, including gender, language and personal identity ([Section 3.5](#)).

## 3.1. European non-discrimination law

### Key points

- EU and CoE law prohibit discrimination on the grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation.<sup>76</sup>
- When the ECtHR establishes that persons have been treated differently in a relevantly similar situation, it will investigate whether there is an objective and reasonable justification. If not, it will conclude that the treatment was discriminatory, in breach of Article 14 of the ECHR on the prohibition of discrimination.

75 ECSR, *Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France*, Complaint No. 26/2004, 15 June 2005, para. 34.

76 For an overview of European non-discrimination law, as constituted by the EU non-discrimination directives and Art. 14 of and Protocol 12 to the ECHR, see: FRA and ECtHR (2011), and its case law update July 2010–December 2011.

**Under EU law**, the prohibition of discrimination in Article 21 of the EU Charter of Fundamental Rights is a free-standing principle that also applies to situations not covered by any other Charter provision. The grounds on which discrimination is explicitly prohibited in this provision include sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age and sexual orientation. By contrast, Article 19 of the TFEU only covers the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

Several EU directives prohibit discrimination in the areas of employment, the welfare system and goods and services, all of which are potentially relevant to children. Council Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation (Employment Equality Directive),<sup>77</sup> prohibits discrimination on the grounds of religion or belief, disability, age and sexual orientation. Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive), prohibits discrimination on the basis of race or ethnicity not only in the context of employment and access to goods and services, but also in relation to the welfare system (including social protection, social security and healthcare) and to education.<sup>78</sup> Further directives implement the principle of equal treatment between men and women in matters of employment and occupation (Gender Equality Directive)<sup>79</sup> and in the access to and supply of goods and services (Gender Goods and Services Directive).<sup>80</sup>

**Under CoE law**, the prohibition of discrimination applies to the exercise of any of the substantive rights and freedoms set forth in the ECHR (Article 14), as well as to the exercise of any right guaranteed under domestic law or in any act by a public authority (Article 1 of Protocol No. 12 to the ECHR). Protocol 12, however, is of limited applicability, since it has only been ratified by a small number of countries and no child-related cases have yet been decided on its basis. The provisions set forth in both instruments include a non-exhaustive list of grounds on which discrimination is prohibited: sex, race, colour, language,

77 Council Directive 2000/78/EC, OJ 2000 L 303. All EU legal instruments are available on the EU's online portal providing access to EU law eur-lex: <http://eur-lex.europa.eu/homepage.html>.

78 Council Directive 2000/43/EC of 29 June 2000 implementing the principal of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, 29 June 2000.

79 Directive 2006/54/EC (recast), OJ 2006 L 204.

80 Council Directive 2004/113/EC, OJ 2004 L 373, p. 37.

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Where the ECtHR finds that persons in relevantly similar positions have been treated differently, it will investigate whether this can be objectively and reasonably justified.<sup>81</sup>

Article E of the ESC also includes a non-exhaustive list of grounds on which discrimination is prohibited: race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, or birth. The appendix to this article clarifies that differential treatment based on an objective and reasonable justification includes requiring a certain age or capacity for access to some forms of education<sup>82</sup> – and that this is therefore not discriminatory.

Under Article 4 of the Framework Convention for the Protection of National Minorities<sup>83</sup> (FCNM), States Parties guarantee to persons belonging to national minorities the right of equality before the law and equal protection by the law, and prohibit discrimination based on belonging to a national minority. They also undertake to adopt, where necessary, adequate measures to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority.

The following sections analyse specific grounds of discrimination which have proven of particular relevance for children.

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81 For an overview of the ECtHR case law, see FRA and ECtHR (2011) and its case law update July 2010–December 2011.

82 Council of Europe, European Social Charter (revised) (1996), [Explanatory report](#), para. 136.

83 Council of Europe, [Framework Convention for the Protection of National Minorities](#) (FCNM), CETS No. 157, 1995.

## 3.2. Non-discrimination based on race or ethnic origin

### Key points

- Race and ethnic origin are prohibited grounds of discrimination.
- Both the EU and the CoE tackle discrimination of the Roma in the areas of education, employment, healthcare and housing.
- The over-representation or segregation of children belonging to a specific ethnic group in special schools or classes can only be objectively justified if appropriate safeguards for referring children to these schools or classes are put in place.

**Under EU law**, the Racial Equality Directive prohibits discrimination on the basis of race or ethnicity not only in the context of employment and goods and services, but also in accessing the welfare system, education and social security. The Roma, as a particularly sizeable and vulnerable ethnic group, fall squarely within the scope of the directive. A key element of the drive to tackle discrimination of the Roma at EU level was the adoption of an EU Framework for National Roma Integration Strategies up to 2020.<sup>84</sup> This has been followed by the European Commission's annual monitoring of the national strategies developed by EU Member States. The Racial Equality Directive covers at least four key areas that are important for Roma children: education, employment, healthcare and housing. Achieving full equality in practice may in certain circumstances warrant Roma-specific positive action, in particular in these four key areas.<sup>85</sup>

**Under CoE law**, the ECtHR has ruled in several landmark cases on the differential treatment of Roma children in the educational system. These cases were analysed under Article 14 taken together with Article 2 of Protocol No. 1 to the

84 European Commission (EC) (2011), *An EU framework for national Roma integration strategies up to 2020: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM(2011) 173 final, Brussels, 5 April 2011.

85 European Commission (2014), *Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, Report from the Commission to the European Parliament and the Council, COM(2014) 2 final, Brussels, 17 January 2014.

ECHR. The ECtHR held that the over-representation or segregation of Roma children in special schools or classes could only be objectively justified by putting in place appropriate safeguards for referring children to these schools or classes, such as tests specifically designed for and sensitive to the needs of Roma children; appropriate evaluation and monitoring of progress so that integration in ordinary classes takes place as soon as learning difficulties have been remedied; and positive measures to address learning difficulties. In the absence of effective anti-segregationist measures, prolonging the educational segregation of Roma children in a mainstream school with a regular program could thus not be justified.<sup>86</sup>

Example: In *D.H. and Others v. the Czech Republic*,<sup>87</sup> the ECtHR found that a disproportionate number of Roma children were placed in special schools for children with learning difficulties without justification. The Court was concerned about the more basic curriculum offered in these schools and the segregation that the system caused. Roma children thus received an education that compounded their difficulties and compromised their subsequent personal development instead of helping them to integrate into the mainstream education system and develop the skills that would facilitate life among the majority population. Consequently, the ECtHR found a violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1 to the ECHR.

Example: In *Oršuš and Others v. Croatia*,<sup>88</sup> the ECtHR examined the existence of Roma-only classes within ordinary primary schools. As a matter of principle, temporarily placing children in a separate class due to their inadequate command of the language of instruction is not discriminatory as such. Such a placement can be seen as adapting the educational system to the special needs of children with language difficulties. However, as soon as this placement disproportionately or exclusively affects members of a specific ethnic group, safeguards have to be put in place. For the initial placement in separate classes, the ECtHR noted that the placement was not part of a general practice to address the problems of children with an

86 ECtHR, *Lavida and Others v. Greece*, No. 7973/10, 30 May 2013 (available in French).

87 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 13 November 2007, paras. 206–210.

88 ECtHR, *Oršuš and Others v. Croatia* [GC], No. 15766/03, 16 March 2010, para. 157.

inadequate command of the language, and that no specific testing of the children's command of the language had taken place. As to the curriculum offered to them, some children were not offered any specific programme (i.e., special language classes) to acquire the necessary language skills in the shortest time possible. There was neither a transferral nor a monitoring procedure in place to ensure the immediate and automatic transfer to the mixed classes as soon as the Roma children attained adequate language proficiency. Consequently, the Court found that this was in violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1.

The ECSR holds that, even though educational policies of Roma children may be accompanied by flexible structures to meet the diversity of the group and may take into account the fact that some groups lead an itinerant or semi-itinerant lifestyle, there should be no separate schools for Roma children.<sup>89</sup>

Under Article 4 (2) and (3) FCNM, special measures adopted to promote the effective equality of persons belonging to national minorities shall not be regarded as discriminatory. In accordance with Article 12 (3) FCNM, States Parties moreover expressly undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities. The Advisory Committee on the FCNM has regularly examined the equal access to education of Roma children in line with this provision.<sup>90</sup>

89 ECSR, European Social Charter (revised) – Conclusions 2003 (Bulgaria), Art. 17, para. 2, p. 53.

90 See Council of Europe, Advisory Committee on the FCNM, *Commentary on Education under the Framework Convention for the Protection of National Minorities* (2006), ACFC/25DOC(2006)002.

### 3.3. Non-discrimination based on nationality and immigration status

#### Key points

- Protection against discrimination based on nationality is more limited in scope under EU law than under CoE law.
- Under EU law, protection against discrimination based on nationality is only granted to citizens of EU Member States, as enshrined in Article 45 (freedom of movement and of residence) of the EU Charter of Fundamental Rights.
- The ECHR guarantees the enjoyment of rights to all persons within the jurisdiction of a member state.

**Under EU law**, protection against discrimination based on nationality is particularly prominent in the context of the free movement of persons. Third-country nationals (i.e. persons who are citizens of a state that is not a member of the EU) enjoy a right to equal treatment in broadly the same areas as those covered by the non-discrimination directives when they qualify as ‘long-term residents’. For qualifying as such, the Third-Country Nationals Directive requires, among other conditions, a period of five years of lawful residence.<sup>91</sup> In addition, Directive 2003/86/EC on the right to family reunification (Family Reunification Directive)<sup>92</sup> allows for third-country nationals lawfully residing in a Member State to be joined by family members, under certain conditions (see also [Section 9.5](#)).

Example: The *Chen case*<sup>93</sup> concerns the question of whether a child of a third-country national had the right to reside in one EU Member State when she was born in a different Member State and held the citizenship of the latter. Her mother, on whom she depended, was a third-country national. The CJEU determined that, when a Member State imposes require-

91 Directive 2003/109/EC of 23 January 2004 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16, p. 44.

92 Directive 2003/86/EC of 3 October 2003 on the right to family reunification, OJ 2003 L 251, p. 12.

93 CJEU, C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004.



ments on individuals seeking citizenship, and these are met, it is not open to a different Member State to then challenge that entitlement when the mother and the child apply for residence. The CJEU confirmed that a Member State cannot refuse a right of residence to a parent who is the carer of a child who is an EU citizen, as this would deprive the child's right of residence of any useful effect.

**Under CoE law**, the ECHR guarantees the enjoyment of rights to all those living within the jurisdiction of a member state, whether they are citizens or not, including those living beyond the national territory, in areas under the effective control of a member state. Regarding education, the ECtHR therefore holds that differential treatment on grounds of nationality and immigration status could amount to discrimination.

Example: *Ponomaryovi v. Bulgaria*<sup>94</sup> concerns the issue of foreign nationals lacking permanent residence permits having to pay school fees for their secondary education. As a matter of principle, the normally wide margin of appreciation in cases of general measures of economic or social strategy needed to be qualified in the field of education, for two reasons:

- the right to education enjoys direct protection under the ECHR;
- education is a very particular type of public service, which serves broad societal functions.

According to the ECtHR, the margin of appreciation increases with the level of education, in inverse proportion to the importance of that education for those concerned and for society at large. So, while for primary schooling (higher) fees for foreigners are hard to justify, they may be fully justified at the university level. Given the importance of secondary education for personal development, and social and professional integration, a stricter scrutiny of the proportionality of the differential treatment applies for that level of education. The Court clarified that it did not take any position on whether or not a state is entitled to deprive all irregular migrants from the educational benefits it provides to nationals and certain limited categories of foreigners. In assessing the particular circumstances of the case, it found that no "considerations relating to the need to stem or reverse the flow of illegal immigration" applied. The applicants had not tried to abuse

94 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 21 June 2011, para. 60.

the Bulgarian educational system, as they had come to live in Bulgaria at a very young age following their mother's marriage with a Bulgarian, so they had no choice but to go to school in Bulgaria. There had accordingly been a violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1 to the ECHR.

### 3.4. Non-discrimination based on age

#### Key point

- Under both EU law and the ECHR, discrimination on the grounds of age is prohibited.

**Under EU law**, the EU Charter of Fundamental Rights in Article 21 explicitly mentions 'age' as a ground on which discrimination is prohibited. Article 24 includes the rights of the child among the protected fundamental rights. Under current EU legislation on non-discrimination, protection from discrimination on the basis of age is more limited than protection on the basis of race and ethnicity or on the basis of sex. Age is currently only protected in the context of access to employment, similarly to sexual orientation, disability and religion or belief.

The Employment Equality Directive is applicable to children who are legally entitled to work. While the International Labour Organization Convention concerning Minimum Age for Admission to Employment,<sup>95</sup> ratified by all EU Member States, establishes a minimum age of 15 years, differences regarding this minimum age persist among the EU Member States.<sup>96</sup> According to Article 6 of the Employment Equality Directive, Member States may provide justifications for differences of treatment on grounds of age. These differences do not constitute discrimination if they are objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. Concerning children and young people, such differences of treat-

95 International Labour Organization (ILO) (1973), Convention concerning Minimum Age for Admission to Employment, No. 138.

96 European Network of Legal Experts in the non-discrimination field, O'Dempsey, D. and Beale, A. (2011), *Age and employment*, European Commission, Directorate-General for Justice, Luxembourg, Publications Office.

ment may, for instance, include the setting of special conditions on access to employment and vocational training, employment and occupation, to promote their vocational integration or ensure their protection.

**Under CoE law**, Article 14 of the ECHR and Article 1 of Protocol 12 to the ECHR do not explicitly mention 'age' in the list of grounds on which discrimination is prohibited. The ECtHR, however, has examined issues of age discrimination in relation to various rights protected by the ECHR, and thereby implicitly analysed age as being included among 'other status'. In *D.G. v. Ireland*<sup>97</sup> and *Bouamar v. Belgium*,<sup>98</sup> for instance, the ECtHR found that there was a difference in treatment between adults and children in the countries' respective justice systems regarding detention, relevant to the application of the Convention. This difference in treatment stemmed from the punitive purpose of detention as regards adults and its preventive purpose in respect of children. Hence, the Court accepted 'age' as a possible ground for discrimination.

### 3.5. Non-discrimination based on other protected grounds

#### Key point

- Further grounds of discrimination, such as disability or birth, have been addressed in European jurisprudence pertaining to children.

**Under EU law**, Article 21 of the EU Charter of Fundamental Rights also prohibits discrimination based on other grounds particularly relevant to children, such as sex, genetic features, language, disability or sexual orientation. At least for disability, the CJEU has accepted that EU law also protects against so-called 'discrimination by association', i.e. discrimination against a person who is associated with another who has the protected characteristic (such as the mother of a child with disabilities).

<sup>97</sup> ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002 (see also [Section 11.2.2](#)).

<sup>98</sup> ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988 (see also [Section 11.2.2](#)).

Example: In *S. Coleman v. Attridge Law and Steve Law*,<sup>99</sup> the CJEU noted that the Employment Equality Directive includes certain provisions designed to specifically accommodate the needs of persons with disabilities. This, however, does not lead to the conclusion that the principle of equal treatment enshrined in the directive must be interpreted strictly, as prohibiting only direct discrimination on the grounds of disability and relating exclusively to persons with disabilities. According to the CJEU, the directive applies not to a particular category of persons but to the very nature of the discrimination. An interpretation limiting its application to persons with disabilities would deprive the directive of an important element of its effectiveness and reduce the protection that it is intended to guarantee. The CJEU concluded that the directive must be interpreted as meaning that the prohibition of direct discrimination laid down therein is not limited to persons with disabilities. Consequently, where an employer treated an employee who did not have a disability less favourably than another employee in a comparable situation, based on the disability of the former employee's child, whose care was provided primarily by that employee, such treatment was contrary to the prohibition of direct discrimination laid down by the directive.

**Under CoE law**, the ECtHR has dealt with discrimination against children in a variety of situations other than those already mentioned, such as discrimination based on language<sup>100</sup> or affiliation.<sup>101</sup>

Example: In *Fabris v. France*,<sup>102</sup> the applicant complained that he had been unable to benefit from a law introduced in 2001 granting children 'born of adultery' identical inheritance rights to those of legitimate children, a law passed following the ECtHR's judgment in *Mazurek v. France*<sup>103</sup> in 2000. The Court held that the legitimate aim of protecting the inheritance rights of the applicant's half-brother and half-sister did not outweigh his claim to a share of his mother's estate. In this case, the difference in treatment had

99 CJEU, C-303/06, *S. Coleman v. Attridge Law and Steve Law* [GC], 17 July 2008.

100 ECtHR, *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968.

101 ECtHR, *Fabris v. France* [GC], No. 16574/08, 7 February 2013.

102 *Ibid.*

103 ECtHR, *Mazurek v. France*, No. 34406/97, 1 February 2000.

been discriminatory, since it had no objective and reasonable justification. The Court found that it was in breach of Article 14 of the ECHR taken in conjunction with Article 1 of Protocol No. 1 to the ECHR.<sup>104</sup>

For children with disabilities, the ECSR holds that in the application of Article 17 (2) of the ESC it is acceptable to make a distinction between children with and without disabilities. It should, nevertheless, be the norm to integrate children with disabilities into mainstream schools, in which arrangements are made to cater for their special needs, and specialised schools should be the exception.<sup>105</sup> In addition, children attending special education schools that conform with Article 17 (2) of the ESC must be given sufficient instruction and training, so that proportionally an equivalent number of children in specialised schools and in mainstream schools complete their schooling.<sup>106</sup> The rights of children in relation to education are further addressed in [Section 7.3](#).

Under UN law, Article 2 of the CRC prohibits discrimination against children on a non-exhaustive list of grounds, specifically listing 'birth' as one of them. Article 2 provides that:

*1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

*2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

<sup>104</sup> ECtHR, *Fabris v. France* [GC], No. 16574/08, 7 February 2013.

<sup>105</sup> ECSR, *International Association Autism Europe (IAAE) v. France*, Complaint No. 13/2002, 4 November 2003.

<sup>106</sup> ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, 3 June 2008.



# 4

## Personal identity issues

EU	Issues covered	CoE
	Birth registration and right to a name	<p>ECtHR, <i>Johansson v. Finland</i>, No. 10163/02, 2007 (refusal to register a name previously granted to other persons)</p> <p>FCNM, Article 11 (right to use the surname in original language)</p> <p>European Convention on the Adoption of Children (Revised), Article 11 (3) (retaining the original name of an adopted child)</p>
	Right to personal identity	<p>ECHR, Articles 6 (fair trial) and 8 (right to respect for private and family life)</p> <p>ECtHR, <i>Gaskin v. the United Kingdom</i>, No. 10454/83, 1989 (refusal of access to child care records)</p> <p>ECtHR, <i>Mizzi v. Malta</i>, No. 26111/02, 2006 (inability to challenge paternity)</p> <p>ECtHR, <i>Menesson v. France</i>, No. 65192/11, 2014 (surrogacy with biological father as intended father)</p> <p>ECtHR, <i>Godelli v. Italy</i>, No. 33783/09, 2012 (non-identifying information about birth mother)</p> <p>European Convention on the Adoption of Children (Revised), Article 22</p>
	Identity theft	<p>ECtHR, <i>K.U. v. Finland</i>, No. 2872/02, 2008 (advertisement placed on the internet without the knowledge of the victim)</p>

EU	Issues covered	CoE
<p>CJEU, C-200/02, <i>Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department</i>, 2004 (residence right of the primary care giver of a child, citizen of the EU)</p> <p>CJEU, C-34/09, <i>Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEm)</i>, 2011 (residence rights of TCN with minor EU citizen children)</p>	<p><b>Citizenship</b></p>	<p>ECtHR, <i>Genovese v. Malta</i>, No. 53124/09, 2011 (arbitrary denial of citizenship to child born out of wedlock)</p> <p>European Convention on Nationality</p> <p>CoE Convention on the Avoidance of Statelessness in Relation to State Succession</p>
	<p><b>Identity as member of national minority</b></p>	<p>FCNM, Article 5 (1) (preservation of the essential elements of the identity)</p>

Issues of personal identity have generally not been addressed at EU level, in view of the EU's limited competence in that area. However, the CJEU has incidentally ruled on the right to a name (particularly the right to have the name which has been recognised in one EU Member State also recognised in others) from the perspective of the freedom of movement principle. Citizenship and residency aspects have also been adjudicated in light of Article 20 of the TFEU. The CoE, on the other hand, in particular through the case law of the ECtHR, has interpreted and developed the application of several fundamental rights in the area of personal identity. Therefore, with the exception of several areas in which issues of personal identity have been addressed at EU level, the following sections deal only with CoE law.

This chapter does not refer to a specific fundamental right. Rather, it provides a cross-section of fundamental rights issues that are related to identity, such as birth registration and the right to a name ([Section 4.1](#)); the right to personal identity ([Section 4.2](#)); identity theft ([Section 4.3](#)); the right to citizenship ([Section 4.4](#)); and the identity of children belonging to national minorities ([Section 4.5](#)). Several related issues are dealt with in other chapters, in particular concerning sexual abuse ([Chapter 8](#)) or data protection ([Chapter 10](#)). Some of these rights, such as the right to a name, have mainly been claimed as parental rights, but the approach could easily be transposed to children themselves, given the implications for their own rights.



## 4.1. Birth registration and the right to a name

### Key point

- Refusal to register a first name not unsuitable for a child which has already gained acceptance may be in breach of Article 8 of the ECHR (right to respect for private and family life).

Unlike UN treaties (e.g. Article 24 (2) of the International Covenant on Civil and Political Rights (ICCPR), Article 7 (1) of the CRC and Article 18 of the Convention on the Rights of Persons with Disabilities (CRPD)), the European instruments on fundamental rights do not explicitly provide for the right to birth registration immediately after birth or the right to a name from birth.

**Under EU law**, the right to a name has been addressed from the perspective of the freedom of movement. The CJEU holds that freedom of movement precludes an EU Member State from refusing to recognise a child's surname as registered in another Member State of which the child is a national or where the child was born and had resided.<sup>107</sup>

**Under CoE law**, refusal of birth registration of children may raise an issue under Article 8 of the ECHR.

First, the ECtHR found that the name as “a means of identifying persons within their families and the community” falls within the scope of the right to respect for private and family life as enshrined in Article 8 of the ECHR.<sup>108</sup> The parents' choice of their child's first name<sup>109</sup> and family name<sup>110</sup> is part of their private life. The Court has held that the refusal of state authorities to register a chosen forename based on the likely harm or prejudice that the name might cause the

107 See CJEU, C-148/02, *Carlos Garcia Avello v. Belgian State*, 2 October 2003; CJEU, C-353/06, *Stefan Grunkin and Dorothee Regina Paul* [GC], 14 October 2008.

108 ECtHR, *Guillot v. France*, No. 22500/93, 24 October 1993, para. 21.

109 ECtHR, *Johansson v. Finland*, No. 10163/02, 6 September 2007, para. 28; ECtHR, *Guillot v. France*, No. 22500/93, 24 October 1993, para. 22.

110 ECtHR, *Cusan and Fazzo v. Italy*, No. 77/07, 7 January 2014, para. 56.

child did not violate Article 8 of the ECHR.<sup>111</sup> Refusal to register a first name, however, that is not unsuitable for a child and that has already gained acceptance may be in breach of Article 8 of the ECHR.

Example: In *Johansson v. Finland*,<sup>112</sup> the authorities refused to register the forename "Axl Mick", because the spelling did not comply with the Finnish naming practice. The ECtHR accepted that due regard had to be given to the child's best interests, and that the preservation of the national naming practice was in the public interest. It found, however, that the name had been accepted for official registration in other cases and could therefore not be considered unsuitable for a child. Since the name had already gained acceptance in Finland and it had not been contended that this name had negatively affected the cultural and linguistic identity of the state, the ECtHR concluded that the public-interest considerations did not outweigh the interest of having the child registered under the name chosen. The Court thus found that there had been a violation of Article 8 of the ECHR.

The ECtHR has also found that a rule stating that the husband's family name should be given to legitimate children at the moment of birth registration does not in itself violate the ECHR. However, the impossibility to derogate from this general rule was found to be excessively rigid and discriminatory for women, and therefore in violation of Article 14, taken in conjunction with Article 8 of the ECHR.<sup>113</sup>

Article 11 of the FCNM provides that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in his or her minority language, as well as the right to have it officially recognised, albeit subject to modalities provided for in the legal system.

Article 11 (3) of the Revised European Convention on the Adoption of Children provides for the possibility for States Parties to keep the original surname of an adopted child (Adoption Convention).<sup>114</sup> This is an exception to the general principle that the legal relationship between the adopted child and his or her original family is severed.

111 ECtHR, *Guillot v. France*, No. 22500/93, 24 October 1993, para. 27.

112 ECtHR, *Johansson v. Finland*, No. 10163/02, 6 September 2007.

113 ECtHR, *Cusan and Fazzo v. Italy*, No. 77/07, 7 January 2014, para. 67.

114 Council of Europe, *European Convention on the Adoption of Children (Revised)*, CETS No. 202, 2008.

## 4.2. Right to personal identity

### Key points

- The right to know one's origins falls within the scope of a child's private life.
- The establishment of paternity requires carefully balancing the child's interest in knowing his or her identity with the interest of the presumed or alleged father, and with the general interest.
- Anonymous births may be permissible under Article 8 of the ECHR (right to respect for private and family life) provided that the child can at least obtain non-identifying information about the mother and that there is a possibility of seeking a confidentiality waiver by the mother.
- An adopted child has the right to access information concerning his or her origins. Biological parents may be granted a legal right not to disclose their identity, but this does not amount to an absolute veto.

**Under CoE law**, according to the ECtHR, Article 8 of the ECHR includes the right to identity and personal development. Details of a person's identity and the interest "in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents"<sup>115</sup> have been considered relevant to personal development. Birth and the circumstances of birth form part of a child's private life. "[I]nformation concerning highly personal aspects of [one's] childhood, development and history" can constitute a "principal source of information about [one's] past and formative years",<sup>116</sup> so that lack of access to that information by the child raises an issue under Article 8 of the ECHR.

Under international law, Article 8 of the CRC provides for a high and rather detailed level of protection of the right to preserve a child's identity. It protects against unlawful interference with the preservation of identity, including nationality, name and family relations, as recognised by law. It also guarantees "appropriate assistance and protection" where a child is illegally deprived of some or all elements of his or her identity, with a view to speedily re-establish that identity.

<sup>115</sup> ECtHR, *Odièvre v. France* [GC], No. 42326/98, 13 February 2003, para. 29.

<sup>116</sup> ECtHR, *Gaskin v. the United Kingdom*, No. 10454/83, 7 July 1989, para. 36.

## 4.2.1. Establishing paternity

**Under CoE law**, children have complained to the ECtHR about the impossibility of determining the identity of their natural fathers. The ECtHR held that the determination of the legal relationship between a child and the alleged natural father was part of the scope of private life (Article 8 of the ECHR). Affiliation is a fundamental aspect of one's identity.<sup>117</sup> A child's interest in establishing paternity, however, must be balanced against the interests of the presumed father as well as the general interest. Indeed, a child's interest in having legal certainty about his or her paternal affiliation does not trump a father's interest in rebutting the legal presumption of paternity.

Example: In *Mikulic v. Croatia*,<sup>118</sup> the applicant was born out of wedlock and instituted proceedings for establishment of paternity against her presumed father. The respondent refused to appear on several occasions for court-ordered DNA testing, which led to unnecessary protraction of the paternity proceedings for about five years. The ECtHR held that if under domestic law alleged fathers could not be compelled to undergo medical testing, states had to provide for alternative means allowing for the swift identification of natural fathers by an independent authority. It found a violation of Article 8 of the ECHR in the applicant's case.

Example: In *Mizzi v. Malta*,<sup>119</sup> the presumed father was unable to deny paternity of a child born by his wife since the legally prescribed six-month time limit had elapsed. The ECtHR examined the case under both Articles 6 (right to a fair trial) and 8 (respect of private and family life) of the ECHR. It noted that introducing a time-limit within which a presumed father must take action to disavow a child aims to ensure legal certainty and protect the interest of the child to know his or her identity. These aims, however, do not outweigh the right of the father to have the opportunity to deny paternity. The practical impossibility of denying paternity since birth had in this case put an excessive burden on the presumed father, in violation of his right of access to a court and a fair trial as enshrined in Article 6 of

117 ECtHR, *Menesson v. France*, No. 65192/11, 26 June 2014, para. 96.

118 ECtHR, *Mikulic v. Croatia*, No. 53176/99, 7 February 2002, paras. 64–65.

119 ECtHR, *Mizzi v. Malta*, No. 26111/02, 12 January 2006.

the ECHR. It had also disproportionately interfered with his rights under Article 8 of the ECHR.<sup>120</sup>

The interests of a child seeking to ascertain paternity and the interests of the biological father may sometimes coincide. This occurred in a situation where a father, due to his lack of legal capacity, was unable to institute proceedings at the domestic level to establish affiliation with his child. The ECtHR found that it was not in the best interests of a child born out of wedlock that his biological father was unable to institute proceedings to have his paternity established, and that the child was therefore entirely dependent on the discretion of state authorities to have its affiliation established.<sup>121</sup>

Authorities may have a positive obligation to intervene in proceedings to establish paternity in the best interests of the child when the legal representative (in this case the mother) of the child is unable to properly represent the child, for instance because of a serious disability.<sup>122</sup>

With regard to the specific case of recognition of affiliation between intended parents and children born out of surrogacy, the Court accepted in principle that states have a wide margin of appreciation, since there is no European consensus on allowing or recognising affiliation in surrogacy arrangements. The fact, however, that affiliation is a fundamental aspect of a child's identity reduces that margin of appreciation.

Example: *Mennesson v. France*<sup>123</sup> concerns the refusal of French authorities to register children born out of surrogacy in the United States in the French birth register on public policy grounds. The ECtHR found no violation of the applicants' right to respect for family life, concluding that they were in no way prevented from enjoying family life in France and that administrative obstacles they might have faced had not been insurmountable. With regard to the right to respect for the private life of the children, the Court attached great importance to their best interests. It particularly emphasised that the man who was intended to be registered as the children's father on the certificate was also their biological father. To deny a child

120 *Ibid.*, paras. 112–114.

121 ECtHR, *Krušković v. Croatia*, No. 46185/08, 21 June 2011, paras. 38–41.

122 ECtHR, *A.M.M. v. Romania*, No. 2151/10, 14 February 2012, paras. 58–65 (available in French).

123 ECtHR, *Mennesson v. France*, No. 65192/11, 26 June 2014.

legal affiliation when a biological affiliation is established and when the parent concerned claims full recognition cannot be held to be in conformity with the best interests of the children. The Court therefore found a violation of Article 8 of the ECHR in respect of the “private life” complaint of the children.<sup>124</sup>

## 4.2.2. Establishing maternity: anonymous birth

**Under CoE law**, a child’s interest in knowing his or her origins, and in particular his or her mother, must be balanced with other private and public interests, such as the interests of the family or families involved, the public interest of preventing illegal abortions, child abandonment or the protection of health. Cases where the birth mother decides to remain anonymous, but the child can at least obtain non-identifying information about the birth mother and the child has the possibility to seek a confidentiality waiver from the mother, might be in conformity with Article 8 of the ECHR.<sup>125</sup>

Example: In *Godelli v. Italy*,<sup>126</sup> the applicant was abandoned at birth by her mother, who did not consent to being named on the birth certificate. The applicant could not access non-identifying information concerning her origins nor could she obtain disclosure of her mother’s identity. The ECtHR found a violation of Article 8 of the ECHR, because the state did not strike a proper balance between the competing interests of birth mother and child.

## 4.3. Establishing one’s origin: adoption

A child’s right to know his or her origins has gained particular prominence in the context of adoption. The substantive guarantees related to adoption, outside the right to know one’s origins, are dealt with in [Section 6.3](#).

**Under CoE law**, Article 22 (3) of the European Convention on the Adoption of Children (revised) is a fairly robust provision on the adopted child’s right to access information held by the authorities concerning his or her origins. It allows

<sup>124</sup> *Ibid.*, para. 100; see also ECtHR, *Labassee v. France*, No. 65941/11, 26 June 2014, para. 79.

<sup>125</sup> ECtHR, *Odièvre v. France* [GC], No. 42326/98, 13 February 2003, paras. 48–49.

<sup>126</sup> ECtHR, *Godelli v. Italy*, No. 33783/09, 25 September 2012, para. 58.

for States Parties to grant the parents of origin a legal right not to disclose their identity, as long as it does not amount to an absolute veto. The competent authority must be able to determine whether it overrides the parents of origin's right and can disclose identifying information in light of the circumstances and the respective rights at stake. In the case of full adoption, the adopted child must at least be able to obtain a document attesting the date and place of birth.<sup>127</sup>

Under international law, the Hague Convention on Inter-Country Adoption provides for the possibility for an adopted child to access information about the identity of his or her parents "under appropriate guidance", but leaves it to each State Party to allow for it, or not.<sup>128</sup>

## 4.4. Identity theft

### Key point

- Practical and effective protection must be ensured against identity theft of children.

Identity theft concerns situations where a child's name is used without his or her knowledge.

**Under CoE law**, the ECtHR has dealt with identity theft under Article 8 of the ECHR on the right to respect for private and family life. It held that states are obliged to ensure the practical and effective protection of children against identity theft, and that states must take effective steps to identify and prosecute the perpetrator.<sup>129</sup>

<sup>127</sup> Council of Europe, [European Convention on the Adoption of Children \(Revised\)](#), CETS No. 202, 2008, Art. 22.

<sup>128</sup> Hague Conference on Private International Law, [Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption](#), 29 May 1993, Art. 30 (2).

<sup>129</sup> ECtHR, [K.U. v. Finland](#), No. 2872/02, 2 December 2008, para. 49.

Example: In *K.U. v. Finland*,<sup>130</sup> an advertisement was placed on an internet dating website in the name of a 12-year-old boy, without his knowledge. It mentioned his age, telephone number, physical description and contained a link to a webpage containing his picture. The advertisement was of a sexual nature, suggesting that the boy was looking for an intimate relationship with a boy of his age or older, thus making him a target for paedophiles. The identity of the person who placed the advertisement could not be obtained from the internet provider due to the legislation in place. The ECtHR held that the positive obligation under Article 8 of the ECHR not only to criminalise offences but also to effectively investigate and prosecute them, assumes even greater importance when the physical and moral welfare of a child is threatened. In this case, the Court found that by being exposed as a target for paedophiliac approaches on the internet the child's physical and moral welfare was threatened. There was consequently a breach of Article 8 of the ECHR.

Aspects related to identity theft are closely related to child pornography and grooming. These are dealt with in [Section 7.2](#).

## 4.5. Right to citizenship

### Key points

- The right of residence within the EU of children who are EU citizens should not be deprived of any useful effect by refusing residence rights to their parent(s).
- The ECHR does not guarantee the right to citizenship, but an arbitrary refusal of citizenship may fall under Article 8 of the ECHR (right to respect for private and family life) due to its impact on an individual's private life.

**Under EU law**, Article 20 (1) of the TFEU grants the status of EU citizen to every Member State national of the EU. The CJEU ruled on the effectiveness of the right of residence of children who have EU citizenship but not the nationality of the EU Member State where they reside. At stake was the refusal of residence rights within the EU to a parent who was the carer of a child with EU citizenship. The CJEU held that the refusal of residence rights to a parent who is the

<sup>130</sup> ECtHR, *K.U. v. Finland*, No. 2872/02, 2 December 2008.



primary caregiver of a child deprives the child's right of residence of any useful effect. Hence, the parent who is the primary caregiver has the right to reside with the child in the host state.<sup>131</sup> These aspects are addressed in more detail in [Section 9.5](#).

**Under CoE law**, the ECHR does not guarantee the right to citizenship.<sup>132</sup> An arbitrary refusal of citizenship, however, may come within the scope of Article 8 of the ECHR because of its impact on an individual's private life, which embraces aspects of a child's social identity<sup>133</sup> – which here refers to the identity a child has in society.

Example: In *Genovese v. Malta*, Maltese citizenship was denied to a child born out of wedlock outside of Malta to a non-Maltese mother and a judicially-recognised Maltese father. The refusal of citizenship as such did not violate Article 8 of the ECHR. The arbitrary denial of citizenship on the ground of birth out of wedlock, however, raised questions of discrimination. Arbitrary differential treatment on this ground requires weighty reasons by way of justification. In the absence of such reasons, a violation of Article 8 together with Article 14 of the ECHR was found.<sup>134</sup>

A key concern in treaty provisions on the right to acquire citizenship is the avoidance of statelessness. The European Convention on Nationality contains detailed provisions on children's legal acquisition of nationality, and restricts the possibilities for children to lose citizenship.<sup>135</sup> The CoE Convention on the Avoidance of Statelessness in Relation to State Succession contains an obligation to avoid statelessness at birth (Article 10) and provides for the right to the nationality of the successor state in case of statelessness (Article 2).<sup>136</sup> Article 12 of the Revised European Convention on Adoption also echoes the concern to avoid statelessness; states have to facilitate the acquisition of their nationality by a child adopted by one of their nationals, and loss of nationality

131 CJEU, C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004, paras. 45–46.

132 ECtHR, *Slivenko and Others v. Latvia* [GC], Decision on admissibility, No. 48321/99, 23 January 2002, para. 77.

133 ECtHR, *Genovese v. Malta*, No. 53124/09, 11 October 2011, para. 33.

134 *Ibid.*, paras. 43–49.

135 Council of Europe, *European Convention on Nationality*, CETS No. 166, 1997, Arts. 6 and 7.

136 Council of Europe, *Convention on the Avoidance of Statelessness in relation to State Succession*, CETS No. 200, 2006.

as a consequence of adoption is conditional upon possession or acquisition of another nationality.

Under international law, Article 7 of the CRC guarantees the right to acquire a nationality, as does Article 24 (3) of the ICCPR.

## 4.6. Identity of children belonging to national minorities

### Key point

- A child belonging to a national minority has the right to enjoy his or her own culture, profess and practice his or her own religion, and use his or her own language.<sup>137</sup>

**Under EU law**, no particular attention has been paid to the identity of children belonging to national minorities from a fundamental rights' perspective. Furthermore, there is no leading jurisprudence in the EU that adds to the CoE standards.

**Under CoE law**, Article 5 (1) of the FCNM explicitly mentions that States Parties undertake to preserve the essential elements of the identity of persons belonging to national minorities, i.e. their religion, language, traditions and cultural heritage. There is no child-specific provision in the FCNM. The question of language in education is dealt with in [Section 8.2](#).

Under international law, Article 30 of the CRC guarantees to a child belonging to a national minority or an indigenous child the right "to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language" in community with other members of his or her group.

<sup>137</sup> On other aspects of economic, social and cultural rights, see further [Chapter 8](#).

# 5

## Family life

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 7 (right to respect for family life)	Right to respect for family life	ECHR, Article 8 (right to respect for family life)
Charter of Fundamental Rights, Article 24 (rights of the child) Maintenance Regulation (4/2009)	Right to be cared for by parents	ECtHR, <i>R.M.S. v. Spain</i> , No. 28775/12, 2013 (deprivation of contact with daughter)
Charter of Fundamental Rights, Article 24 (3) (right to maintain contact with both parents) Brussels II bis Regulation (2201/2003) Mediation Directive (2008/52/EC)	Right to maintain contact with both parents	Convention on Contact concerning Children
Access to Justice Directive (2002/8/EC) (access to justice in cross border disputes)	Parental separation	ECtHR, <i>Levin v. Sweden</i> , No. 35141/06, 2012 (restriction of contact rights) ECtHR, <i>Schneider v. Germany</i> , No. 17080/07, 2011 (contact between a child and non-legally recognised father). ECtHR, <i>Sommerfeld v. Germany</i> [GC], No. 31871/96, 2003 (contact between father and daughter) ECtHR, <i>Mustafa and Armağan Akin v. Turkey</i> , No. 4694/03, 2010 (contact between siblings after custody award) ECtHR, <i>Vojnity v. Hungary</i> , No. 29617/07, 2013 (restriction on access on the ground of religious convictions)

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 24 (rights of the child) Brussels II bis Regulation (2201/2003) CJEU, C211/10 PPU, <i>Doris Povse v. Mauro Alpage</i> , 2010 (enforcement certificate)	Child abduction	Convention on Contact concerning Children ECtHR, <i>Neulinger and Shuruk v. Switzerland</i> [GC], No. 41615/07, 2010 (taking of child by mother) ECtHR, <i>X v. Latvia</i> [GC], No. 27853/09, 2013 (grave risk in case of child's return under Hague Convention)

European law – both EU and CoE – provides for the right to respect for family life (Article 7 of the EU Charter of Fundamental Rights; Article 8 of the ECHR). The EU’s competence in matters of family life relates to cross-border disputes, including recognition and enforcement of judgments across Member States. The CJEU deals with matters such as the child’s best interests and the right to family life as laid down in the EU Charter of Fundamental Rights, relative to the Brussels II bis Regulation. ECtHR case law relating to family life recognises interdependent rights, such as the right to family life and the right of the child to have their best interests, as a primary consideration. It acknowledges that children’s rights are sometimes conflicting. The right of the child to respect for family life, for instance, may be limited to secure their best interests. Further, the CoE has adopted various other instruments which deal with matters related to contact, custody and exercise of children’s rights.

This chapter examines the child’s right to respect for family life and associated rights, especially the content and scope of these rights as well as the associated legal obligations and their interaction with other rights. Specific aspects addressed include the right to respect for family life and its limitations ([Section 5.1](#)), the right of the child to be cared for by his/her parents ([Section 5.2](#)), the right to maintain contact with both parents ([Section 5.3](#)) and child abduction ([Section 5.4](#)).

## 5.1. Right to respect for family life

### Key points

- States have positive obligations to ensure children’s effective enjoyment of their right to respect for family life.
- Under both EU and CoE law, judicial and administrative authorities should take into account the child’s best interests in any decision related to the child’s right to respect for his/her family life.

The child’s right to respect for family life includes a number of composite rights, such as: the child’s right to be cared for by his/her parents ([Section 5.2](#)); the right to maintain contact with both parents ([Section 5.3](#)); the right not to be separated from parents except where it is in the child’s best interests ([Section 5.4](#) and [Chapter 6](#)); and the right to family reunification ([Chapter 9](#)).

**Under both EU law and CoE law**, the right to respect for family life is not absolute, and subject to a number of limitations. These limitations, as the explanatory note to the EU Charter of Fundamental Rights<sup>138</sup> clarifies, are the same as for the corresponding provision of the ECHR, specifically Article 8 (2), that is: in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>139</sup>

The EU Charter of Fundamental Rights expressly incorporates within this right an obligation to consider the best interests of the child (Article 24 (2)).<sup>140</sup> Even though the obligation to observe the child’s best interests is not expressly laid down under the ECHR, the ECtHR incorporates that obligation in its case law.<sup>141</sup>

138 European Parliament, Council of the European Union, European Commission (2007), “*Explanations relating to the Charter of Fundamental Rights*”, 2007/C 303/02, OJ 2007 C 303, 14 December 2007, pp. 17–35, see explanation relating to Art. 7.

139 Council of Europe, [Convention for the Protection of Human Rights and Fundamental Freedoms](#), CETS No. 5, 1950, Art. 8.

140 CJEU, C400/10 PPU, *J. McB. v. L.E.*, 5 October 2010.

141 See, for example, ECtHR, *Ignaccolo-Zenide v. Romania*, No. 31679/96, 25 January 2000, para. 94.

## 5.2. Right of the child to be cared for by his/her parents

### Key points

- EU law regulates procedural aspects of the child's right to be cared for by his/her parents.
- Under the ECHR, states have negative and positive duties to respect children's and parents' rights to family life.

The right of children to know the identity of their parents and the right to be cared for by them are two core components of children's right to respect for family life. They are to an extent interdependent: children's right to know their parents is ensured through parental care. Sometimes, however, these rights are distinct - for example, for children who are adopted or born as a result of medically-assisted procreation. Here the right is more closely associated with the child's right to identity, as expressed by knowing his/her biological parentage, and is therefore considered in [Chapter 4](#). The focus of this section is on the second right: the right of the child to be cared for by his/her parents.

**Under EU law**, there are no provisions dealing with the substantive scope of the right to be cared for by parents. EU instruments may deal with cross-border aspects, such as recognition and enforcement of judgements across Member States. Regulation 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance (Maintenance Regulation), for instance, covers cross-border maintenance applications arising from family relationships.<sup>142</sup> It establishes common rules for the entire EU, aiming to ensure the recovery of maintenance claims even where the debtor or creditor is in another country.

**Under CoE law**, the ECtHR has underscored that Article 8 of the ECHR primarily establishes the duty of the state not to intervene in family life.<sup>143</sup> However, states

<sup>142</sup> Council of the European Union (2008), Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance, OJ 2008 L 7 (Maintenance Regulation).

<sup>143</sup> ECtHR, *R.M.S. v. Spain*, No. 28775/12, 18 June 2013, para. 69.

also have a positive obligation to take the necessary measures to both support parents and families and to protect children against potential abuse.<sup>144</sup> Children should only be separated from their parents in exceptional circumstances. In these cases, everything must be done to preserve personal relations and, when appropriate, to ‘rebuild’ the family. States enjoy a wide margin of appreciation when taking the initial decision to separate children from their parents.<sup>145</sup> However, stricter scrutiny is called for regarding any further limitations, such as restrictions placed on parental rights of access, and any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed. Equally, when it comes to separating mothers from new-born babies, the reasons put forth by the state must be extraordinarily compelling.<sup>146</sup>

The margin of appreciation decreases with the amount of time children are separated from their parents, and state authorities should put forward strong reasons to support their decision to maintain the separation.<sup>147</sup> The ECtHR analyses whether the decision-making process was fair and whether all parties involved were given the opportunity to present their case.

Example: In *R.M.S. v. Spain*<sup>148</sup>, the applicant argued that she had been deprived of all contact with her daughter from the age of three years and 10 months onwards on the basis of her socio-economic status. In finding a violation of Article 8 of the ECHR, the Court stressed that “the Spanish administrative authorities should have considered other less drastic measures than taking the child into care”. It also stated that: “The role of the social welfare authorities is precisely to help persons in difficulty [...], to provide them with guidance and to advise them on matters such as the different types of benefits available, the possibility of obtaining social housing and other means of overcoming their difficulties, such as those originally sought by the applicant.” Accordingly, the ECtHR held “that the Spanish authorities failed to undertake appropriate and sufficient efforts to secure the applicant’s right to live with her child”.<sup>149</sup>

144 *Ibid.*, para. 69 and following.

145 ECtHR, *Y.C. v. the United Kingdom*, No. 4547/10, 13 March 2012, para. 137.

146 ECtHR, *K. and T. v. Finland* [GC], No. 25702/94, 12 July 2001, para. 168.

147 ECtHR, *Y.C. v. the United Kingdom*, No. 4547/10, 13 March 2012, para. 137.

148 ECtHR, *R.M.S. v. Spain*, No. 28775/12, 18 June 2013.

149 *Ibid.*, paras. 86 and 93.

Under international law, Article 5 of the CRC provides that “States Parties shall respect the responsibilities, rights and duties of parents, [...] to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention”. Furthermore, Article 9 of the CRC states that a child shall not be separated from his/her parents against his/her will, and that all parties must be given the opportunity to participate in any proceedings relating to this situation. The UN Guidelines on Alternative Care further substantiate the rights of children in these circumstances and the corresponding duties of states.<sup>150</sup>

## 5.3. Right to maintain contact with both parents

### Key points

- The right of the child to maintain contact with both parents subsists in all forms of parental separation: family-related and state-sanctioned.
- The process of ensuring the right of the child to maintain contact with his/her parents and family reunification requires regard for the best interests of the child as a primary consideration, giving due weight to the views of the child in accordance with his/her age and maturity.

The scope of the right to maintain contact with parents differs depending on the context. In the event of a decision of the parents to separate from each other, the scope is broader and normally limited only by the best interests of the child. In the context of a state-sanctioned separation resulting from, for instance, expulsion or imprisonment of a parent, state authorities act in furtherance of a protected interest, and must strike a fair balance between the interests of the parties and the obligation to ensure the best interests of the child. The right of children to maintain contact with both parents is applicable in both instances.

**Under EU law**, Article 24 (3) of the EU Charter of Fundamental Rights expressly recognises every child’s right to maintain contact with both parents. The

<sup>150</sup> UN, Human Rights Council (2009), *UN Guidelines for the Alternative Care of Children*, UN Doc. A/HRC/11/L.13, 15 June 2009.



provision's wording clarifies the content of the right, particularly the meaning of contact, which must: occur on a *regular basis*; allow the development of a *personal relationship*; and be in the form of *direct contact*. There is, however, a caveat: the right of each child to maintain contact with her or his parents is expressly limited by their best interests. This provision, as the explanatory note to the Charter clarifies, is expressly informed by Article 9 of the CRC.

In line with EU competences (see [Chapter 1](#)), there has been a specific focus on judicial cooperation (with the objective of creating an area of freedom, security and justice in which the free movement of persons is ensured). Two EU instruments are of particular relevance: Council Regulation (EC) No. 2201/2003<sup>151</sup> (Brussels II bis), and European Parliament and Council Directive 2008/52/EC (Mediation Directive).<sup>152</sup> From a rights perspective, the Brussels II bis Regulation is significant. First, it applies to *all* decisions on parental responsibility, irrespective of marital status. Second, the rules relating to jurisdiction (determined for the most part by the child's habitual residence) are expressly informed by the best interests of the child; and third, there is particular regard for ensuring the respect of children's views.<sup>153</sup>

CJEU jurisprudence in cases of wrongful removal of a child following a decision taken unilaterally by one of the parents has primarily aimed to uphold the fundamental right of the child to maintain on a regular basis a personal relationship and direct contact with both parents (Article 24 (3) of the Charter), as the Court asserts that this right undeniably merges into the best interests of any child. In the CJEU's view, a measure that prevents the child to maintain on a regular basis a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interest underlying that fundamental right.<sup>154</sup> This includes provisional, including protective, measures under Article 20 of the Brussels II bis Regulation. The Court ruled that a balanced and reasonable

151 Council of the European Union (2003), Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338 (Brussels II bis).

152 European Parliament, Council of the European Union (2008), Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ 2008 L 136/3 (*Mediation Directive*).

153 See, for example, Council Regulation (EC) No. 2201/2003, Preamble (paras. 5, 12, 13 and 19) and Articles 8, 41 (2) (c) and 42 (2) (a).

154 CJEU, C-403/09 PPU, *Jasna Detiček v. Maurizio Squeglia*, 23 December 2009, para. 59.

assessment of all the interests involved, which must be based on objective considerations relating to the actual person of the child and his or her social environment, must in principle be performed in proceedings in accordance with the provisions of Brussels II bis Regulation.<sup>155</sup>

Example: The case of *E. v. B.*<sup>156</sup> concerns proceedings between Mr. E. (the father) and Ms. B. (the mother), in relation to the jurisdiction of the courts of the United Kingdom to hear and determine the usual place of residence of their child, S., and the rights of access of the father. The parents had signed an agreement before a Spanish court whereby the mother had custody, and access was granted to the father. Subsequently, the mother sought to reduce the rights of access which had been granted to the father by that agreement. The father submitted an application before the High Court seeking the enforcement of the Spanish agreement. The mother submitted that she had prorogued the jurisdiction of the Spanish court and sought to transfer the prorogued jurisdiction to the courts of England and Wales. On the father's appeal, the Court of Appeal referred several questions to the CJEU concerning the interpretation of Article 12 (3) of the Brussels II bis Regulation. The CJEU held that where a court is seized of proceedings in accordance with Article 12 (3) of the Brussels II bis Regulation, the best interests of the child can only be safeguarded by a review, in each specific case, of the question of whether the prorogation of jurisdiction which is sought is consistent with the child's best interests. A prorogation of jurisdiction is valid only in relation to the specific proceedings for which the court whose jurisdiction is prorogued is seized. After the final conclusion of the proceedings from which the prorogation of jurisdiction derives, that jurisdiction comes to an end, in favour of the court benefiting from a general jurisdiction under Article 8 (1) of the Brussels II bis Regulation.

With regard to parental responsibility, Brussels II bis co-exists with the Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.<sup>157</sup> Pursuant to Article 61, Brussels II bis shall take precedence over

<sup>155</sup> *Ibid.*, para. 60.

<sup>156</sup> CJEU, C-436/13, *E. v. B.*, 1 October 2014 (summary adjusted from <http://cases.iclr.co.uk>).

<sup>157</sup> The World Organisation for Cross-border Cooperation in Civil and Commercial Matters (1996), Hague Conference on private international law, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children, 19 October 1996.

the Hague Convention: (a) if the child concerned has her or his habitual residence on the territory of a Member State or (b) as concerns the recognition and enforcement of a judgment rendered in a court of a Member State on the territory of another Member State, even if the child concerned has her or his habitual residence on the territory of a third state which is a contracting Party to the Hague Convention. Therefore, a key issue under the Brussels II bis Regulation is the determination of the habitual residence of the child.

Example: In *Mercredi v. Chaffe*,<sup>158</sup> the Court of Appeal of England and Wales referred a case to the CJEU concerning the removal of a two-month-old child from the United Kingdom to the French island of Réunion. The CJEU ruled that the concept of habitual residence, for the purposes of Articles 8 and 10 of the Brussels II bis Regulation corresponds to the place which reflects some degree of integration by the child in a social and family environment. Where the situation concerns an infant who has been staying with his/her mother only a few days in a Member State – other than that of his/her habitual residence – to which he/she was removed, the factors that must be taken into consideration include: first, the duration, regularity, conditions and reasons for the stay in the territory of that EU Member State and for the mother’s move to that state; and second, with particular reference to the child’s age, the mother’s geographic and family origins, and the family and social connections which the mother and child have with that Member State.

Also of particular relevance for the enjoyment of the right to maintain contact with both parents in cross-border disputes are the instruments related to regulating access to justice that clarify how to handle complex disputes, such as Council Directive 2002/8/EC (Access to Justice Directive), which requires “improv[ing] access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes”.<sup>159</sup> The purpose of this directive is to: improve access to justice in cross-border civil cases by establishing common minimum rules relating to legal aid; ensure that appropriate legal aid is granted, under certain conditions, to persons who cannot meet the cost of proceedings on account of their financial situation; and facilitate compatibil-

158 CJEU, C-497/10 PPU, *Barbara Mercredi v. Richard Chaffe*, 22 December 2010.

159 Council of the European Union (2003), Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L 026 (Access to justice directive).

ity of national laws in this matter and to provide for cooperation mechanisms between the authorities of the Member States.

**Under CoE law,** the right of each child to maintain contact with both parents is implicit in Article 8 of the ECHR. The ECtHR affirms that “the mutual enjoyment by parent and child of each other’s company constitutes a fundamental element of family life”.<sup>160</sup> It also emphasises, however, that this right may be limited by the best interests of the child (see [Section 5.4](#) and [Chapter 6](#)). This right is at the centre of judicial decision-making about custody of and contact with children.

In a series of cases, the ECtHR has either expressly or implicitly referred to the best interests of the child within the context of custody and contact.

Example: In *Schneider v. Germany*,<sup>161</sup> the applicant had a relationship with a married woman and claimed to be the biological father of her son, whose legally recognised father was the mother’s husband. The applicant argued that the decision of the domestic courts to dismiss his application for contact with the child and information about the child’s development on the basis that he was neither the child’s legal father nor had a relationship with the child violated his rights under Article 8 of the ECHR. In finding a violation, the ECtHR focused on the failure of the domestic courts to give any consideration to the question of whether, in the particular circumstances of the case, contact between the child and the applicant would have been in the child’s best interest.<sup>162</sup> As regards the applicant’s request for information about the child’s personal development, the Court held that the domestic courts failed to give sufficient reasons to justify their interference for the purposes of Article 8 (2)<sup>163</sup> and that, therefore, the interference had not been “necessary in a democratic society”.

160 ECtHR, *K. and T. v. Finland* [GC], No. 25702/94, 12 July 2001, para. 151.

161 ECtHR, *Schneider v. Germany*, No. 17080/07, 15 September 2011.

162 See also ECtHR, *Anayo v. Germany*, No. 20578/07, 21 December 2010, paras. 67 and 71.

163 ECtHR, *Schneider v. Germany*, No. 17080/07, 15 September 2011, para. 104.

Example: In *Levin v. Sweden*<sup>164</sup> the applicant, a mother of three children in alternative non-family based care, argued that the restrictions on her right to maintain contact with her children violated her right to respect for family life. The ECtHR focused on the objective of the contact restrictions, i.e. protecting the best interests of the children. In that particular case, the children had been neglected while in the care of the applicant, and contact with her revealed strong negative reactions on the part of the children. In holding that there had been no violation of Article 8 of the ECHR, the Court found that the interference with the applicant's rights had been "proportionate to the legitimate aim pursued [the best interests of the children] and within the margin of the domestic authorities".

Example: In *Sommerfeld v. Germany*<sup>165</sup> the applicant complained about the restrictions on his right to maintain contact with his daughter, who had consistently expressed that she did not wish to remain in contact with him. In particular, the applicant argued that the failure of the domestic courts to obtain a psychological expert opinion constituted a flaw in the domestic proceedings. In finding no violation of Article 8 of the ECHR, the ECtHR concluded that the domestic court had been well placed to evaluate the daughter's statements and to establish whether or not she had been able to make up her own mind.

Example: In *Mustafa and Armağan Akin v. Turkey*,<sup>166</sup> the applicants – a father and a son – argued that the terms of a custody order by the domestic court had violated their rights under Article 8 of the ECHR. These terms prevented the son from having contact with his sister, who was in the custody of their mother. Moreover, the father could not have contact with both of his children together because his son's contact with his mother coincided with his own contact with his daughter. The ECtHR held that the decision of the domestic court separating the two siblings constituted a violation of the applicants' right to respect for their family life, as it not only prevented the two siblings from seeing each other, but also made it impossible for their father to enjoy the company of both his children at the same time.

164 ECtHR, *Levin v. Sweden*, No. 35141/06, 15 March 2012, paras. 57 and 69; ECtHR, *K. and T. v. Finland* [GC], No. 25702/94, 12 July 2001, para. 151.

165 ECtHR, *Sommerfeld v. Germany* [GC], No. 31871/96, 8 July 2003, para. 72.

166 ECtHR, *Mustafa and Armağan Akin v. Turkey*, No. 4694/03, 6 April 2010.

In the context of custody and contact decision-making, the ECtHR also prohibits discrimination incompatible with Article 14 of the ECHR.

Example: In the case of *Vojnity v. Hungary*,<sup>167</sup> the applicant argued that he had been denied access to his son due to his religious convictions.<sup>168</sup> In finding a violation of Article 14 in conjunction with Article 8 of the ECHR, the ECtHR observed that there was no evidence that the applicant's religious convictions involved dangerous practices or exposed his son to physical or psychological harm.<sup>169</sup> The domestic courts' decisions on the removal of the applicant's access rights rendered any form of contact and the establishment of any kind of further family life impossible, despite the fact that total severance of contact could be justified only in exceptional circumstances.<sup>170</sup> The ECtHR, therefore, held that there had been no reasonable relationship of proportionality between a total ban on the applicant's access rights and the aim pursued, namely the protection of the best interest of the child.<sup>171</sup>

Example: The case of *Salgueiro da Silva Mouta v. Portugal*<sup>172</sup> was brought by a father who claimed parental responsibility over his child. He alleged that, in the national proceedings, the Portuguese authorities had dismissed his claim and awarded parental responsibility to the mother on the basis of his sexual orientation. The ECtHR found that the domestic authorities indeed refused custody on the ground that he was homosexual – a decision that does not have an objective and reasonable justification. The Court concluded that Article 8 taken together with Article 14 of the ECHR were violated.

167 ECtHR, *Vojnity v. Hungary*, No. 29617/07, 12 February 2013; see also ECtHR, *P.V. v. Spain*, No. 35159/09, 30 November 2010 (available in French and Spanish).

168 ECtHR, *Vojnity v. Hungary*, No. 29617/07, 12 February 2013, para. 22.

169 *Ibid.*, para. 38.

170 *Ibid.*, para. 41.

171 *Ibid.*, para. 43.

172 ECtHR, *Salgueiro da Silva Mouta v. Portugal*, No. 33290/96, 21 December 1999.

Furthermore, the right of the child to maintain contact with both parents is expressly cited within the CoE Convention on Contact Concerning Children.<sup>173</sup> Article 4 (1) of this convention states that “a child and his or her parents shall have the right to obtain and maintain regular contact with each other”. The general principles to be applied in jurisprudence about contact emphasise the right of a child to be informed, consulted and to express his or her views, and for these views to be given due weight. Article 6 of the CoE Convention on the Exercise of Children’s Rights<sup>174</sup> further identifies requisites of judicial decision-making, including the legal obligations to: consider whether the judicial authority has sufficient information to determine the best interests of the child; ensure the right of the child to information about the process and outcomes; and open a safe space for affected children to freely express their views in an age/maturity appropriate manner.

Situations may arise in which children are otherwise separated from a parent, for example as a result of the parent’s imprisonment. The ECtHR was faced with such a situation in *Horych v. Poland*,<sup>175</sup> where it addressed the issue of the conditions in which the applicant, categorised as a dangerous prisoner, had received visits from his minor daughters. It noted that “visits from children [...] in prison require special arrangements and may be subjected to specific conditions depending on their age, possible effects on their emotional state or well-being and on the personal circumstances of the person visited”.<sup>176</sup> The Court went on to say that “positive obligations of the State under Article 8, [...] include a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment”.<sup>177</sup>

Finally, the right of children deprived of the liberty to maintain contact with their parents is reinforced by selected provisions of the CoE Guidelines on

173 Council of Europe, [Convention on Contact Concerning Children](#), CETS No. 192, 2003. See also The World Organisation for Cross-border Cooperation in Civil and Commercial Matters (1996), Hague Conference on private international law, Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children.

174 Council of Europe, [European Convention on the Exercise of Children’s Rights](#), CETS No. 160, 1996.

175 ECtHR, *Horych v. Poland*, No. 13621/08, 17 April 2012.

176 *Ibid.*, para. 131.

177 *Ibid.*, para. 131.

child-friendly justice.<sup>178</sup> The guidelines expressly affirm the right of children deprived of their liberty “to maintain regular meaningful contact with parents [and] family” (Article 21 (a)) (see also [Chapter 11](#)).

Under international law, the right to maintain contact with both parents is affirmed in Article 9 (3) of the CRC: “State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.”

## 5.4. Improper removal of children across borders – child abduction

### Key points

- The ECtHR requires a child rights-based approach to improper removals in breach of custody arrangements: Article 8 of the ECHR (right to respect for private and family life) must be interpreted in connection with the Hague Convention and the CRC.
- EU law requires more specifically that the child be heard during the proceedings relating to his/her return following wrongful removal or retention.

Child abduction refers to a situation in which a child is removed or retained across national borders in breach of existing custody arrangements (Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction<sup>179</sup> (Hague Convention)). Under the Hague Convention, wrongfully removed or retained children are to be returned speedily to their country of habitual residence (Article 11 (1)). The courts of the country of habitual residence determine the merits of the custody dispute. The courts of the country from which the child has been removed should order the return within six weeks from the date that the return application is made (Article 11). The Hague Convention is underpinned by the principle of the child’s best interests. In the context of this convention, the presumption is that the unlawful removal of a child is in itself

<sup>178</sup> Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*.

<sup>179</sup> The World Organisation for Cross-border Cooperation in Civil and Commercial Matters (1980), Hague conference on private international law, Hague Convention of 25 October 1980 on the civil aspects of international child abduction, 25 October 1980.



harmful and that the *status quo ante* should be restored as soon as possible to avoid the legal consolidation of wrongful situations. Issues of custody and access should be determined by the courts that have jurisdiction in the place of the child's habitual residence rather than those of the country to which the child has been wrongfully removed. There are several limited exceptions to the return mechanism, established in Articles 12, 13, and 20 of the Hague Convention. Article 13 includes the provisions that have generated most of the litigation, both at a domestic and at an international level. It establishes that the country the child has been removed to may refuse to return a child, where the return would expose him/her to a grave risk of harm or otherwise place him/her in an intolerable situation (Article 13 (b)). A return may equally be refused if the child objects to the return if he or she has attained the level of maturity to express his/her views (Article 13 (2)).

**Under EU law**, the most important instrument regulating child abduction between EU Member States is the Brussels II bis Regulation,<sup>180</sup> largely based on the provisions of the Hague Convention. This regulation complements and takes precedence over the Hague Convention in intra-EU abduction cases (Recital 17 of the Preamble and Article 60 (e)). Although the Hague Convention remains the main child-abduction instrument, in certain respects Brussels II bis has 'tightened' the jurisdictional rules in favour of the courts of origin/habitual residence. Similar to the Hague Convention, the courts of the state where the child was habitually resident immediately prior to improper removal/retention retain the jurisdiction in cases of child abduction. The regulation maintains the same exceptions to the return as those included in the Child Abduction Convention.

However, under Brussels II bis, as opposed to the Hague Convention, the state of habitual residence retains jurisdiction to adjudicate the merits of the custody dispute, even after a non-return order is issued in application of Article 13 (b) of the Hague Convention and (Article 11 (6)–(8) of the Brussels II bis Regulation). The change of jurisdiction to the state the child has been removed to may only occur in two situations, provided for under Article 10 of the Brussels II bis Regulation. The first situation stipulates that the courts of the state of refuge shall have jurisdiction if the child has acquired habitual residence in that

<sup>180</sup> Council of the European Union (2003), Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003) L 338.

state and each person having right of custody has acquiesced in the removal or retention.<sup>181</sup> The second situation arises where the child: has acquired habitual residence in the state he/she has been removed to; a period of one year has elapsed since the parent left behind had or should have had knowledge of the whereabouts of the child; the child is settled into his new environment; and at least one of the four further conditions listed in Article 10 (b) of the Brussels II bis Regulation are met.<sup>182</sup>

As with all other EU legal instruments, Brussels II bis must be interpreted in accordance with the provisions of the EU Charter of Fundamental Rights, in particular Article 24. The CJEU has had the opportunity to clarify the interpretation of Article 24 in the context of child abductions. As discussed in [Section 2.3](#), in the *Aguirre Zarraga Case*, the CJEU ruled that the right of the child to be heard, enshrined in Article 24 of the Charter, requires that the legal procedures and conditions which enable children to express their views freely be made available to them, and that those views be obtained by the court.<sup>183</sup> According to the CJEU however, it is only for the courts of the child's habitual residence to examine the lawfulness of their own judgments in the light of the EU Charter of Fundamental Rights and the Brussels II bis Regulation. According to the mutual trust principle, Member States' legal systems should provide effective and equivalent protection of fundamental rights. Therefore, the interested parties have to bring any human rights-based challenge before the courts which have jurisdiction over the merits of the custody dispute pursuant to the regulation. The CJEU ruled that the court of the Member State to which the child had been wrongfully removed could not oppose the enforcement of a certified judgement, ordering the return of the child, since the assessment of whether there was an infringement of these provisions fell exclusively within the jurisdiction of the state from which the child had been removed.

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181 Art. 10 (a) of the Brussels II bis Regulation.

182 Art. 10 (b) of the Brussels II bis Regulation provides for four alternative conditions as follows: (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed to or is being retained; (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i); (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Art. 11 (7); (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

183 CJEU, C-491/10 PPU, *Joseba Adoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010. On aspects concerning child participation in this case, see further the analysis in [Section 2.3](#).

Example: The case of *Povse v. Alpagó*<sup>184</sup> concerns the unlawful removal of a girl to Austria by her mother. The Austrian courts dismissed the father's application for return of his daughter to Italy on the ground that there was a grave risk of harm to the child. Meanwhile, upon the request of the father, the Italian court ruled that it retained jurisdiction to adjudicate the merits of the custody dispute and issued an order for the return of the child to Italy and an enforcement certificate on the basis of Article 42 of Brussels II bis. The case was referred to the CJEU by an Austrian court following the mother's appeal against the application for enforcement of the certificate and the ensuing return order of the child to Italy. The CJEU ruled that once a certificate of enforcement has been issued there are no possibilities of opposing the return in the country the child has been removed to (in this case Austria), as the certificate is automatically enforceable. Further, the CJEU decided that, in this case, only the Italian courts were competent to adjudicate on the serious risk to the child's best interests entailed by the return. Assuming that these courts were to consider such a risk justified, they retained sole competence to suspend their own enforcement order<sup>185</sup>.

**Under CoE law**, the CoE European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody<sup>186</sup> and the Convention on Contact concerning Children<sup>187</sup> include safeguards to prevent the improper removal of children and ensure the return of children.<sup>188</sup>

The ECtHR often deals with child abduction cases, and is in such instances generally guided by provisions of the Hague Convention when interpreting Article 8 of the ECHR. However, the ECtHR inevitably conducts an analysis of the child's best interests in these cases. Two leading Grand Chamber judgments reflect the court's position on this matter.

184 CJEU, C-211/10, *Doris Povse v. Mauro Alpagó*, 1 July 2010.

185 An application based on the same facts was later lodged with the ECtHR and declared inadmissible. See ECtHR, *Povse v. Austria*, Decision of inadmissibility, No. 3890/11, 18 June 2013.

186 Council of Europe, [European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children](#), CETS No. 105, 1980.

187 Council of Europe, [Convention on Contact Concerning Children](#), CETS No. 192, 2003.

188 *Ibid.*, Arts. 10 (b) and 16, respectively; Council of Europe, [European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children](#), CETS No. 105, 1980, Art. 8.

Example: The case *Neulinger and Shuruk v. Switzerland*<sup>189</sup> was brought by a mother, who had removed her son from Israel to Switzerland in breach of existing guardianship arrangements. Upon the father's application under the Hague Convention, the Swiss authorities ordered the child's return to Israel. In the opinion of the national courts and experts, the child's return to Israel could be envisaged only if he was accompanied by his mother. The measure in question remained within the margin of appreciation afforded to national authorities in such matters. Nevertheless, to assess compliance with Article 8 of the ECHR, it was also necessary to take into account any developments since the Federal Court's judgment ordering the child's return. In the present case, the child was a Swiss national and had settled well in the country, where he had been living continuously for about four years. Although he was at an age where he still had a significant capacity for adaptation, being uprooted again would probably have serious consequences for him and had to be weighed against any benefit he was likely to gain from it. It was also noteworthy that restrictions had been imposed on the father's right of access before the child's removal. Moreover, the father had remarried twice since then and was now a father again, but failed to pay maintenance for his daughter. The ECtHR doubted that such circumstances would be conducive to the child's well-being and development. As to the mother, her return to Israel could expose her to a risk of criminal sanctions, such as a prison sentence. It was clear that such a situation would not be in the child's best interests, given that his mother was probably the only person to whom he related. The mother's refusal to return to Israel was not, therefore, totally unjustified. Moreover, the father had never lived alone with the child and had not seen him since the child's departure at the age of two. The ECtHR was thus not convinced that it would be in the child's best interests to return to Israel. As to the mother, a return to Israel would mean a disproportionate interference with her right to respect for her family life. Consequently, there would be a violation of Article 8 of the ECHR in respect of both applicants if the decision ordering the second applicant's return to Israel were to be enforced.

189 ECtHR, *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07, 6 July 2010.

Example: In *X v. Latvia*,<sup>190</sup> the mother argued that the return of her daughter to Australia, from where she had been wrongfully removed, would expose her to serious harm. In determining whether the decisions of the national courts had struck a fair balance between the competing interests at stake – within the margin of appreciation afforded to states in such matters – the best interests of the child had to be a primary consideration. To achieve a harmonious interpretation of the ECHR and the Hague Convention, the factors capable of constituting an exception to the child’s immediate return under Articles 12, 13 and 20 of the Hague Convention had to be genuinely taken into account by the requested state, which had to issue a decision that was sufficiently reasoned on this point, and then evaluated in light of Article 8 of the ECHR. This Article imposed a procedural obligation on the domestic authorities, requiring that when assessing an application for a child’s return, the courts had to consider arguable allegations of a “grave risk” for the child in the event of return and make a ruling giving specific reasons. As to the exact nature of the “grave risk”, the exception provided for in Article 13 (b) of the Hague Convention concerned only situations which go beyond what a child could reasonably bear. In the present case, the applicant had submitted to the Latvian Appeal Court a psychologist’s certificate concluding that there existed a risk of trauma for the child in the event of immediate separation from her mother. Although it was for the national courts to verify the existence of a “grave risk” for the child, and the psychological report was directly linked to the best interests of the child, the regional court refused to examine the conclusions of that report in light of the provisions of Article 13 (b) of the Hague Convention. At the same time, the national courts also failed to deal with the issue of whether it was possible for the mother to follow her daughter to Australia and to maintain contact with her. As the national courts had failed to carry out an effective examination of the applicant’s allegations, the decision-making process under domestic law did not satisfy the procedural requirements inherent in Article 8 of the ECHR, and the applicant had therefore suffered a disproportionate interference with her right to respect for her family life.

190 ECtHR, *X v. Latvia* [GC], No. 27853/09, 26 November 2013, paras. 101, 106, 107 and 115–119.



# 6

## Alternative care to family care and adoption



EU	Issues covered	CoE
<p>Charter of Fundamental Rights, Article 7 (family life) and Article 24 (rights of the child)</p> <p>Brussels II bis Regulation (2201/2003)</p>	<p>Alternative care to family care</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>ESC (revised), Article 17 (right of children and young persons to social, legal and economic protection)</p> <p>ECtHR, <i>Wallová and Walla v. the Czech Republic</i>, No. 23848/04, 2006 (placement in care due to inadequate housing)</p> <p>ECtHR, <i>Saviny v. Ukraine</i>, No. 39948/06, 2008 (placement in care due to socio-economic reasons)</p> <p>ECtHR, <i>B. v. Romania (No. 2)</i>, No. 1285/03, 2013 (parents involvement in decision-making)</p> <p>ECtHR, <i>B.B. and F.B. v. Germany</i>, Nos. 18734/09 and 9424/11, 2013 (procedural flaws in decision-making process).</p> <p>ECtHR, <i>Olsson v. Sweden (No. 1)</i>, No. 10465/83, 1988 (implementation of care order)</p> <p>ECtHR, <i>T. v. the Czech Republic</i>, No. 19315/11, 2014 (importance of contact).</p>

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 24 (rights of the child)	Adoption	European Convention on the Adoption of Children (Revised) ECtHR, <i>Pini and Others v. Romania</i> , Nos. 78028/01 and 78030/01, 2004 (priority of child’s interests in adoption) ECtHR, <i>Kearns v. France</i> , No. 35991/04, 2008 (parental consent to adoption). ECtHR, <i>E.B. v. France</i> [GC], No. 43546/02, 2008 (lesbian woman’s eligibility to adopt). ECtHR, <i>Gas and Dubois v. France</i> , No. 25951/07, 2012 (gay couple’s eligibility to adopt). ECtHR, <i>X and Others v. Austria</i> [GC], No. 19010/07, 2013 (second parent adoption for same sex couple). ECtHR, <i>Harroudj v. France</i> , No. 43631/09, 2012 (kafala and adoption).

Every child has the right to respect for family life, a right recognised under Article 7 of the EU Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights (ECHR) (see [Chapter 5](#)). Both EU and Council of Europe law reflect the importance to the child of family relationships, and this includes the child’s right not to be deprived of contact with his/her parents, except when this is contrary to the child’s best interests.<sup>191</sup> Finding a balance between ensuring the child remains with his/her family – in line with the respect for family life – and ensuring the child is protected from harm is difficult. Where a child is removed from his/her family, he/she may be placed in either foster care or residential care. Family life does not end with this separation and requires that contact continues to support family reunification if it is in the child’s best interests. In certain circumstances, permanent removal, through adoption, will take place. The finality of adoption means that stringent requirements must be followed.

The purpose of this chapter is to consider European law on alternative care. EU law, mainly through the Brussels II bis Regulation, deals with cross-border procedural aspects related to placing children in alternative care. This regulation should be interpreted according to the EU Charter of Fundamental Rights, in particular Article 24. The ECtHR has also developed an extensive body of case law dealing with both substantive and procedural matters of placing children into alternative care.

<sup>191</sup> EU (2012), Charter of Fundamental Rights of the European Union, OJ 2012 C 326, Art. 24 (3).



Section 6.1 begins by introducing some of the general principles governing the situation of children deprived of family care, Section 6.2 outlines the law concerning the child's removal into alternative care and Section 6.3 considers the European standards on adoption.

## 6.1. Alternative care: general principles

### Key points

- Alternative care is a temporary protective measure.
- International law confirms that family-based care should be preferred over residential care.
- Children have the right to information and to express their view with respect to placement into alternative care.

**Under EU, CoE and international law**, viewed together, six broad principles relating to alternative care emerge.

First, alternative care is a protective measure that ensures children's interim safety and facilitates children's return to their families where possible.<sup>192</sup> Ideally, it is thus a temporary solution. Sometimes, it is a protective measure pending family reunification, for example of unaccompanied or separated child migrants with their families.<sup>193</sup> Other times it is a protective measure pending developments in family life, for example, improvements in the health of a parent or provision of support to parents.

Second, international law confirms that family-based care (such as foster care) is the optimal form of alternative care for securing children's protection and development. This is affirmed by the UN Guidelines for the Alternative

<sup>192</sup> UN, General Assembly (GA), *Guidelines for the alternative care of children*, A/RES/64/142, 24 February 2010, paras. 48–51; Committee on the Rights of the Child (2013), *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)*, UN Doc. CRC/C/GC/14, 29 May 2013, paras. 58–70.

<sup>193</sup> UN, General Assembly (GA), *Convention on the Rights of the Child*, 20 November 1989, Art. 22; Committee on the Rights of the Child (2005), *General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/GC/2005/6, 1 September 2005, paras. 81–83.

Care of Children and the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the EU is a party.<sup>194</sup> The CRPD expressly states that “States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting”.<sup>195</sup> Non-family based care (e.g. residential care) “should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests”.<sup>196</sup>

Third, the child’s right to a guardian or representative is key to securing his or her broader rights.<sup>197</sup> Although there is no explicit general obligation in EU law to appoint a guardian for children without parental care, at least seven EU directives require Member States to appoint a guardian for children within different contexts, some directly related to children without parental care.<sup>198</sup> Further, this body of law is substantiated by the UN Guidelines for the Alternative Care of Children (generally regarding children without parental care), the CRC (specifically regarding unaccompanied children) and the CoE Convention on Action against Trafficking in Human Beings.<sup>199</sup> Most often the mandate of a legal guardian is to safeguard the child’s best interests, ensure his or her overall well-being and complement his/her limited legal capacity (and also sometimes to exercise legal representation).<sup>200</sup>

Fourth, implicit within Article 24 of the EU Charter of Fundamental Rights is the legal obligation to take positive measures to ensure that decision-making

194 UN, General Assembly (GA), *Guidelines for the alternative care of children*, A/RES/64/142, 24 February 2010, paras. 20–22; UN, Committee on the Rights of the Child (2006), *General Comment No. 7 (2005): Implementing child rights in early childhood*, UN Doc. CRC/C/GC/7/Rev.136 (b), 20 September 2006, para. 18. UN, Convention on the rights of persons with disabilities (CRPD), 13 December 2006, Art. 23 (5) (see also Art. 7).

195 UN, Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006, Art. 23 (5).

196 UN, General Assembly (GA), *Guidelines for the alternative care of children*, 24 February 2010, A/RES/64/142, para. 21.

197 FRA (2014a), p. 31.

198 *Ibid.*, p. 14.

199 UN, General Assembly (GA), *Guidelines for the alternative care of children*, 24 February 2010, A/RES/64/142, paras. 100–103; UN, Committee on the Rights of the Child, *General Comment No. 6, (2005): Treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/GC/2005/6, 1 September 2005, paras. 33–38; Council of Europe, *Convention on Action against Trafficking in Human Beings*, CETS No. 197, 2005, Art. 10 (4).

200 FRA (2014a), p. 15.

about a child's placement is guided by his/her best interests<sup>201</sup> and views.<sup>202</sup> General Comments No. 5 and 14 of the Committee on the Rights of the Child<sup>203</sup> as well as the UN Guidelines for the Alternative Care of Children emphasise the need to ensure the child's right to information, including on his/her rights and options, as well as the child's right "to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities".<sup>204</sup>

Fifth, children's broader rights within the EU Charter of Fundamental Rights, the ECHR and the CRC remain applicable to cases of alternative care (foster or residential care). This includes their civil and political rights (e.g. their rights to privacy, freedom of expression and freedom of religion and protection from all forms of violence) and their socio-economic rights (including their rights to education, healthcare and participation in cultural life).<sup>205</sup>

Finally, Article 4 of the CRC requires states to take "all appropriate legislative, administrative, and other measures" to implement the convention. This applies equally to the context of alternative care. Article 17 (1) (c) of the revised European Social Charter (ESC) similarly requires states to take all appropriate and necessary measures designed to provide protection and special aid for children and young persons temporarily or definitively deprived of their family's support.

**Under EU law**, the CJEU ruled that the Brussels II bis Regulation applies to decisions to place a child in alternative care. As noted in [Chapter 5](#), Brussels II bis incorporates children's rights principles in its approach, emphasising that the equality of all children, the best interests of the child and the right to be heard, amongst others, should be taken into account.<sup>206</sup> Here the

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

202 UN, Committee on the Rights of the Child (2009), *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC/12, 20 July 2009, para. 97.

203 UN, Committee on the Rights of the Child, *General Comment No. 14*, para. 15 (g), 29 May 2013; *General Comment No. 5*, para. 24, 27 November 2003.

204 UN, General Assembly (GA), *Guidelines for the alternative care of children*, 24 February 2010, A/RES/64/142, para. 6.

205 EU Charter of Fundamental Rights, Arts. 3–4, 7, 10–11, 14 and 24; ECHR, especially Art. 8; and CRC, Arts. 13–14, 16, 19, 28, 29, 24, 31 and 37; UN, General Assembly (GA), *Guidelines for the alternative care of children*, 24 February 2010, A/RES/64/142, Sec. 2.

206 Brussels II bis, Preamble. See also [Chapter 5](#).

“grounds of non-recognition for judgments relating to parental responsibility”, as expressed in Article 23 of the Brussels II bis Regulation, are instructive. Article 23 states that judgments shall not be recognised:

*“(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;  
(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought [...]”*

Under the regulation, jurisdiction is determined on the basis of the child’s habitual residence, with several limited exceptions, including the child’s best interests (Articles 8, 12 and 15 of Brussels II bis).

**Under CoE law**, the ECtHR affirms that the family is the natural environment for the growth and well-being of children. However, where the family cannot provide the child with the requisite care and protection, removal to an alternative care setting may be required. Such removal interferes with the respect for family life. The ECtHR has explained that in most cases the placement of a child in alternative care should be intended as a temporary measure and that the child must ultimately be reunited with his/her family in fulfilment of the right to respect for private and family life under Article 8 of the ECHR.<sup>207</sup>

Although the ECHR does not impose any specific duty on states to provide children with care and protection, Article 17 of the ESC requires that states “take all appropriate and necessary measures designed to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family’s support”.<sup>208</sup>

207 ECtHR, *K.A. v. Finland*, No. 27751/95, 14 January 2003. The Committee of Ministers of the Council of Europe has endorsed this approach in its Recommendation on the rights of children living in residential institutions, adopted on 16 March 2005.

208 Council of Europe, European Social Charter (revised), CETS No. 163, 1996, Art. 17 (1) c.

## 6.2. Placing children in alternative care

### Key points

- Under the CoE law, placing a child in alternative care should be provided for by law, pursue a legitimate aim and be necessary in a democratic society. Relevant and sufficient reasons must be put forward by the competent authority.
- Under CoE law, the decision-making process must follow certain procedural safeguards.

**Under CoE law**,<sup>209</sup> the child's placement in alternative care is only compatible with Article 8 of the ECHR when it is in accordance with the law, pursues a legitimate aim (such as the protection of the child's best interests) and is considered necessary in a democratic society. This last aspect requires that the courts give reasons that are both relevant and sufficient to support the means used to pursue the desired aim.

Example: In *Olsson v. Sweden (No. 1)*,<sup>210</sup> the applicants complained about the decision to place their three children into care. Finding that the care decision fell within the state's margin of appreciation, the ECtHR focused on the manner in which the care order was implemented. According to the Court, the care decision should have been regarded as a temporary measure, to be discontinued as soon as circumstances permitted, given that adoption was not being considered. Measures taken should thus have been consistent with the ultimate aim of reuniting the natural family. In this light, the ECtHR noted that the national authorities had placed the children in separate foster homes, at a significant distance from each other and their parents. Although the authorities had acted in good faith in implementing the care order, the Court noted that it was unacceptable for administrative difficulties, such as the lack of appropriate foster families or placements, to determine where the children would be placed. In such a fundamental area as respect for family life, such considerations could not be allowed to play more than a secondary role. Thus, in finding a violation

<sup>209</sup> The placement of children in alternative care has also been a topic of political debate in the CoE for many years. See for instance the Committee of Ministers Resolution (77) 33 on the placement of children, adopted on 3 November 1997.

<sup>210</sup> ECtHR, *Olsson v. Sweden (No. 1)*, No. 10465/83, 24 March 1998.

of Article 8 of the ECHR, the ECtHR stated that the measures taken by the authorities in the implementation of the care order were not supported by sufficient reasons to render them proportionate to the legitimate aim pursued under Article 8.

More recently, the ECtHR considered the merits of decisions to place children in alternative care under Article 8 of the ECHR.

Example: In *Wallová and Walla v. the Czech Republic*<sup>211</sup> the applicants complained about the placement of their five children in two separate children's homes due to their poor housing situation. Custody of the children was given to the children's homes in 2002 on the basis of the parents' economic instability and the care orders were later lifted when their economic and housing situation improved. The ECtHR found that the underlying reason for the decision to place the children in care had been a lack of suitable housing and as such a less drastic measure could have been used to address their situation. Under Czech law, there was a possibility to monitor the family's living and hygiene conditions, and to advise them on how to improve their situation, but this option was not used. While the reasons given for placing the children in care were relevant, they were not sufficient, and the authorities did not make enough efforts to help the applicants overcome their difficulties through alternative measures. In concluding that there had been a violation of Article 8 of the ECHR, the Court also took note of the conclusions of the UN Committee on the Rights of the Child, which observed that the principle of primary consideration of the best interests of the child was still not adequately defined and reflected in all Czech legislation, court decisions and policies affecting children.

Example: In *Saviny v. Ukraine*,<sup>212</sup> the applicants' children were placed in care due to the parents' lack of financial means and the domestic court's conclusion that their personal qualities endangered their children's lives, health and moral upbringing. In assessing the case, the ECtHR questioned the adequacy of the evidence on which the domestic authorities had based their findings and considered that there was insufficient information available on the extent of social assistance made available. This would

211 ECtHR, *Wallová and Walla v. the Czech Republic*, No. 23848/04, 26 October 2006 (available in French).

212 ECtHR, *Saviny v. Ukraine*, No. 39948/06, 18 December 2008.

have been pertinent in evaluating whether the authorities had discharged the duty to keep the family together and whether they had sufficiently explored the effectiveness of less drastic alternatives before seeking to separate the children from their parents. Furthermore, at no stage of the proceedings had the children been heard by the judges. In sum, although the reasons given by the national authorities for removal of the applicants' children were relevant, they were not sufficient to justify such a serious interference with the applicants' family life. Therefore, the Court found that there had been a violation of Article 8 of the ECHR.

The ECtHR requires under Article 8 of the ECHR that decision-making concerning respect for family life must adhere to certain procedural safeguards. It states that the decision-making process (administrative and judicial proceedings) leading to measures of interference with family life must be fair and afford due respect to the interests protected by Article 8. What is considered under Article 8 is whether "the parents have been involved in the decision-making process [...] to a degree sufficient to provide them with [a] requisite protection of their interests".<sup>213</sup> This includes keeping them informed about developments, ensuring that they can participate in decisions made about them<sup>214</sup> and, in certain circumstances, hearing from the children concerned.<sup>215</sup>

Example: In *B. v. Romania (No. 2)*,<sup>216</sup> the applicant had been diagnosed with paranoid schizophrenia and taken by the police on a number of occasions to psychiatric institutions for treatment. Her children no longer lived with her and were placed in a care home because of their mother's illness. The ECtHR had to examine whether, having regard to the serious nature of the decisions to be taken as regards placing children into care, the decision-making process, seen as a whole, provided the parents to a sufficient degree with the requisite protection of their interests. In that connection, the Court observed that the applicant, who was suffering from a severe mental disorder, had not been assigned either a lawyer or a guardian *ad litem* to represent her during the proceedings, so that it had been impossible for her to take part in the decision-making process concerning her

213 ECtHR, *W. v. the United Kingdom*, No. 9749/82, 8 July 1987, para. 64.

214 ECtHR, *McMichael v. the United Kingdom*, No. 16424/90, 24 February 1995.

215 ECtHR, *B. v. Romania (No. 2)*, No. 1285/03, 19 February 2013; ECtHR, *B.B. and F.B. v. Germany*, Nos. 18734/09 and 9424/11, 14 March 2013.

216 ECtHR, *B. v. Romania (No. 2)*, No. 1285/03, 19 February 2013.

minor children. In addition, the applicant's situation and the situation of her children had been examined by a court on only two occasions over a period of 12 years before both children had reached majority, and there was no evidence of regular contact between social workers and the applicant, which may otherwise have provided suitable means of representing her views to the authorities. In light of these facts, the Court concluded that the decision-making process around her children's placement in care had not adequately protected her interests, and that there had thus been a violation of her rights under Article 8 of the ECHR.

Example: In *B.B. and F.B. v. Germany*,<sup>217</sup> following allegations from the applicants' 12-year-old daughter that she and her eight-year-old brother had been repeatedly beaten by their father, the parental rights in respect of the two children were transferred to the Youth Court and the children were placed in a children's home. The District Court made a full order transferring parental authority from the applicants to the Youth Office, reaching its decision on the basis of direct evidence from the children. About a year later, at the first subsequent meeting with their parents, the daughter admitted that she had lied about having been beaten, and the children were eventually returned to their parents. In considering the applicants' complaint that the authorities had failed to adequately examine the relevant facts, the ECtHR emphasised that mistaken assessments by professionals did not necessarily mean that measures taken would be incompatible with Article 8 of the ECHR. The placement decision could only be assessed in light of the situation as presented to the domestic authorities at the time. In the ECtHR's assessment, the fact that the District Court had relied only on the statements of the children, while the applicants had submitted statements from medical professionals who had not noticed any signs of ill-treatment, combined with the fact that the Court of Appeal had not re-examined the children, were significant. As the children were in a safe placement at the time of the full hearing, there had been no need for haste, and the courts could have established an investigation into the facts of their own motion, which they failed to do. In sum, the German courts failed to give sufficient reasons for their decision to withdraw the applicants' parental authority, in breach of Article 8 of the ECHR.

<sup>217</sup> ECtHR, *B.B. and F.B. v. Germany*, Nos. 18734/09 and 9424/11, 14 March 2013.



Even when placed in alternative care, children retain the right to maintain contact with their parents. This right has been recognised under the ECHR,<sup>218</sup> as the ECtHR holds that mutual contact between parents and children is a fundamental part of family life under Article 8. Given that placement in alternative care should normally be a temporary measure, maintaining family relationships is essential to ensure the successful return of the child to his/her family.<sup>219</sup> Under the ECHR, positive duties flow from these principles, as illustrated by the following cases.

Example: In *T. v. the Czech Republic*,<sup>220</sup> the ECtHR considered whether the rights of a father and daughter (applicants) had been violated by the placement of the child in care and the failure of the authorities to support contact between them. The child had been placed in a specialist institution after the death of her mother and after the father's applications for custody of his daughter had been denied due to concerns about his personality. Further requests to spend holidays with his daughter were denied and a therapeutic centre concluded that the visits were not beneficial to the child as she was afraid of him, at which time all contact was terminated. Later on, the courts decided that contact between the two applicants should only take place in writing, in accordance with the wishes of the child. The ECtHR emphasised *inter alia* a child's interests in maintaining ties with his/her family, except in particularly extreme cases where this would not be in the child's best interest. In examining the decision to place the child into care, the ECtHR noted with approval that the domestic authorities had given careful consideration to their decision, which was made after hearing expert psychological and psychiatric opinions as well as taking into account the wishes of the child. There had thus been no violation of Article 8 of the ECHR in relation to the decision to place the child in care. However, the Court went on to find that Article 8 had been violated as a result of the restrictions imposed on the contact between the applicants, in particular due to the lack of oversight of decisions by the child's residential institution to deny contact, given that these decisions ultimately reduced the chances of family reunification.

218 ECtHR, *Olsson v. Sweden* (No. 1), No. 10465/83, 24 March 1998.

219 ECtHR *Eriksson v. Sweden*, No. 11373/85, 22 June 1989.

220 ECtHR, *T. v. the Czech Republic*, No. 19315/11, 17 July 2014 (available in French).

Example: In *K.A. v. Finland*,<sup>221</sup> the applicant's children were placed in alternative care due to allegations that they were being sexually abused. During the children's placement in care, little contact took place between them and their parents and little effort was made to plan for their reunification. Examining the case, the ECtHR noted that the state has a positive duty to facilitate family reunification as soon as reasonably feasible, taking into account the duty to protect the best interests of the child. According to the ECtHR, the severe restrictions on the applicant's right to visit his children reflected the social welfare authority's intention to strengthen the ties between the children and the foster family, rather than to reunite the original family. This was made notwithstanding a noted improvement in the father's circumstances. Accordingly, there was a violation of Article 8 of the ECHR.

## 6.3. Adoption

### Key points

- Adoption ensures alternative care for children who cannot remain with their biological families.
- The best interests of the child must be the paramount consideration in adoption.
- There is no right to adopt under EU or CoE law, but the adoption process must adhere to certain criteria to ensure that it is in the best interests of the child.<sup>220</sup>

Under international law, the best interests of the child must be the paramount consideration in cases of adoption. Aside from the best interests principle, other general principles of the CRC also guide and inform its implementation in the context of adoption: non-discrimination, the right to life, survival and development and respect for children's views.<sup>223</sup> Of particular relevance is

<sup>221</sup> ECtHR, *K.A. v. Finland*, No. 27751/95, 14 January 2003.

<sup>222</sup> On the interest of the child to know his/her origins in the context of adoption, see [Chapter 4](#).

<sup>223</sup> CRC, Arts. 2, 3, 6 and 12. See also, UN, Committee on the Rights of the Child (2010), Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States Parties under Article 44, paragraph 1 (b), of the Convention on the Rights of the Child, UN Doc. CRC/C/58/Rev.2, 23 November 2010, paras. 23–27.

the UN Committee on the Rights of the Child's General Comment No. 14 on the "right of the child to have his or her best interests taken as a primary consideration".<sup>224</sup>

Similarly, one of the objectives of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption is to "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law".<sup>225</sup>

**Under EU law**, the rights and associated legal obligations in Article 24 of the EU Charter of Fundamental Rights are applicable to adoption in so far as it is addressed by the EU.

**Under CoE law**, the right to respect for family life as expressed in Article 8 of the ECHR is applicable and relied on in adoption cases. There are also two specific CoE conventions on this subject: the European Convention on the Adoption of Children<sup>226</sup> and the European Convention on the Adoption of Children (revised).<sup>227</sup> These instruments require a child rights-based approach to adoption. The European Convention on the Adoption of Children (revised), for instance, states that "[t]he competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child".<sup>228</sup> Likewise, the ECtHR emphasises that the best interests of the child may override those of the parent in certain circumstances, including in adoption.<sup>229</sup> The European Convention on the Adoption of Children (revised) also requires that adoption should not be granted by the competent authority without "the consent of the child considered by law as having sufficient understanding".<sup>230</sup> Moreover, the child not deemed to understand this shall "as far as possible, be consulted

224 UN Committee on the Rights of the Child (2013), *General comment No. 14 (2013) on the right of the child to have his/her best interests taken as a primary consideration*, CRC /C/GC/14, Art. 3, para. 1.

225 Hague Conference on private international law, *The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption*, 29 May 1993, Art. 1(a).

226 Council of Europe, [European Convention on the Adoption of Children \(Revised\)](#), CETS No. 202, 2008.

227 *Ibid.* This Convention opened for signature in 2008 and came into force in 2011.

228 *Ibid.*, Art. 4 (1).

229 ECtHR, *Pini and Others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004.

230 Council of Europe, [European Convention on the Adoption of Children \(Revised\)](#), CETS No. 202, 2008, Art. 5 (1) b.

and his or her views and wishes shall be taken into account having regard to his or her degree of maturity".<sup>231</sup>

Example: In *Pini and Others v. Romania*,<sup>232</sup> two Italian couples complained about the failure of the Romanian authorities to execute the decision of a Romanian court concerning their adoption of two Romanian children. In breach of court orders, the private institution in which the children resided in Romania had refused to hand them over to the applicants. The ECtHR held that the relationship between the applicants and their adopted children fell within the scope of family life under Article 8 of the ECHR, even though they had never lived together or established emotional ties. Considering the case, the ECtHR interpreted Article 8 in light of the CRC and the Hague Convention in finding that the positive obligation on the authorities to enable the applicants to establish family ties with their adopted children was circumscribed by the best interests of the child.<sup>233</sup> In this regard, it held that the child's interests may, depending on their nature and seriousness, override those of the parent. Furthermore, in finding that there was no violation of Article 8, the Court emphasised that in a relationship based on adoption it is important that the child's interests should prevail over those of the parents, since adoption meant providing a child with a family, not a family with a child.<sup>234</sup>

Example: In *Kearns v. France*,<sup>235</sup> the ECtHR found it compatible with the ECHR that an Irish woman, who had placed her child for adoption in France, could not revoke her formal consent to adoption after the expiry of a two-month period. The ECtHR first underlined that the national authorities' refusal of the request for the child's return pursued the legitimate aim of protecting the rights and freedoms of others, in this case the child.<sup>236</sup> In relation to the imposition of a time-limit for the withdrawal of consent, the French law sought to strike a fair balance and ensure proportionality between the conflicting interests of the biological mother, the child and the adoptive family. In this process, the child's best interests

231 *Ibid.*, Art. 6.

232 ECtHR, *Pini and Others v. Romania*, Nos. 78028/01 and 78030/01, 22 June 2004.

233 *Ibid.*, para. 155.

234 *Ibid.*, para. 156.

235 ECtHR, *Kearns v. France*, No. 35991/04, 10 January 2008.

236 *Ibid.*, para. 73.

had to be paramount.<sup>237</sup> From the evidence presented to the Court, it was in the child's best interests to enjoy stable relations within a new family as quickly as possible and all of the necessary steps had been taken to ensure that the applicant understood the precise implications of her action. In light of these considerations, the Court held that France had not failed in its positive obligations towards the applicant under Article 8 of the ECHR.

The ECtHR also affirms that decision-making about adoption must take place in a manner consistent with the prohibition of discrimination established in Article 14 of the ECHR. In particular, the ECtHR considered whether the applicants' exclusion from eligibility to adopt on the grounds of either sexual orientation or age was compatible with Article 14, in conjunction with Article 8. In doing so, it reaffirms that the duty to take proportionate action with a view to protecting the best interests of the child is of central importance.

Example: In *Schwizgebel v. Switzerland*,<sup>238</sup> the applicant, a single 47-year-old woman, was unable to adopt a second child given the age gap between her and the child she wished to adopt. The applicant claimed to be a victim of discrimination on the grounds of age. The ECtHR considered that the denial of authorisation to receive a child with a view to adoption in the applicant's case pursued the legitimate aim of protecting the well-being and rights of the child.<sup>239</sup> Given the lack of European consensus concerning the right to adopt as a single parent, the lower and upper age-limits for adopters and the age-difference between the adopter and the child, and the state's consequent broad margin of appreciation in this area as well as the need to protect children's best interests, the refusal to authorise the placement of a second child did not contravene the proportionality principle.<sup>240</sup> The Court therefore found that the justification given by the government appeared objective and reasonable and that the difference in treatment complained of had not been discriminatory within the meaning of Article 14 of the ECHR.

<sup>237</sup> *Ibid.*, para. 79.

<sup>238</sup> ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010.

<sup>239</sup> *Ibid.*, para. 86.

<sup>240</sup> *Ibid.*, para. 97.

Example: The case of *E.B. v. France*<sup>241</sup> concerns the refusal of the national authorities to grant approval for the purposes of adoption to the applicant, a lesbian living with her partner who sought to adopt as a single person.<sup>242</sup> The Court reiterated that Article 8 of the ECHR did not in itself confer a right to found a family or adopt. However, a discrimination complaint could fall within the broader scope of a particular right, even if the issue in question did not relate to a specific entitlement granted by the ECHR.<sup>243</sup> Given that French law allowed single persons to adopt, such a right could not be denied to an individual on discriminatory grounds. As established by domestic courts, the applicant presented undoubted personal qualities and an aptitude for bringing up children, which were assuredly in the child's best interests, a key notion in the relevant international instruments.<sup>244</sup> The Court formed the view that the applicant's sexual orientation played a determinative role in the refusal of the authorities to allow her to adopt, amounting to discriminatory treatment by comparison to other single individuals who were entitled to adopt under national law.<sup>245</sup>

Example: The case of *Gas and Dubois v. France*<sup>246</sup> concerns the question of whether same-sex couples should have an equal right to second-parent adoption as heterosexual couples. The applicants were a same-sex couple who had entered into a civil partnership. Together they had brought up a daughter, who was conceived by artificial insemination and borne by one of them in 2000. The other partner's application for a simple adoption was rejected on the grounds that the adoption would deprive the child's biological mother of her parental rights, which would run counter to both the applicant's intentions and the child's best interests. Under French law, the only situation in which a simple adoption does not result in the removal of the biological parents' rights in favour of the adoptive parent is when an individual adopts his/her spouse's child. The applicants alleged that they had been discriminated against compared with both married and unmarried heterosexual couples. Examining whether they had been discriminated against compared with a married couple, the

241 ECtHR, *E.B. v. France* [GC], No. 43546/02, 22 January 2008.

242 *Ibid.*, para. 49.

243 *Ibid.*, paras. 41–48.

244 *Ibid.*, para. 95.

245 *Ibid.*, para. 96.

246 ECtHR, *Gas and Dubois v. France*, No. 25951/07, 15 March 2012.

ECtHR concluded that marriage conferred a special status, giving rise to social, personal and legal consequences; for that reason, the applicants could not be said to be in a relevantly similar situation to married couples. Concerning the comparison with unmarried couples of opposite sex, the Court concluded that a comparable heterosexual couple in a civil partnership would also have their application for a simple adoption refused under the provisions of French law. The ECtHR consequently concluded that there had been no difference in treatment based on sexual orientation and thus no violation of the applicants' Convention rights.

Example: The case of *X and Others v. Austria*<sup>247</sup> concerns a complaint from a same-sex couple that it had been discriminated against in comparison with different-sex couples as regards second-parent adoption. The first and third applicants were in a stable relationship and the first applicant sought to adopt the second applicant, who was the son of the third applicant. As in *Gas and Dubois*, the ECtHR rejected the notion that the applicants were in an analogous position to a married couple in which one spouse wants to adopt the child of the other spouse. However, the ECtHR accepted that the applicants were in a comparable situation to an unmarried heterosexual couple. While second-parent adoption for unmarried heterosexual couples is permissible under Austrian law, the Austrian Civil Code provides that anyone who adopts a child would replace the biological parent of the same sex, meaning that second-parent adoption for same-sex couples is a legal impossibility. The Court concluded that in such circumstances there had been a difference in treatment of the applicants on the grounds of their sexual orientation and that no sufficiently weighty and convincing reasons had been advanced by the Government, in breach of Article 14 in conjunction with Article 8 of the ECHR.

Finally, the ECtHR also focuses its attention on the merits of abiding by the spirit and purpose of international law with respect to decision-making about adoption.

<sup>247</sup> ECtHR, *X and Others v. Austria* [GC], No. 19010/07, 19 February 2013.

Example: In *Harroudj v. France*,<sup>248</sup> the French authorities refused the applicant's request for the full adoption of an Algerian girl who had been abandoned at birth and placed in the applicant's care under *kafala* – guardianship under Islamic law. The reasons for such a refusal were the fact that the French Civil Code does not allow for the adoption of a child whose adoption would be prohibited under the law of his/her country of origin (which is the case for Algerian law), and the fact that *kafala* already gave the applicant parental authority allowing her to take decisions in the child's best interests. A subsequent appeal was rejected on the basis that the domestic law was consistent with the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption and that Article 20 of the CRC recognised *kafala* as being on a par with adoption in preserving the child's best interests. In examining the applicant's complaint, the ECtHR recalled the principle that, once a family tie is established, the state has to act in a manner calculated to enable that tie to be developed and establish legal safeguards that render possible the child's integration in the family, as well as the need to interpret the ECHR harmoniously with the general principles of international law. In its assessment, the ECtHR underlined the French courts' concern to abide by the spirit and purpose of international conventions, including the UN Convention on the Rights of the Child. *Kafala* was recognised under French law and the applicant was allowed to exercise parental authority and take decisions in the child's interest. It was open to her, for example, to draw up a will in the child's favour, overcoming difficulties stemming from the restriction on adoption. In conclusion, by gradually obviating the prohibition of adoption in this manner, the respondent state, which sought to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, showed respect for cultural pluralism and struck a fair balance between the public interest and that of the applicant. The ECtHR thus found no violation of the applicant's rights.

248 ECtHR, *Harroudj v. France*, No. 43631/09, 4 October 2012.



# 7

## Child protection against violence and exploitation

EU	Issues covered	CoE
<p>Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU)</p>	<p>Violence in schools, at home and other settings</p>	<p>ECHR, Articles 2 (right to life), 3 (in-human and degrading treatment), and 8 (physical integrity); Protocol No. 1 to the ECHR, Article 2 (right to education)</p> <p>ECtHR, <i>Kayak v. Turkey</i>, No. 60444/08, 2012 (stabbing in the vicinity of a school)</p> <p>ECtHR, <i>O’Keeffe v. Ireland</i> [GC], No. 35810/09, 2014 (sexual abuse in school)</p> <p>ECtHR, <i>Campbell and Cosans v. the United Kingdom</i>, Nos. 7511/76 and 7743/76, 1982 (corporal punishment)</p> <p>ESC (revised), Articles 7 (right to special protection against physical and moral hazards) and 17 (right to protection)</p> <p>ECSR, <i>World Organisation against Torture (OMCT) v. Belgium</i>, Complaint No. 21/2003, 2004 (prohibition of corporal punishment in Belgium)</p> <p>Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)</p> <p>Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)</p>

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 5 (2) (forced or compulsory labour) Young Workers Directive (94/33/EC) Anti-Trafficking Directive (2011/36/EU)	<b>Forced labour</b>	ECHR, Article 4 (freedom from servitude, forced and compulsory labour) ECtHR, <i>C.N. and V. v. France</i> , No. 67724/09, 2012 (servitude; positive obligations of the state) ESC (revised), Article 7 (10) (protection of children against physical and moral dangers) CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)
Charter of Fundamental Rights, Article 5 (3) (prohibition of trafficking) Anti-Trafficking Directive (2011/36/EU)	<b>Child trafficking</b>	ECHR, Article 4 (freedom from servitude) ECtHR, <i>Rantsev v. Cyprus and Russia</i> , No. 25965/04, 2010 (failure of the state to investigate alleged accusations of trafficking) CoE Convention on Action against Trafficking in Human Beings
Anti-Trafficking Directive (2011/36/EU)	<b>Child pornography</b>	ECHR, Article 8 (right to respect for private life) ECtHR, <i>Söderman v. Sweden</i> [GC], No. 5786/08, 2013 (secret filming of a child) ESC (revised), Article 7 (10) (special protection against physical and moral dangers) Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) Convention on Cybercrime
Council Decision 2010/48/EC	<b>Children belonging to a minority</b>	ECtHR, <i>Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania</i> [GC], No. 47848/08, 2014 (death of a severely disabled young man in a state institution)
Commission Decision 2007/698/EC	<b>Children with disabilities</b>	ECtHR, <i>Nencheva and Others v. Bulgaria</i> , No. 48609/06, 2013 (death of children in a state institution)
Commission Decision 2007/698/EC	<b>Missing children</b>	ECtHR, <i>Zorica Jovanović v. Serbia</i> , No. 21794/08, 2013 (right to information)

Child protection in the broad sense relates to all measures designed to ensure the exercise of children's rights. In the narrow sense, it relates to the rights of children to be free from all forms of violence. Under international law, states must take measures to ensure children benefit from adequate protection and their rights to physical integrity and dignity are effectively observed. The duty of the state to protect may take various forms, depending on the specific risk of violence a child is exposed to and the perpetrator thereof. Thus, states' duties are more evident where children are under the authority and control of the state, for example where they are placed in public institutions. This happens when the risk of violence is high. The state's duty to protect may prove more difficult in cases where children are exposed to violence by private actors, such as their family members.

The European Union's main competence in the area relates to cross-border crimes (Article 83 of the Treaty on the Functioning of the European Union (TFEU)). Particular legislative measures have therefore been enacted with respect to child pornography and human trafficking. The EU has also passed legislation requiring Member States to criminalize several forms of sexual abuse. At the Council of Europe (CoE) level, the European Convention on Human Rights (ECHR) – mainly under Articles 2, 3 and 8 – has elaborated on states' duties in relation to a wide range of acts constituting violence against children. The ECSR has also been active in the field, both through its reporting procedure and its collective complaint mechanism. Further, specific CoE conventions, most notably the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention),<sup>249</sup> are now in place and monitoring bodies in charge of supervising their implementation.

This chapter analyses specific aspects of violence against children and the response of the international community. [Section 7.1](#) looks at violence at home, school and other settings and focuses on issues such as corporal punishment, child abuse and neglect, and sexual violence. [Section 7.2](#) looks at cases of child exploitation which have a marked cross-border dimension, including human trafficking (for the purposes of forced labour or sexual exploitation), child pornography and grooming. Finally, [Section 7.3](#) deals with instances of abuse where children are in particularly vulnerable situations.

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249 Council of Europe, [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#), CETS No. 201, 2007.

## 7.1. Violence at home, in schools or other settings

### Key points

- States have the duty to ensure that children are effectively protected against violence and harm in all settings.
- States have the duty to provide an adequate legal framework for child protection.
- States must conduct effective investigations into arguable allegations of child abuse, violence against children and harm to children.

**Under EU law**,<sup>250</sup> the main legal instrument in this field, enacted on the basis of Articles 82 and 83 of the TFEU, is Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography.<sup>251</sup>

**Under CoE law**, the ECtHR and the ECSR have developed a substantial body of case law regarding the protection of children against violence in all settings. In addition, specific CoE conventions (e.g. the Lanzarote Convention) provide detailed guarantees to protect children against specific forms of violence.

### 7.1.1. Scope of state responsibility

**Under CoE law**, the ECtHR has analysed the most severe forms of violence against children under various articles of the ECHR, most notably Articles 2 and 3. The Court has identified clear duties incumbent on states whenever children are placed in institutions under their authority.<sup>252</sup> Likewise, if a certain conduct or situation reaches the level of severity after which it qualifies as inhuman or degrading treatment under Article 3, the state has positive obligations to protect children against ill-treatment, including treatment administered by private individuals. Situations such as long-term neglect by parents,<sup>253</sup> repeated sexual

<sup>250</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1.

<sup>251</sup> *Ibid.*

<sup>252</sup> ECtHR, *Nencheva and Others v. Bulgaria*, No. 48609/06, 18 June 2013 (available in French).

<sup>253</sup> ECtHR, *Z and Others v. the United Kingdom* [GC], No. 29392/95, 10 May 2001.

abuse by school teachers,<sup>254</sup> rape,<sup>255</sup> or corporal punishments<sup>256</sup> have all been found to fall within the scope of Article 3 of the ECHR.

In the case of a death, a state may be held responsible under Article 2 of the ECHR, even if the death was inflicted by a private person, and not by an agent of the state. States' positive obligations vary from case to case, the core duty being to secure the *effective* protection of children against violence. In cases of serious forms of ill-treatment, positive obligations include the duty to enact effective criminal law provisions which are backed by the law-enforcement machinery.<sup>257</sup> States must also adopt special measures and safeguards for protecting children.<sup>258</sup>

The ECHR was faced on several occasions with cases concerning violence against children administered by private individuals in schools, private homes or other establishments which were ran by non-state actors, where it was questionable whether state responsibility could arise. More importantly, the ECtHR ruled that a state may not absolve itself of the duty to protect children by delegating the administration of important public services – such as education – to private individuals.<sup>259</sup> In cases concerning the determination of state responsibility, the ECtHR generally distinguished between the states' general obligation to protect, when the risk was not clearly identifiable, and a specific obligation to protect, in cases where the victim was clearly identifiable. In the former case, the ECtHR analysed whether the absence of state intervention resulted in a real risk of violence for the child victim.

Example: The case of *Kayak v. Turkey*<sup>260</sup> concerns the stabbing to death of a 15-year-old boy by another teenager, in the vicinity of a school. The ECtHR found that schools have an obligation to protect those enrolled from all forms of violence. In this specific case the ECtHR ruled that Turkey was responsible under Article 2 of the ECHR for failing to protect the right to life

254 ECtHR, *O'Keeffe v. Ireland* [GC], No. 35810/09, 28 January 2014.

255 ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003.

256 ECtHR, *Tyler v. the United Kingdom*, No. 5856/72, 25 April 1978.

257 ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003, para. 150.

258 ECtHR, *O'Keeffe v. Ireland* [GC], No. 35810/09, 28 January 2014, para. 146.

259 *Ibid.*, para. 150; ECtHR, *Costello-Roberts v. the United Kingdom*, No. 13134/87, 25 March 1993, para. 27.

260 ECtHR, *Kayak v. Turkey*, No. 60444/08, 10 July 2012 (available in French).

of the applicants' son and brother, as there was no effective surveillance system in place at the time. In the absence of such a system, it was possible for a teenager to take a knife from the kitchen school, which he used to stab the victim.

Example: The case of *O'Keeffe v. Ireland*<sup>261</sup> concerns acts of abuse committed in the 1970s in an Irish National School. At the time, national schools in Ireland were recognised and paid for by the state, whereas the management and administration was entrusted to the Church. The applicant, a pupil at the time, was subjected to approximately 20 acts of sexual abuse by one of the school teachers. She only complained to the state authorities about these acts in 1998, after finding out about other acts of sexual abuse committed by the same teacher. The ECtHR had to determine whether the state could be held liable for acts of abuse which were not reported at the time to the authorities. The Court first found that the acts of abuse to which the applicant had been subjected fell within the scope of Article 3 of the ECHR. Then, based on various reports, the ECtHR found that the state should have been aware of the potential risks of sexual abuse in schools. At the time, there was no adequate procedure in place which would have allowed a child or a parent to complain directly to the state about acts of abuse. There was also no supervision mechanisms of the teachers' treatment of children. The ECtHR therefore concluded that Ireland had failed to fulfil its positive obligations under Article 3 of the ECHR, since it did not provide an effective protection mechanism for acts of abuse against minors in schools.

Pursuant to the ECtHR, states must also conduct effective investigations into allegations of ill-treatment or loss of life, irrespective of whether the acts were perpetrated by state agents<sup>262</sup> or by private persons. An investigation is effective if, upon the receipt of complaints from victims or their successors, states put in place a procedure capable of leading to the identification and punishment of those responsible for acts of violence contrary to either Articles 2 or 3 of the ECHR.

Under the ESC, children's rights to protection from abuse and ill-treatment fall mainly under Articles 7 and 17.

<sup>261</sup> ECtHR, *O'Keeffe v. Ireland* [GC], No. 35810/09, 28 January 2014.

<sup>262</sup> ECtHR, *Assenov and Others v. Bulgaria*, No. 24760/94, 28 October 1998.

Further, under the Lanzarote Convention, states are required to criminalise various forms of sexual abuse and sexual exploitation against children.<sup>263</sup> This convention also requires states to take legislative or other measures to prevent sexual abuse of children, by organising awareness-raising campaigns, training specialist staff, informing children on the risks of abuse, and providing specialist help to individuals who risk committing child abuse crimes. Furthermore, under Articles 4 and 5 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention),<sup>264</sup> states undertake to enact special legislative measures and to investigate acts of violence against women. Under Article 22 of the Istanbul Convention, states are obliged to ensure specialist support services to women and children who are victims of domestic violence.

Under international law, the CRC is the key legal instrument for ensuring child protection at state level. Pursuant to Article 19, States Parties have the duty to take legislative, administrative, social and educational measures to protect children against all forms of violence. The UN Committee on the Rights of the Child has issued an important number of General Comments and recommendations interpreting states' obligations under the CRC. For instance, General Comment No. 13 describes measures to protect children against all forms of violence.<sup>265</sup> General Comment No. 5 refers to measures to implement and monitor the CRC in national laws and policies.<sup>266</sup>

263 Council of Europe, [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#), CETS No. 201, 2007.

264 Council of Europe, [Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence](#), CETS No. 210, 2011.

265 UN, Committee on the Rights of the Child (2011), *General comment No. 13, CRC/GC/13*, 18 April 2011.

266 UN, Committee on the Rights of the Child (2003), *General comment No. 5, CRC/GC/2003/5*, 27 November 2003.

## 7.1.2. Corporal punishment

Corporal punishment is generally defined as any form of physical punishment intended to cause someone pain or discomfort. It mostly relates to hitting children with the hand or with an object, but it may also involve non-physical acts, such as threats, which have the same end result – the humiliation of the child.<sup>267</sup>

**Under CoE law**, the ECtHR has analysed complaints about corporal punishment as a form of disciplinary measure mainly under Article 3 of the ECHR. Where the measure reached the level of severity required under Article 3, the ECtHR found that the treatment violated that provision.<sup>268</sup> Where measures of corporal punishment do not reach the threshold of severity required under Article 3, they may nevertheless fall under Article 8 as part of the right to physical and moral integrity. However, the ECtHR has to date not found a violation on the merits of Article 8 in corporal punishment cases. The use of corporal punishment in state schools may also breach the rights of the parents to raise their children according to their philosophical convictions, as provided for under Article 2 of Protocol No. 1 to the ECHR.<sup>269</sup>

Example: The cases of *Campbell and Cosans v. the United Kingdom*<sup>270</sup> concern the suspension from school of two boys for refusing to accept corporal punishment. The ECtHR found no violation of Article 3 of the ECHR as the children had not actually been subjected to corporal punishment. It found, however, a violation of Article 2 of Protocol No. 1 to the ECHR on the grounds that, by allowing for corporal punishment, the respondent state had failed to respect the parents' philosophical convictions. The ECtHR also found a violation of one of the boys' right to education provided for under Article 2 of Protocol No. 1 to the ECHR, on account of his suspension from school.

267 UN, Committee on the Rights of the Child (2007), *General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (Arts. 19; 28, para. 2; and 37 inter alia), CRC/C/GC/8, 2 March 2007.

268 ECtHR, *Tyrer v. the United Kingdom*, No. 5856/72, 25 April 1978.

269 ECtHR, *Campbell and Cosans v. the United Kingdom*, Nos. 7511/76 and 7743/76, 25 February 1982, para. 38.

270 ECtHR, *Campbell and Cosans v. the United Kingdom*, Nos. 7511/76 and 7743/76, 25 February 1982.



The ESC does not include any direct prohibition against corporal punishment. Nevertheless, the ECSR has read such an obligation into Article 17 of the ESC.<sup>271</sup> By virtue of its supervision, both through the reporting procedure and the collective complaints procedure of states' compliance with Article 17, the ECSR has found that several contracting states breach this provision by not prohibiting all forms of corporal punishment. In three similar cases filed by the Association for the Protection of All Children (APPROACH) Ltd. against Belgium,<sup>272</sup> the Czech Republic,<sup>273</sup> and Slovenia<sup>274</sup> respectively, the ECSR found a violation of Article 17 of the ESC, as these states lacked legislation setting out "an express and comprehensive prohibition on all forms of corporal punishment of children that is likely to affect their physical integrity, dignity, development or psychological well-being".<sup>275</sup> The ECSR also established that laws prohibiting the corporal punishment of children must be applicable to such forms of alternative care as institutional care, foster care and kindergartens. It should also be recalled in this regard that the Council of Europe's Parliamentary Assembly issued in 2004 a recommendation requesting all contracting states to ban corporal punishment.<sup>276</sup>

Under international law, corporal punishment is indirectly considered a form of violence against children falling under Articles 19, 28 (2) and 37 of the CRC. Moreover, the Committee on the Rights of the Child has issued General Comment No. 8/2006, calling on states to take appropriate measures against all forms of corporal punishment.<sup>277</sup>

271 See, for example, ECSR, *World Organisation against Torture (OMCT) v. Belgium*, Complaint No. 21/2003, 7 December 2004; ECSR, Conclusions XVI-2, Poland, Art. 17, p. 65.

272 ECSR, *Association for the Protection of All Children (APPROACH) v. Belgium*, Complaint No. 98/2013, 29 May 2015, para. 49.

273 ECSR, *Association for the Protection of All Children (APPROACH) v. Czech Republic*, Complaint No. 96/2013, 29 May 2015.

274 ECSR, *Association for the Protection of All Children (APPROACH) v. Slovenia*, Complaint No. 95/2013, 27 May 2015.

275 ECSR, *Association for the Protection of All Children (APPROACH) v. Slovenia*, Complaint No. 95/2013, 27 May 2015, para. 51.

276 Council of Europe, Parliamentary Assembly (2004), Recommendation 1666 (2004) on a Europe-wide ban on corporal punishment of children, 23 June 2004.

277 UN, Committee on the Rights of the Child (2008), *General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)*, CRC/C/GC/8, 2 March 2007.

### 7.1.3. Sexual abuse

Human trafficking and child pornography is dealt with in [Sections 7.2.2](#) and [7.2.3](#) respectively.

Child sexual abuse may take many forms, including harassment, touching, incest or rape. Child sexual abuse can take place in various settings, including homes, schools, care-institutions, churches, etc. Children are particularly vulnerable to sexual abuse, as they often find themselves under the authority and control of adults and have less access to complaint mechanisms.

**Under EU law**, Directive 2011/93/EU – largely reflecting the approach of the Lanzarote Convention – seeks to harmonise minimum criminal sanctions for various child sexual abuse offences between Member States.<sup>278</sup> Under Article 3 of this directive, Member States must take criminal law measures to ensure the sanctioning of various forms of sexual abuse, including causing children to witness sexual activities or sexual abuse, and engaging in sexual activities with children. The directive provides for increased penalties if the acts are committed by persons in a position of trust against particularly vulnerable children and/or through the use of coercion. Further, Member States must ensure that the prosecution of suspects of child abuse takes place automatically and that persons convicted of sexual abuse crimes are prevented from exercising any professional activities involving direct or regular contact with children. The directive also includes provisions on child-friendly proceedings and ensures the protection of child victims in courts.

Directive 2011/93/EU is linked to the Framework Decision 2009/315/JHA<sup>279</sup> on the organisation and content of the exchange of information extracted from the criminal record between Member States. Despite not being child-specific, this Framework Decision fills an important gap in the protection system, ensuring that Member States' authorities have access to the criminal records of convicted persons. This facilitates the identification of individuals convicted of sexual abuse looking for a job in institutions working with children in other Member States.

<sup>278</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1.

<sup>279</sup> Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ 2009 L 93, pp. 23–32.

**Under CoE law**, the ECtHR has examined cases of sexual abuse under Articles 3 and 8 of the ECHR. Complaints generally concern the failure of states to take appropriate measures to protect children from abuse. In the context of Article 3, the ECtHR has also examined whether states conducted effective investigations into allegations of sexual abuse. Child-abuse claims made under Article 8 concern the impact of such acts on the physical integrity of the victim and on the right to respect for family life. At times, the distinction between states' obligations under Articles 3 and 8 is rather blurred, the ECtHR using similar reasoning for finding violations of both Articles. It should be noted, however, that Article 8 cases have been more common in situations concerning undue removal/taking into care and the impact of allegations of child abuse on the family. These situations are analysed in [Chapter 5](#).

Example: In *M.C. v. Bulgaria*<sup>280</sup> the applicant was a 14-year-old girl, who claimed to have been raped by two individuals after she had gone out one evening. Her complaint before the domestic authorities had been dismissed mainly as no form of physical violence had been found. The ECtHR noted that allegations of rape fell under Article 3 of the ECHR and that the respondent state had to conduct an effective investigation into such allegations. In finding that the Bulgarian authorities failed to conduct such an investigation, the ECtHR relied on evidence that the authorities generally dismissed cases where the victim could not show physical opposition to the act of rape. The Court found that such a standard of proof was not in accordance with factual realities concerning victims of rape and was therefore capable of rendering the authorities' investigation ineffective in breach of Article 3 of the ECHR.

Further, the Lanzarote Convention regulates in detail the right of children to be protected from sexual abuse. This convention adopted in the framework of the CoE, is open to ratification by states outside Europe. This binding instrument is backed by a plethora of non-legally binding instruments aimed at further ensuring that states enact effective measures against child sexual abuse.<sup>281</sup>

<sup>280</sup> ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003.

<sup>281</sup> Examples include: Council of Europe, Committee of Ministers (2001), Recommendation Rec (2001) 16 on the protection of children against sexual exploitation, 31 October 2001; Council of Europe, Parliamentary Assembly (1996), Resolution 1099 (1996) on the sexual exploitation of children, 25 September 1996; Council of Europe, Parliamentary Assembly (2000), Resolution 1212 (2000) on rape in armed conflicts, 3 April 2000; Council of Europe, Parliamentary Assembly (2002), Resolution 1307 (2002) on sexual exploitation of children: zero tolerance, 27 September 2002.

## 7.1.4. Domestic violence and child neglect

Many cases of domestic violence include allegations of sexual abuse. In this sense, states' obligations under international law are similar to those listed in [Section 7.1.3](#) above.

**Under CoE law**, it has usually been mothers who have complained to the ECtHR that the state has failed to adequately discharge its obligation – established by the ECHR – to protect against harm. Domestic violence cases raised issues under Articles 2, 3 and 8 of this Convention. States must comply with their positive obligation to take effective measures against domestic violence and conduct an effective investigation into arguable allegations of domestic violence or child neglect.

Example: In the case of *Kontrová v. Slovakia*,<sup>282</sup> the applicant had on several occasions been physically assaulted by her husband. She complained to the police, but later withdrew her complaint. Her husband subsequently threatened to murder their children. A relative reported this incident to the police. Nevertheless, several days after the incident, the applicant's husband shot himself and their two children dead. The ECtHR held that a state's positive obligations arise in the sphere of Article 2 of the ECHR whenever the authorities know or ought to know of the existence of a real and immediate risk to the life of an identified individual. In this case, the Slovak authorities should have known of such a risk by virtue of the pre-existing communications between the applicant and the police. The positive obligations of the police should have entailed registering the applicant's criminal complaint, launching a criminal investigation and initiating criminal proceedings, keeping a proper record of the emergency calls and taking action in respect of the allegations that the applicant's husband had a shotgun. The police, however, failed to meet its obligations and the direct consequence of those failures was the death of the applicant's children, in breach of Article 2 of the ECHR.

282 ECtHR, *Kontrová v. Slovakia*, No. 7510/04, 31 May 2007.

Example: The case of *Eremia v. the Republic of Moldova*<sup>283</sup> concerns the complaint of a mother and her two daughters about the authorities' failure to protect them from the violent and abusive behaviour of their husband and father. The ECtHR held that, despite their knowledge of the abuse, the authorities failed to take effective measures to protect the mother from further domestic violence. It also considered that, despite the detrimental psychological effects on the daughters witnessing their father's violence against their mother in the family home, little or no action had been taken to prevent the recurrence of such behaviour. The Court found that the Moldovan authorities had not properly complied with their obligations under Article 8 of the ECHR.

Cases of child neglect, either in state institutions or at home, have also been raised under the ECHR. The obligations of the authorities in situations of parental child neglect are similar to those in the cases presented previously. On the one hand, the state needs to put in place effective mechanisms for child protection, while on the other, state authorities must take action for protecting children in cases of reported child neglect, or where there is enough evidence of child neglect at their disposal, be it in homes or in privately-run institutions.<sup>284</sup> Cases of neglect in state institutions impose direct obligations on the authorities to protect children by ensuring that they receive adequate (medical) care, that the facilities where they are placed are adequate and/or the staff is trained to deal with the needs of children.<sup>285</sup>

The Istanbul Convention is also relevant.<sup>286</sup> Though not child-specific, it includes several references to children. First, under Article 3 (f), girls below the age of 18 are to be considered 'women', therefore, all the provisions of the convention apply to them. Secondly, under Article 2 (2), States Parties are encouraged to apply the convention to all victims of domestic violence, which can include children. In fact, in most cases children are witnesses to and are severely affected by domestic violence within the home.<sup>287</sup> Finally, child-specific provisions of the convention include obligations for states to take measures to address the needs of child victims, raise awareness among children, and protect child witnesses.

283 ECtHR, *Eremia v. the Republic of Moldova*, No. 3564/11, 28 May 2013.

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

285 ECtHR, *Nencheva and Others v. Bulgaria*, No. 48609/06, 18 June 2013 (available in French).

286 Council of Europe, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, CETS No. 210, 2011.

287 FRA (2014c), pp. 134-135. See also UNICEF (2006).

In the same vein, under Article 17 of the ESC, states are obliged to prohibit all forms of violence against children and to adopt adequate criminal and civil law provisions.

The issues of domestic violence and child neglect have been addressed in various non-legally binding instruments of the CoE.<sup>288</sup>

## 7.2. Child exploitation, pornography and grooming

### Key points

- State authorities have a duty to cooperate and effectively work together to protect children against violence, including in the conduct of investigations.

### 7.2.1. Forced labour

**Under EU law**, slavery, servitude, forced or compulsory labour are prohibited (Article 5 (2) of the EU Charter of Fundamental Rights). The employment of children is also prohibited (Article 32 of the Charter). Directive 94/33/EC is the main legal instrument prohibiting child labour.<sup>289</sup> Only in exceptional circumstances are states allowed to set the minimum age for employment below the minimum school leaving age (Article 4 (2)). States have to ensure that young people admitted to work benefit from appropriate working conditions (Articles 6 and 7). Furthermore, children can only be employed for certain activities, such as light domestic work or social and cultural activities (Articles 2 (2) and 5). The directive also sets out specific protection measures to be taken in cases of child labour (Section III).

<sup>288</sup> Examples include: Council of Europe, Committee of Ministers (1985), Recommendation No. R (85) 4 on violence in the family, 26 March 1985; Council of Europe, Committee of Ministers (1990), Recommendation No. R (90) 2 on social measures concerning violence in the family, 15 January 1990; Council of Europe, Parliamentary Assembly (1998), Recommendation 1371 (1998) on abuse and neglect of children, 23 April 1998.

<sup>289</sup> Council Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work, OJ 1994 L 216.

In many instances, forced child labour cases involve trafficked children.<sup>290</sup> Directive 2011/36/EU on preventing and combating trafficking in human beings recognises forced labour as a form of child exploitation (Article 2 (3)).<sup>291</sup> Children trafficked for the purposes of forced labour are protected under the directive in the same way as victims of trafficking for other purposes (such as sexual exploitation, see [Section 7.1.3](#)).<sup>292</sup>

**Under CoE law**, Article 4 of the ECHR prohibits in absolute terms all forms of slavery, servitude, forced and compulsory labour. The ECtHR defines “forced or compulsory labour” as “work or service which is exacted from any person under the menace of any penalty against the will of the person concerned and for which the said person has not offered himself voluntarily”.<sup>293</sup> Servitude includes, in addition, “the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition”.<sup>294</sup> Servitude is therefore an aggravated form of compulsory labour.

In cases concerning allegations of forced labour, the ECtHR first determines whether the allegations fall within the scope of Article 4 of the ECHR.<sup>295</sup> It then analyses whether states have complied with their positive obligations to put in place a legislative and administrative framework that prohibits, punishes and effectively prosecutes cases of forced or compulsory labour, servitude and slavery.<sup>296</sup> As regards the procedural aspect of Article 4, the ECtHR examines whether the domestic authorities conducted an effective investigation into arguable allegations of forced labour or servitude.<sup>297</sup>

290 Recital 11, Directive 2011/36/EU of the European Parliament and of the Council of 15 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101/1.

291 Directive 2011/36/EU of the European Parliament and of the Council of 15 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101/1.

292 See further FRA (2015c), pp. 40–41.

293 ECtHR, *Siliadin v. France*, No. 73316/01, 26 July 2005, para. 116.

294 *Ibid.*, para. 123.

295 ECtHR, *C.N. and V. v. France*, No. 67724/09, 11 October 2012, para. 70.

296 *Ibid.*, para. 104 and following.

297 ECtHR, *C.N. v. the United Kingdom*, No. 4239/08, 13 November 2012, paras. 70–82.

Example: The case of *C.N. and V. v. France*<sup>298</sup> concerns the forced-labour claims of two sisters of Burundian origin. After the death of their parents, they were taken to live with their aunt and her family in France. They were accommodated for four years in the basement of the house in allegedly very bad conditions. The older sister did not attend school and spent all her time doing household chores and taking care of her aunt's disabled son. The younger sister attended school and worked for the aunt and her family after school and after having been given time to do her homework. Both sisters lodged a complaint with the ECtHR that they had been held in servitude and subjected to forced labour. The ECtHR found that the first applicant had indeed been subject to forced labour as she had to work seven days a week with no remuneration and no holiday. Moreover, she had been held in servitude because she had the feeling that her situation was permanent, with no likelihood of change. The ECtHR further found that the state did not meet its positive obligations, since the legal framework in place did not offer effective protection to victims of compulsory labour. Concerning the procedural obligation to investigate, the ECtHR held that the requirements of Article 4 of the ECHR had been met, as the authorities had conducted a prompt independent investigation capable of leading to the identification and punishment of those responsible. The ECtHR dismissed the second applicant's allegations of forced labour, reasoning that she had been able to go to school and was given time to do her homework.

The ESC guarantees the right of children to be protected against physical and moral dangers within and outside the working environment (Article 7 (10)). The ECSR observed that domestic/labour exploitation of children, including trafficking for the purposes of labour exploitation, must be prohibited at state level.<sup>299</sup> States Parties to the ESC must ensure not only that they have the necessary legislation to prevent exploitation and protect children and young persons, but also that this legislation is effective in practice.<sup>300</sup>

The Lanzarote Convention also stipulates that states should criminalise all forms of child sexual exploitation.

298 ECtHR, *C.N. and V. v. France*, No. 67724/09, 11 October 2012.

299 ECSR Conclusions 2004, Bulgaria, p. 57.

300 ECSR Conclusions 2006, Albania, p. 61; ECSR Conclusions 2006, Bulgaria, p. 113.



## 7.2.2. Child trafficking

**Under EU law**, Article 83 of the TFEU identifies trafficking in human beings as a field where the EU Parliament and Council have legislative powers. Article 5 (3) of the EU Charter of Fundamental Rights contains an express prohibition of trafficking in human beings. The contribution of the EU is valued here, as this is an area with cross-border dimensions.

Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims is the first instrument passed by the European Parliament and the Council based on Article 83 of the TFEU.<sup>301</sup> Under Article 2 (1) of this directive, trafficking is defined as “the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”. The purpose of the directive is to set out minimum rules for the definition and sanctioning of human trafficking-related offences (Article 1). The directive as a whole is relevant for children, and it also includes several child-specific provisions relating to assistance and support of child victims of trafficking and protection in criminal investigations (Articles 13–16).<sup>302</sup> Specific support measures are to be taken pursuant to a specialist assessment of each individual victim (Article 14 (1)). States should appoint a guardian to represent the child’s best interests (Article 14 (2)) and provide support to the family of the child (Article 14 (2)). During criminal proceedings, children have the right to a representative, free legal counselling, and the right to be heard in adequate premises and by trained professionals (Article 5 (1)–(3)). Further protection measures include the possibility to conduct hearings without the presence of the public and the possibility to hear the child indirectly via communication technologies (Article 5 (5)).<sup>303</sup>

301 Directive 2011/36/EU of the European Parliament and of the Council of 15 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101/1.

302 Provisions detailed in FRA and ECtHR (2014), p. 222.

303 See FRA (2015b), p. 79.

Directive 2004/81/EC is also relevant for trafficked children.<sup>304</sup> Under this instrument, victims of trafficking may be issued residence permits by the host Member States, provided they cooperate in the criminal investigation. Nevertheless, the directive only applies to children to the extent decided by Member States.<sup>305</sup>

When it comes to enforcement, the EU's law enforcement agency (Europol) and the EU's Judicial Cooperation Unit (Eurojust) play important roles in ensuring cooperation between Member States to identify and prosecute organised trafficking networks. The relevant provisions for the protection of child victims at EU level are addressed in [Section 11.3](#) of this handbook.

**Under CoE law**, the ECHR does not include any express provision on trafficking. Nevertheless, the ECtHR interprets Article 4 of the ECHR as including a prohibition of trafficking.<sup>306</sup> The Court has adopted the same definition of trafficking as laid down in Article 3 (a) of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the UN Convention against Transnational Organized Crime (Palermo Protocol) and Article 4 (a) of the CoE Convention on Action against Trafficking in Human Beings.<sup>307</sup> The ECtHR first identifies whether a particular situation involves a credible allegation of trafficking and thus falls under the scope of Article 4. If it does, the ECtHR's analysis will follow the patterns described in [Section 7.2.1](#): the Court looks into whether the legal framework of the respondent state offers effective protection against trafficking, whether the state has discharged its positive obligations in the particular circumstances of the case and whether the authorities have conducted an effective investigation into arguable allegations of trafficking.

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304 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate irregular immigration, who cooperate with the competent authorities, OJ 2004 L 261, pp. 19–23.

305 *Ibid.*, Art. 3.

306 ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010, para. 282.

307 UN, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC), New York, 15 November 2000; Council of Europe, [Council of Europe Convention on Action against Trafficking in Human Beings](#), CETS No. 197, 2005.

Example: The case of *Rantsev v. Russia and Cyprus*<sup>308</sup> was lodged by the father of a young Russian girl who died under suspicious circumstances in Cyprus. She had entered Cyprus on a cabaret artist visa. After what appeared to be an escape attempt, she died by falling off the balcony of an apartment belonging to acquaintances of her employer. Her father lodged a complaint against both Russia and Cyprus, essentially claiming that the authorities had not appropriately investigated the death of his daughter. The ECtHR held for the first time that trafficking in human beings falls under the scope of Article 4 of the ECHR. Although Cyprus had an adequate legal framework to combat trafficking, Article 4 was violated, as the administrative practice of requiring employers to issue financial guarantees for cabaret dancers did not offer effective protection against trafficking and exploitation. Further, in the particular circumstances of the case, the Cypriot authorities should have known that the applicant's daughter was at risk of being trafficked. The Court ruled that the police failed to take measures to protect Ms Rantseva against exploitation. Finally, it found a violation of Article 4 by Russia, since the Russian authorities did not appropriately investigate the allegations of trafficking.

The ECSR considers trafficking in human beings to constitute a grave violation of human rights and human dignity, and to amount to a new form of slavery.<sup>309</sup> Under Article 7 (10), states must enact legislation to criminalise it.<sup>310</sup> This legislation must be backed by an adequate supervisory mechanism, sanctions, and an action plan to combat child trafficking and sexual exploitation.<sup>311</sup>

At treaty level, the CoE Convention on Action against Trafficking in Human Beings is the key instrument addressing human trafficking.<sup>312</sup> In view of the broader membership of the CoE and the fact that the Anti-Trafficking Convention is open to accession by non-CoE member states,<sup>313</sup> it complements the

308 ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 7 January 2010. The case does not concern the death of a child; however, this case is worth mentioning in absence of ECtHR child-specific trafficking cases and in view of the particular threat of trafficking to children.

309 ECSR, *Federation of Catholic Family Associations in Europe (FAFCE) v. Ireland*, No. 89/2013, 12 September 2014, para. 56.

310 ECSR, Conclusions XVII-2 (2005), Poland, p. 638.

311 ECSR, *Federation of Catholic Family Associations in Europe (FAFCE) v. Ireland*, No. 89/2013, 12 September 2014, para. 57.

312 Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 2005.

313 For example, Belarus acceded to the convention on 26 November 2013.

EU Directive 2011/36/EU and is instrumental in combating trafficking in states party to the convention, whether EU members or not, on the basis of common standards and obligations. The implementation of the convention is monitored by a group of independent experts (the Group of Experts on Action against Trafficking in Human Beings GRETA), who periodically assess the situation in each country and publish reports. On the basis of these reports, the Committee of the Parties to the Convention, the political pillar of the monitoring mechanism under the convention, adopts recommendations to States Parties concerning measures to be taken to implement GRETA's conclusions and follows up on progress.

### 7.2.3. Child pornography and grooming

**Under EU law**, Directive 2011/93/EU is the main legal instrument addressing child pornography.<sup>314</sup> Pornography is defined as: "(i) any material that visually depicts a child engaged in real or simulated sexually explicit conduct; (ii) any depiction of the sexual organs of a child for primarily sexual purposes; (iii) any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or (iv) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes."<sup>315</sup> Article 5 of this directive introduces an obligation for EU Member States to take all necessary measures to ensure that the intentional production, acquisition, possession, distribution, dissemination, transmission, offering, supplying or making available of child pornography as well as knowingly obtaining access to this type of content is punishable.

**Under CoE law**, the ECtHR has on several occasions analysed cases concerning child pornography under Article 8 of the ECHR.

Example: The case of *Söderman v. Sweden* was brought by a girl whose stepfather attempted to film her while she was taking a shower.<sup>316</sup> She alleged that the Swedish legislative framework did not adequately protect

314 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1, pp. 1-14.

315 *Ibid.*, Art. 2 (c).

316 ECtHR, *Söderman v. Sweden* [GC], No. 5786/08, 12 November 2013.

her private life. The ECtHR held that the state has positive obligations to set up a legislative framework offering adequate protection to victims such as the applicant. As this case concerns only an attempt to film the applicant, the ECtHR held that such legislative framework does not necessarily have to include criminal sanctions. The remedies offered to a victim – either civil or criminal – have to be effective. On the facts of the case, the ECtHR held that the applicant did not benefit from effective criminal or civil remedies against her stepfather’s attempt to film her, in breach of Article 8 of the ECHR.

Article 9 of the CoE Convention on Cybercrime<sup>317</sup> requires States Parties to criminalise the conduct of offering, making available, distributing, transmitting, procuring or possessing child pornography or producing such material through a computer system. An important requirement is that this conduct must be intentional. The Explanatory Report of the Convention states that the term ‘pornographic material’ is dependent on national standards concerning materials classified as “obscene, inconsistent with public morals or similarly corrupt”.<sup>318</sup> Nevertheless, this obligation to criminalise should not only apply to material if it visually depicts a child, but also if it depicts a person appearing to be one or realistic images representing a child who is engaged in sexually explicit conduct.<sup>319</sup>

Further, pursuant to Articles 21 to 23 of the Lanzarote Convention, states are required to take legislative measures to criminalise various forms of child pornography. Under Article 21, recruiting, coercing and participating in child pornography activities should be criminalised. Under Article 22, causing children to witness sexual (abuse) acts must equally be criminalised. Finally, Article 23 requires that criminal legislation be enacted in relation to acts of solicitation of children for sexual purposes through information and communication technologies. The Lanzarote Committee has adopted an opinion on this provision, which invites the States Parties to the convention to consider extending the criminalisation of solicitation to cases when the sexual abuse is not the result of a meeting in person but committed online.<sup>320</sup>

317 Council of Europe, [Convention on Cybercrime](#), CETS No. 185, 2001.

318 Explanatory report to the Council of Europe, Council of Europe Convention on Cybercrime, para. 99.

319 Council of Europe, [Convention on Cybercrime](#), CETS No. 185, 2001, Art. 9 (2).

320 Lanzarote Committee Opinion on Art. 23 of the Lanzarote Convention and its explanatory note, 17 June 2015.

## 7.3. High risk groups

### Key point

- Children victims of forced disappearance (known as 'enforced disappearance' in international law) have the right to preserve or to re-establish their identity.

### 7.3.1. Children belonging to a minority

**Under CoE law**, ECtHR cases dealing specifically with violence against minority children – outside the context of human trafficking and forced labour – are rather sparse. They mainly concern segregation in schools and discrimination, which is analysed in [Section 3.2](#).

Example: In the case of *Centre of Legal Resources on behalf of Valentin Câmpeanu v. Romania*, an NGO lodged an application in the name of a young Roma boy who died in a state institution.<sup>321</sup> He was HIV-positive and had a severe intellectual disability. The conditions in the institution where he lived were appalling: there was no heating, no bedding or clothes, no support from staff, etc. In the absence of any close relative of the victim, an NGO alleged on his behalf the infringement of the rights established by Articles 2, 3, 5, 8, 13 and 14 of the ECHR. The Grand Chamber decided that, in the exceptional circumstances of the case (the extreme vulnerability and lack of any known next-of-kin of the young Roma), the NGO had standing to represent the deceased applicant. On the merits, the ECtHR found a violation of the substantive limb of Article 2. The domestic authorities were found liable for the death of Mr. Câmpeanu as they had placed him in an institution where he died due to the lacked adequate food, accommodation and medical care. The ECtHR also found a violation of Article 2 due to the fact that the Romanian authorities did not conduct an effective investigation into the death of Mr. Câmpeanu.

<sup>321</sup> ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], No. 47848/08, 17 July 2014.

With respect to children living in institutions, the CoE Recommendation Rec(2005)5 supports the decision that the placement of a child should not be based on discriminatory grounds.<sup>322</sup>

### 7.3.2. Children with disabilities

**Under EU law**, the EU has become a party to the CRPD, the first international treaty in the field of human rights to which the EU has acceded.<sup>323</sup> The CRPD includes specific provisions related to children. EU Member States and the EU have undertaken to ensure the enjoyment of human rights by children with disabilities on an equal basis with other children. Under Article 16 of the CRPD, they must take specific measures to protect children with disabilities from abuse and exploitation.<sup>324</sup>

**Under CoE law**, ECtHR cases concerning children with disabilities have raised several issues, including consent, states' positive obligations to protect from death and ill-treatment, and living conditions in state-run facilities.

Example: The case of *Nencheva and Others v. Bulgaria*<sup>325</sup> concerns the death of 15 children and young adults in a home for people with mental and psychological disabilities. The ECtHR held that the children had been placed in a specialised public institution under the sole control of the state. The living conditions of the children in the institution were appalling: they lacked food, medicine, clothing and heating. The competent authorities had been alerted to this situation on several occasions, and were consequently aware or should have been aware of the risks of death. The ECtHR found a violation of the substantive limb of Article 2 of the ECHR, as the authorities did not take measures to protect the lives of children placed under their control. Further, the Bulgarian authorities did not conduct an effective investigation into the deaths of the applicants' children. In the particular circumstances of the case, the Bulgarian authorities should have launched an *ex officio* criminal investigation. The investigation was

322 Council of Europe, Committee of Ministers (2005), Recommendation Rec (2005)5 on the rights of children living in residential institutions, 16 March 2005.

323 Council of the European Union (2009), Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ 2010 L 23/35.

324 See also [Section 3.5](#).

325 ECtHR, *Nencheva and Others v. Bulgaria*, No. 48609/06, 18 June 2013 (available in French).

deemed ineffective for several reasons: it had started two years after the death of the children, it had lasted unreasonably long, it did not cover the death of all the children and it did not clarify all the relevant factors in the matter.

## 7.4. Missing children

**Under EU law**, the EU Commission has launched a hotline number (116000) for missing children.<sup>326</sup> This service takes calls reporting missing children and passes them on to the police authorities, offers guidance to and supports the persons responsible for the missing child, and supports the investigation.

**Under CoE law**, the enforced disappearance of children has been addressed under Article 8 of the ECHR.

Example: In *Zorica Jovanović v. Serbia*,<sup>327</sup> a new-born baby allegedly died in hospital shortly after birth, but his body was never transferred to the parents. The mother complained that the state had failed to provide her with any information about the fate of her son, including the cause of his alleged death or time and place of his burial. The ECtHR held that a state's "continuing failure to provide [the mother] with credible information as to the fate of her son" amounted to a violation of her right to respect for family life.<sup>328</sup>

Under UN law, Article 25 (1) (b) of the International Convention for the Protection of All Persons from Enforced Disappearance<sup>329</sup> stipulates that states must prevent and punish the "falsification, concealment or destruction of documents attesting to the true identity" of children that are themselves or whose parents are subjected to enforced disappearance. States must also take the necessary measures to search for and identify these children, and to return them to their families of origin. In light of these children's right to preserve,

326 Commission Decision (2007), Commission Decision 2007/698/EC of 29 October 2007 amending Decision 2007/116/EC as regards the introduction of additional reserved numbers, OJ 2007, L 284/31.

327 ECtHR, *Zorica Jovanović v. Serbia*, No. 21794/08, 26 March 2013.

328 *Ibid.*, para. 74.

329 UN, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006.



or to have re-established, their identity, including their nationality, name and family relations as recognised by law, states need to have legal procedures in place to review and annul any adoption or placement of children involved in enforced disappearances (Article 25 (4)). The convention reiterates two of the general principles underpinning children's rights: the best interests of the child as a primary consideration and the right of the child to express his/her views (Article 25 (5)). Whereas a relatively low number of European states have ratified this convention, its relevance to the European normative framework should not be dismissed.<sup>330</sup>

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330 As at 19 February 2015, nine out of the 28 EU Member States had ratified this convention (Austria, Belgium, Spain, France, Germany, Lithuania, Netherlands, Portugal and Slovakia). In addition, the following CoE member states have ratified the convention: Serbia, Montenegro, Bosnia and Herzegovina, Armenia and Albania.



# 8

## Economic, social and cultural rights and adequate standard of living



EU	Issues covered	CoE
<p>Charter of Fundamental Rights, Article 14 (education)</p> <p>Qualification Directive (2011/95/EU)</p> <p>CJEU, C-413/99, <i>Baumbast and R v. Secretary of State for the Home Department</i>, 2002 (education of migrant children)</p>	<p>Right to education</p>	<p>ECHR, Protocol No. 1, Article 2 (right to education)</p> <p>ESC (revised), Article 17 (right to education)</p> <p>ECtHR, <i>Catan and Others v. Moldova and Russia</i> [GC], Nos. 43370/04, 8252/05 and 18454/06, 2012 (language in schools)</p> <p>ECtHR, <i>D.H. and Others v. the Czech Republic</i> [GC], No. 57325/00, 2007; ECtHR, <i>Oršuš and Others v. Croatia</i> [GC], No. 15766/03, 2010 (discrimination in school of Roma children)</p> <p>ECtHR, <i>Ponomaryovi v. Bulgaria</i>, No. 5335/05, 2011 (discrimination on ground of immigration status)</p> <p>FCNM, Articles 12 (3) and 14</p> <p>European Convention on the Legal Status of Migrant Workers</p>
<p>Charter of Fundamental Rights, Article 35 (access to health care)</p> <p>Qualification Directive (2011/95/EU), Article 29 (core benefits for migrant children)</p>	<p>Right to health</p>	<p>ESC (revised), Articles 11 (right to protection of health) and 13 (right to social and medical assistance)</p> <p>ECHR, Articles 2 (right to life) and 8 (right to physical integrity)</p> <p>ECtHR, <i>Oyal v. Turkey</i>, No. 4864/05, 2010 (HIV infection of a newborn)</p> <p>ECtHR, <i>Iliya Petrov v. Bulgaria</i>, No. 19202/03, 2012 (injury in an electricity substation)</p> <p>ECtHR, <i>Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania</i> [GC], No. 47848/08, 2014 (death in an institution)</p>

EU	Issues covered	CoE
		<p>ECtHR, <i>Glass v. the United Kingdom</i>, No. 61827/00, 2004 (informed consent)</p> <p>ECtHR, <i>M.A.K and R.K. v. the United Kingdom</i>, Nos. 45901/05 and 40146/06, 2010 (test without parental consent)</p> <p>ECSR, <i>International Federation of Human Rights Leagues (FIDH) v. France</i>, Complaint No. 14/2003, 2004, (medical care for migrant children)</p> <p>ECSR, <i>Defence for Children International (DCI) v. Belgium</i>, Complaint No. 69/2011, 2012 (children in an irregular situation)</p> <p>Convention on Human Rights and Biomedicine (Oviedo Convention), Articles 6 and 8</p>
<p>Charter of Fundamental Rights, Article 34 (3) (right to social and housing assistance)</p>	<p><b>Right to housing</b></p>	<p>ESC (revised), Articles 16 (right of the family to social, legal and economic protection), 17 (right of children and young persons to social, legal and economic protection) and 31 (right to housing)</p> <p>ECtHR, <i>Bah v. the United Kingdom</i>, No. 56328/07, 2011</p> <p>ECtHR, <i>Connors v. the United Kingdom</i>, No. 66746/01, 2004.</p>
<p>Charter of Fundamental Rights, Article 34 (social security and social assistance)</p>	<p><b>Right to an adequate standard of living and right to social security</b></p>	<p>ESC (revised), Articles 12–14 (rights to social security, social and medical assistance, and to benefit from social welfare services), 16 (right of the family to social, legal and economic protection) and 30 (right to protection against poverty and exclusion)</p> <p>ECSR, <i>European Committee for Home-Based Priority Action for the Child and the Family (EU-ROCEF) v. France</i>, Complaint No. 82/2012, 2013 (suspension of family allowances for truancy)</p> <p>ECtHR, <i>Konstantin Markin v. Russia</i> [GC], No. 30078/06, 2012 (parental leave)</p>

Economic, social and cultural rights (ESC rights), more often referred to as socio-economic rights or social rights in a European context, include work-related rights as well as the right to education, health, housing, social security and, more generally, an adequate standard of living. Cultural rights have remained largely underdeveloped and unaddressed in scholarship and litigation. Aspects of them are addressed in [Section 4.5](#) on the identity of children belonging to a minority and in [Section 8.2](#) under the right to education.

Explicit standards on ESC rights in the European context can mainly be found in the European Social Charter and the EU Charter of Fundamental Rights, although the ECHR and its protocols also include several relevant provisions, for instance the prohibition of forced labour and the right to education. Moreover, the ECtHR has argued that there is “no water-tight division separating [the] sphere [of social and economic rights] from the field covered by the Convention”<sup>331</sup> and has read ESC rights into the civil rights guaranteed by the ECHR. In that way, for example, access to health care has been dealt with under the prohibition of torture, inhuman and degrading treatment and punishment (Article 3 of the ECHR).<sup>332</sup>

This chapter analyses ESC rights that are of specific relevance to children: the right to education (Section 8.2); the right to health (Section 8.3); the right to housing (Section 8.4); and the right to an adequate standard of living and social security (Section 8.5).

## 8.1. Approaches to economic, social and cultural rights

### Key points

- Securing the availability of adequate resources is key to ensure the protection of social rights.
- Essential elements of social rights are availability, accessibility, adaptability and acceptability.

**Under EU law**, ESC rights have been included in the EU Charter of Fundamental Rights on par with civil and political rights. However, Article 52 of the Charter distinguishes between rights and principles, with the latter being limited in the way they are “judicially cognisable”.

331 ECtHR, *Airey v. Ireland*, No. 6289/73, 9 October 1979, para. 26.

332 See, for example, ECtHR, Factsheet on Prisoners’ health-related rights, February 2015, and Factsheet on Health, April 2015.

**Under CoE law**, the ECSR notes that when the realisation of a right is “exceptionally complex and particularly expensive to resolve”, it assesses progressive realisation against three criteria: measures must be taken “to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources”.<sup>333</sup> It also introduces a prioritisation, in that it reminds states of “the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected”.<sup>334</sup>

The ECSR, albeit in the specific context of the right to social security, argues that retrogressive steps “in order to ensure the maintenance and sustainability of the existing social security system” are permissible provided they do not “undermine the core framework of a national social security system or deny individuals the opportunity to enjoy the protection it offers against serious social and economic risk”.<sup>335</sup> The ECtHR also accepts the possibility of retrogressive steps, but examines whether the method chosen is reasonable and suitable to the achievement of the legitimate aim pursued.<sup>336</sup>

In the context of the right to education, the ECSR, in line with the approach of the UN Committee on Economic, Social and Cultural Rights, has adopted the analytical framework of availability, accessibility, acceptability and adaptability.<sup>337</sup> The distinction between availability and accessibility also features in the case law of the ECtHR. The criteria or essential elements of availability, accessibility, acceptability and adaptability guide the analysis that follows, to the extent that relevant case law is available.

333 ECSR, *International Association Autism Europe (IAAE) v. France*, Complaint No. 13/2002, 4 November 2003, para. 53; applied in ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, 11 September 2013, paras. 94–99.

334 ECSR, *International Association Autism Europe (IAAE) v. France*, Complaint No. 13/2002, 4 November 2003, para. 53.

335 ECSR, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, 23 May 2012, para. 47.

336 ECtHR, *Markovics and Others v. Hungary*, Decision of inadmissibility, Nos. 77575/11, 19828/13 and 19829/13, 24 June 2014, paras. 37 and 39.

337 ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, 3 June 2008, para. 37.

## 8.2. Right to education

### Key points

- Limitations to the accessibility of education must be foreseeable, pursue a legitimate aim and must be justified and non-discriminatory.
- Acceptability of education, which requires respect for the religious and philosophical convictions of parents, does not exclude the possibility of religious or sexual education in schools.
- Adaptability requires special measures for children with disabilities and the possibility for children belonging to a minority to learn and be taught in their own language.
- Children have the right to education regardless of their nationality or migration status.

**Under EU law**, Article 14 (2) of the EU Charter of Fundamental Rights guarantees the right to education, including “the possibility to receive free compulsory education”. In its third paragraph, Article 14 ensures the freedom to found educational establishments and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions.

**Under CoE law**, Article 2 of Protocol No. 1 to the ECHR guarantees the right to education. The ECtHR clarifies that this article does not oblige states to make education available; it provides “a right of access to educational institutions existing at a given time”.<sup>338</sup> In addition, the right to education also includes “the possibility of drawing profit from the education received, that is to say, the right to obtain, in conformity with the rules in force in each state, and in one form or another, official recognition of the studies [...] completed”.<sup>339</sup> However, this is not an absolute right; limitations must be foreseeable for those concerned and must pursue a legitimate aim. Disciplinary measures, including suspension or expulsion from an educational institution, are allowed, provided they meet the conditions for permissible limitations. To assess whether these forms of exclusion from education result in a denial of the right to ed-

338 ECtHR, *Case “Relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium*, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968, para. 4.

339 *Ibid.*

ucation, factors such as the procedural safeguards, duration of the exclusion, reintegration efforts and adequacy of alternative education provided will be considered.<sup>340</sup>

Example: In *Catan and Others v. Moldova and Russia*,<sup>341</sup> the ECtHR looked into the language policy introduced in schools by the separatist authorities in Transdnistria. The objective of this language policy was Russification. Following the forced closure of Moldovan-language schools (using the Latin alphabet), parents had to choose between sending their children to schools where they were taught in an artificial combination of language and Cyrillic alphabet and with teaching materials produced in Soviet times, or to sending their children to schools that were less well equipped and less conveniently situated, on their way to which they were subjected to harassment and intimidation. The forced closure of schools and subsequent harassment was held to be an unjustified interference with the children's right to education that amounted to a violation of Article 2 of Protocol No. 1 to the ECHR.<sup>342</sup>

As part of the right to education, parents have the right to respect for their religious and philosophical convictions. However, "the setting and planning of the curriculum fall in principle within the competence" of the state.<sup>343</sup> They can also integrate information or knowledge of a religious or philosophical kind in the school curriculum, on condition that it is "conveyed in an objective, critical and pluralistic manner".<sup>344</sup> To safeguard pluralism, quantitative and qualitative differences in teaching a particular religion or philosophy must be balanced by offering parents the possibility of either partially or fully exempting their children from such teaching, namely the possibility not to attend certain classes or the religious course as a whole.<sup>345</sup> For the ECtHR's way of dealing with the issue from a non-discrimination angle, see [Section 2.1](#).<sup>346</sup>

340 ECtHR, *Ali v. the United Kingdom*, No. 40385/06, 11 January 2011, para. 58.

341 ECtHR, *Catan and Others v. Moldova and Russia* [GC], Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012.

342 *Ibid.*, paras. 141-144.

343 ECtHR, *Folgerø and Others v. Norway* [GC], No. 15472/02, 29 June 2007, para. 84.

344 *Ibid.*, para. 84.

345 *Ibid.*, paras. 85-102 and Dissenting opinion.

346 ECtHR, *Grzelak v. Poland*, No. 7710/02, 15 June 2010.



Pursuant to Article 17 (2) of the revised ESC, states undertake “to take all appropriate and necessary measures designed [...] to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools”.<sup>347</sup> Additionally, the ECSR ruled that under this provision, contracting states should ensure that children unlawfully present in their territory also have access to education.<sup>348</sup>

Furthermore, educational institutions have to be accessible to everyone without discrimination.<sup>349</sup> The ESCR held that the “integration of children with disabilities into mainstream schools [...] should be the norm and teaching in specialised schools must be the exception”.<sup>350</sup> States do not enjoy a wide margin of appreciation regarding the choice of the type of school for persons with disabilities; it must be a mainstream school.<sup>351</sup>

Situations concerning differential treatment in education on grounds such as nationality, immigration status or ethnic origin are dealt with in [Chapter 3](#).

Under the ECSR case law, sexual and reproductive health education must be part of the ordinary curriculum.<sup>352</sup> Whereas states enjoy a wide margin of appreciation in determining the cultural appropriateness of the educational material used, they must ensure non-discriminatory sexual and reproductive health education “which does not perpetuate or reinforce social exclusion and the denial of human dignity”. Educational materials must not “reinforce demeaning stereotypes”, for instance concerning persons of non-heterosexual orientation.<sup>353</sup>

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347 The ESC of 1961 does not contain a provision on the right to education.

348 ECSR, *Médecins du Monde – International v. France*, Complaint No. 67/2011, 11 September 2012.

349 On the issue of children with disabilities, see further [Chapters 3](#) and [7](#).

350 ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, 3 June 2008, para. 35.

351 ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, 11 September 2013, para. 78.

352 ECSR, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, Complaint No. 45/2007, 30 March 2009, para. 47.

353 *Ibid.*, paras. 59 and 61.

Finally, adaptability of education requires, for example, that for children with disabilities who are integrated into mainstream schools, “arrangements are made to cater for their special needs”<sup>354</sup> (see also [Section 3.5](#)).

In addition, under Article 12 (3) of the FCNM, States Parties undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities (see also [Chapter 3](#)).<sup>355</sup> For children belonging to national minorities, Article 14 of the FCNM contains the right to learn and be taught one’s own language.<sup>356</sup> The ECtHR has confirmed that the right to education implies the right to be educated in (one of) the national language(s).<sup>357</sup>

## 8.2.1. Right to education of migrant children

**Under EU law**, children’s fundamental right to education, regardless of their migration status, is recognised in virtually all aspects of EU migration law.<sup>358</sup> That said, the EU does not have the competence to determine the content or scope of national educational provisions. Rather, the EU protects migrant children’s right to access education on the same or, depending on their status, similar basis as nationals. The Students Directive (2014/114/EC) regulates the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.<sup>359</sup> This admission

354 ECSR, *Mental Disability Advocacy Center (MDAC) v. Bulgaria*, Complaint No. 41/2007, 3 June 2008, para. 35.

355 See further Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM), Commentary on Education under the Framework Convention for the Protection of National Minorities, 2006, ACFC/25DOC(2006)002, Part 2.1.

356 For further clarification, see Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM), Commentary on Education under the Framework Convention for the Protection of National Minorities, 2006, ACFC/25DOC(2006)002, Part 2.3, and Thematic Commentary No. 3: The language rights of persons belonging to national minorities under the Framework Convention, 2012, ACFC/44DOC(2012)001 rev, Part VI, Language Rights and Education.

357 ECtHR, *Catan and Others v. Moldova and Russia* [GC], Nos. 43370/04, 8252/05 and 18454/06, 19 October 2012, para. 137.

358 E.g. Art. 27 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast) (Qualification Directive), OJ 2011 L 337/9, pp. 9–268.

359 Council Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (Students Directive).

covers the entry and residence of the third-country national for a period exceeding three months. The general conditions of admission for children include the presentation of a valid travel document, parental authorisation for the planned stay, sickness insurance and, if the Member State so requests, the payment of a fee for processing the application for admission.<sup>360</sup> School pupils for instance are required to provide evidence of participation in a pupil exchange scheme operated by an organisation recognised by the Member State.<sup>361</sup> Unremunerated trainees are subject to providing the evidence the Member State requires to ensure that during their stay they will have sufficient resources to cover their subsistence, training and return travel costs.<sup>362</sup> Access to economic activities, including employment, by higher education students are subject to restrictions.<sup>363</sup>

The children of EU migrants who move to another EU Member State under free movement law benefit from the most favourable entitlement in this context. They have a right to be admitted to that state's general educational, apprenticeship and vocational training courses under the same conditions as nationals.<sup>364</sup> This includes public and private, and compulsory and non-compulsory education. The CJEU has always interpreted this entitlement broadly to ensure equal access to education, but also to broader, education-related social benefits, as well as to any benefits intended to facilitate educational attendance. For example, in the *Casagrande* case, the child of a migrant worker was able to access a means-tested educational grant under EU free movement law.<sup>365</sup>

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360 *Ibid.*, Art. 6.

361 *Ibid.*, Art. 7.

362 *Ibid.*, Art. 10.

363 *Ibid.*, Art. 17.

364 Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ 2011 L 141/1, pp. 1–12, Art. 10; and Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Free Movement Directive), OJ 2004 L 158, pp. 77–123, Art. 24 (1).

365 CJEU, C-9/74, *Donato Casagrande v. Landeshauptstadt München*, 3 July 1974. Subsequently confirmed in cases such as CJEU, C-3/90, *M.J.E. Bernini v. Minister van Onderwijs en Wetenschappen*, 26 February 1992.

Moreover, legislation introduced in the 1970s requires Member States to provide supplementary language tuition for children of EU migrant workers, in both the host state language and in their mother tongue, with a view to facilitate their integration in the host state and in their country of origin should they subsequently return.<sup>366</sup> While this seems to offer quite generous and valuable supplementary support to children following their admission to a school in the host state, its implementation across different countries has been notoriously patchy and increasingly impractical given the range of different languages to accommodate.<sup>367</sup>

Example: The issue in *Baumbast and R v. Secretary of State for the Home Department*<sup>368</sup> was whether the two daughters of a German migrant worker who moved to the United Kingdom with his Colombian wife and daughters, could continue to attend school there after he left the United Kingdom for a non-EU Member State, leaving his wife and daughters behind. The CJEU was faced with the question of whether his wife and daughters could remain in the host state independently, notwithstanding the fact that Mr Baumbast (from whom the family derived their residence rights) had effectively relinquished his status as an EU migrant worker. The decisive factor for the CJEU was that the children were integrated into the education system of the host state and it would have been both harmful and disproportionate to uproot them at such a crucial point in their education. The Court confirmed that such is the importance of achieving continuity in children's education that it can effectively 'anchor' the (otherwise non-qualifying) family's residence in the host state for the duration of a migrant child's studies.

366 Council Directive 77/486/EEC on the education of the children of migrant workers, OJ 1977 L 199, pp. 32–33. Note that third-country national migrant children are excluded from its scope.

367 Commission reports on the implementation of Directive 77/486/EEC, COM(84) 54 final and COM(88) 787 final.

368 CJEU, C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002.

The *Baumbast* decision was followed in successive cases<sup>369</sup> and has been codified in Article 12 (3) of Directive 2004/38/EC (Free Movement Directive).<sup>370</sup>

Third-country national children can generally only access *publicly-funded* education under the same conditions as nationals, and are excluded from associated benefits such as maintenance grants.<sup>371</sup> Some EU immigration instruments, however, go further than granting mere equality of access, requiring Member States to implement mechanisms to ensure due recognition and transferability of foreign qualifications, even in the absence of documentary evidence (Article 28 of the Qualification Directive).<sup>372</sup>

The educational rights of asylum-seeking children are weaker still; they must be granted access to the host state's education system on *similar*, but not necessarily the *same* terms as those that apply to nationals.<sup>373</sup> As such, education may be provided in accommodation centres rather than schools, and the authorities can postpone asylum-seeking children's full access to a school for up to three months from the date of application for asylum. Where access to the education system is impossible due to the specific situation of the child, Member States are obliged to offer alternative education arrangements (Article 14 (3) of the Reception Conditions Directive).<sup>374</sup>

369 CJEU, C-480/08, *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*, 23 February 2010; CJEU, C-310/08, *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department* [GC], 23 February 2010.

370 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, Art. 2 (2) (c) and Art. 12 (3).

371 Refugee Qualification Directive 2011/95/EU, Art. 11; Long-Term Residents Directive (Directive 2003/109/EC), Art. 14; Directive 2003/86/EC on the right to family reunification, Art. 14; Temporary Protection Directive (2001/55/EC); Reception Directive (2013/33/EU), Art 14(c); and Return Directive (2008/115/EC).

372 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast) (Qualification Directive), OJ 2011 L 337/9.

373 Reception Conditions Directive (2013/33/EU). Note that, under the Refugee Qualification Directive (2011/95/EU, Art. 27), child refugees (who have acquired longer term residence rights) can access education under the same conditions as nationals.

374 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) (Reception Directive), OJ 2013 L 180/96, pp. 96-116.

**Under CoE law**, Article 2, Protocol No. 1 has been used in conjunction with Article 14 to secure migrant children's access to education (see also [Section 3.3](#)).

Example: In *Ponomaryovi v. Bulgaria*,<sup>375</sup> the ECtHR considered the requirement for two Russian school children without permanent residence to pay secondary school fees. The Court concluded that imposing fees for secondary school in their case had been discriminatory and thus contrary to Article 14 of the ECHR taken together with Article 2 of Protocol No. 1 to the ECHR.<sup>376</sup>

The ESC protects migrant children's educational rights both directly (Article 17, paragraph 2) and indirectly, imposing restrictions on children's employment rights with a view to enabling them to obtain the full benefits of compulsory education (Article 7).

Furthermore, the European Convention on the Legal Status of Migrant Workers<sup>377</sup> endorses migrant children's right to access "on the same basis and under the same conditions as nationals", general education and vocational training in the host state (Article 14 (1)).

Under international law, migrant children's equality of access to education is supported by the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (Article 30).<sup>378</sup>

Article 28 of the CRC provides that all children have the right to free compulsory education. According to Article 29 (1) (c), this right extends far beyond equality of access to education and includes provisions concerning the development of the child's cultural identity, language and values of the child's country of origin.

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375 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 21 June 2011.

376 See also [Section 3.3](#).

377 Council of Europe, [European Convention on the Legal Status of Migrant Workers](#), CETS No. 93, 1977.

378 UN, [Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), 18 December 1990.

## 8.3. Right to health

### Key points

- States have positive obligations to take measures against life-endangering health risks that the authorities are or ought to be aware of.
- State authorities must undertake an effective investigation in case of a person's death.
- Under the ESC, children who are unlawfully in the country are entitled to healthcare beyond urgent medical assistance.
- Acceptability of healthcare requires informed consent or authorisation.
- Under EU law and the ESC, subject to several limitations, migrant children are entitled to access social assistance and healthcare.

**Under EU law**, Article 35 of the EU Charter of Fundamental Rights guarantees a right of access to healthcare.

Children of EU migrant nationals can access social welfare and health support on the same basis as nationals, following three months of residence in the host state.<sup>379</sup> Similar rights are extended to the children of third-country nationals who have acquired permanent residence in a Member State, although these may be restricted to so-called 'core benefits'.<sup>380</sup> As far as refugee and asylum-seeking children are concerned, Member States have to provide access to appropriate social assistance on an equal basis as nationals of the host state, but, again, this can be limited to 'core benefits' (Article 29 of the Qualification Directive). The legislation requires Member States to provide vulnerable migrant children with access to sufficient healthcare support. For instance, children who have suffered violence or torture must be provided with sufficient support to address their physical and mental needs (Chapter IV Recast Reception Directive, Articles 21, 23 (4) and 25). The Qualification Directive contains similar provisions for vulnerable child migrants.

<sup>379</sup> Free Movement Directive, Art. 24.

<sup>380</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, Art. 11 (d)).

**Under CoE law**, the ECHR does not expressly guarantee a right to healthcare or a right to health. However, the ECtHR has dealt with a number of health-related cases in a variety of circumstances. First, the Court examines life-endangering health issues for children. It identifies positive obligations incumbent on the state to take preventive measures against life-endangering health risks that it knows or should know about.

Example: In *Oyal v. Turkey*, the state failed to take preventive measures against the spread of HIV through blood transfusions. As a consequence, a new-born baby was infected with the HIV virus during blood transfusions at a state hospital. While some redress was offered, the ECtHR found that, in the absence of full medical cover for treatment and medication during the lifetime of the child concerned, the state had failed to offer satisfactory redress and thereby violated the right to life (Article 2 of the ECHR).<sup>381</sup> In addition, it ordered the Turkish State to provide free and full medical cover during the lifetime of the victim.

Example: In *Iliya Petrov v. Bulgaria*,<sup>382</sup> a 12-year old boy got seriously injured in an electricity substation. The substation was located in an outdoor park where children and young people often met, and the door was not locked. The ECtHR held that the exploitation of an electricity grid is an activity that poses a heightened risk to persons who are close to the installations. The state has an obligation to put adequate regulation in place, including a system to control the proper application of security rules. The Court ruled that the failure of the state to ensure that the electricity substation was secured, although it knew about the safety problems, amounted to a violation of the right to life (Article 2 of the ECHR).<sup>383</sup>

Moreover, states have positive obligations to account for the treatment of children in a vulnerable situation who are in the care of state authorities (see also [Chapter 6](#) and [Section 7.3](#)).

381 ECtHR, *Oyal v. Turkey*, No. 4864/05, 23 March 2010, paras. 71-72.

382 ECtHR, *Iliya Petrov v. Bulgaria*, No. 19202/03, 24 April 2012 (available in French).

383 *Ibid.*



Example: The case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*<sup>384</sup> concerned an HIV-positive Roma teenager who had a severe intellectual disability and also suffered from tuberculosis, pneumonia and hepatitis, and died at the age of 18. He had been in state care throughout his life. The ECtHR found serious shortcomings in the decision-making concerning the provision of medication and care, and a continuous failure of the medical staff to provide him with appropriate care and treatment. Article 2 of the ECHR had therefore been violated.<sup>385</sup>

Furthermore, in the absence of an emergency, the ECtHR found that medical treatment without parental consent is in breach of Article 8 of the ECHR.

Example: In *Glass v. the United Kingdom*,<sup>386</sup> diamorphine had been administered to a child with severe disability, notwithstanding firm objections by his mother. The ECtHR found that the decision of the hospital authorities to override the mother's objection to the proposed treatment in the absence of authorisation by a Court resulted in a breach of Article 8 of the ECHR.<sup>387</sup>

Example: In *M.A.K. and R.K. v. the United Kingdom*,<sup>388</sup> a nine year old girl underwent a blood test and photographs without parental consent, notwithstanding her father's express instructions not to carry out any further tests while the girl was alone in the hospital. In the absence of any medical urgency, these medical interventions without parental consent were held to be in violation of her right to physical integrity under Article 8 of the ECHR.<sup>389</sup>

In accordance with Articles 6 and 8 of the Convention on Human Rights and Biomedicine,<sup>390</sup> when a child does not have the legal capacity to consent to

384 ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], No. 47848/08, 17 July 2014. See further the description of this ECHR ruling in [Chapter 7](#).

385 See also [Section 7](#).

386 ECtHR, *Glass v. the United Kingdom*, No. 61827/00, 9 March 2004.

387 *Ibid.*, para. 83.

388 ECtHR, *M.A.K. and R.K. v. the United Kingdom*, Nos. 45901/05 and 40146/06, 23 March 2010.

389 *Ibid.*, para. 79.

390 Council of Europe, [Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine](#), CETS No. 164, 1997.

a medical intervention, that intervention may only be carried out with the authorisation of his or her representative, save in an emergency situation. Whereas the ECHR does not require the consent of the child if he or she is legally incapable of consenting, it does hold that the opinion of the child must be taken into consideration “as an HIV determining factor in proportion to his or her age and degree of maturity” (Article 6 (2)).

Furthermore, under Article 11 of the ESC, States Parties agree to take appropriate measures to provide for advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health.<sup>391</sup> Medical assistance and care is guaranteed under Article 13 of the ESC to those who are without adequate resources and unable to secure those resources by their own efforts or from other sources. Finally, in 2011 the Committee of Ministers adopted child-specific guidelines on child-friendly healthcare.<sup>392</sup>

As indicated in the following examples, the ECSR holds that migrant children staying irregularly in a country are entitled to healthcare beyond urgent medical assistance. The ESC includes many references to children’s rights to social welfare and health services (Articles 11, 12, 13, 14, 16 and 17), which apply regardless of their migration status.

Example: The ECSR decision in *International Federation of Human Rights Leagues (FIDH) v. France*<sup>393</sup> concerns France passing a law which ended the exemption of immigrants in an irregular situation with very low incomes from paying for medical treatment, and imposed health care charges. The ECSR ruled that individuals who have not reached the age of majority, including unaccompanied children, must be provided with free medical care.

391 On sexual and reproductive health education, see also under education (Section 8.2).

392 Council of Europe, Committee of Ministers (2011), Guidelines on child-friendly health care, 21 September 2011.

393 ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 8 September 2004, paras. 35–37.

Example: In *Defence for Children International (DCI) v. Belgium*,<sup>394</sup> the ECSR found a violation of Article 17 of the ESC because of restrictions on medical assistance to undocumented migrant children. The Committee confirmed “the right of migrant minors unlawfully in a country to receive health care extending beyond urgent medical assistance and including primary and secondary care, as well as psychological assistance”.<sup>395</sup> It also stated that the lack of reception facilities for foreign minors unlawfully in the country made access to health care difficult. Moreover, it found that causes of ill-health can only be removed to the extent that children are provided with housing and foster homes. Accordingly, it held that there was a violation of Article 11 (1) and (3) of the ESC due to the lack of housing and foster homes.<sup>396</sup>

The European Convention on the Legal Status of Migrant Workers<sup>397</sup> similarly provides that migrant workers who are lawfully employed in the territory of another state, as well as their families, should receive equal access to social and medical assistance (Article 19).

Under international law, more comprehensive provisions on the right to health can be found in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>398</sup> and in Article 24 of the CRC. These instruments emphasise prevention and treatment. The UN Committee on the Rights of the Child emphasises the importance of access to the highest attainable standard of healthcare and nutrition during early childhood,<sup>399</sup> and access for adolescents to sexual and reproductive information.<sup>400</sup> It has also clarified that children’s right to health entails “the right to control one’s health and body,

394 ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 23 October 2012.

395 *Ibid.*, para. 128.

396 *Ibid.*, paras. 116–118.

397 Council of Europe, *European Convention on the Legal Status of Migrant Workers*, CETS No. 93, 1977.

398 UN, General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3.

399 UN, Committee on the Rights of the Child (2006), *General Comment No. 7 (2005): Implementing child rights in early childhood*, UN Doc. CRC/C/GC/7/Rev.1, para. 27.

400 UN, Committee on the Rights of the Child (2003), *General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/4, para. 28.

including sexual and reproductive freedom to make responsible choices”.<sup>401</sup> It encourages states to “consider allowing children to consent to certain medical treatments and interventions without the permission of a parent, caregiver, or guardian, such as HIV testing and sexual and reproductive health services, including education and guidance on sexual health, contraception and safe abortion”.<sup>402</sup>

## 8.4. Right to housing

### Key points

- The right to adequate housing is guaranteed in Article 31 of the ESC.
- The ECSR holds that adequate shelter is to be provided to children residing irregularly in a country and that the living conditions in shelters must be in keeping with human dignity.
- According to the ECtHR, inadequate housing does not justify placement into public care.

**Under EU law**, Article 34 (3) of the EU Charter of Fundamental Rights contains a reference to the right to housing assistance as part of the struggle against social exclusion and poverty. The Racial Equality Directive highlights housing among the goods and services available to the public to which non-discriminatory access and supply should be granted.<sup>403</sup> Non-differential treatment regarding housing benefits applies to long-term residents. However, EU law tries to ensure, regarding family reunification for instance, that family members will not constitute a burden for the Member States’ social assistance systems.<sup>404</sup> The Family Reunification Directive requires applications for family reunification to provide evidence that a valid sponsor of family reunification (i.e. a third-country national allowed to reside for a period of one year or more and with a reasonable prospect of obtaining the right of permanent residence) has

401 UN, Committee on the Rights of the Child (2013), *General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, UN Doc. CRC/C/GC/15, para. 24.

402 *Ibid.*, para. 31.

403 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and education, 27 November 2000, Art. 3.

404 See further FRA and ECtHR (2014), p. 201.

accommodation regarded as normal for a comparable family in the same region. The accommodation should meet the general health and safety standards in force in the Member State concerned.<sup>405</sup>

**Under CoE law**, there is no right to be provided with housing under the ECHR, but if a state decides to provide housing, it must do so in a non-discriminatory way.

Example: In *Bah v. the United Kingdom*<sup>406</sup> the applicant, who was lawfully residing in the UK, was allowed to be joined by her son on the condition that he did not have recourse to public funds. Shortly after her son's arrival, the applicant sought assistance in finding accommodation. However, because her son was subject to immigration control, she was refused the priority to which her status as an unintentionally homeless person with a minor child would ordinarily have entitled her. The authorities ultimately helped her find new accommodation and later provided her with social housing. The applicant complained that the refusal to grant her priority had been discriminatory. The ECtHR held that it was legitimate to put in place criteria for the allocation of limited resources such as social housing, provided that such criteria were not arbitrary or discriminatory. There had been nothing arbitrary in the denial of priority to the applicant, who had brought her son into the country in full awareness of the condition attached to his leave to enter. Moreover, the applicant had never in fact been homeless and there were other statutory duties which would have required the local authority to assist her and her son had the threat of homelessness actually manifested itself. Consequently, there had been no violation of Article 14 taken in conjunction with Article 8 of the ECHR.

The ECtHR also examines cases of eviction of Roma families from caravan sites.<sup>407</sup> The ECtHR has indirectly dealt with the issue of the quality of housing, stating that inadequate housing does not justify placing children into public care<sup>408</sup> (see also [Sections 5.2.](#) and [6.2.](#)).

405 Council Directive 2003/86/EC on the right to family reunification of 22 September 2003 (Family Reunification Directive) Art. 7 (1) (a).

406 ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 27 September 2011.

407 ECtHR, *Connors v. the United Kingdom*, No. 66746/01, 27 May 2004.

408 ECtHR, *Wallová and Walla v. the Czech Republic*, No. 23848/04, 26 October 2006, paras. 73–74 (available in French); ECtHR, *Havelka and Others v. the Czech Republic*, No. 23499/06, 21 June 2007, paras. 57–59 (available in French).

The right to adequate housing is guaranteed in Article 31 of the ESC. The ECSR holds that “[a]dequate housing under Article 31 (1) means a dwelling which is safe from a sanitary and health point of view, i.e. it must possess all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity and must also be structurally secure, not overcrowded and with secure tenure supported by the law”.<sup>409</sup> Evictions are permissible if justified, carried out in conditions that respect dignity, and if alternative accommodation is made available.<sup>410</sup> Living conditions in a shelter “should be such as to enable living in keeping with human dignity [...] [and] must fulfil the demands for safety, health and hygiene, including basic amenities, i.e. clean water, sufficient lighting and heating. The basic requirements of temporary housing include also security of the immediate surroundings.”<sup>411</sup>

With regard to housing for foreign children in an irregular situation, the ECSR holds that both the failure to provide any form of accommodation and the provision of inappropriate accommodation in hotels amount to a violation of Article 17 (1) of the ESC.<sup>412</sup> Moreover, under Article 31 (2) of the ESC on the prevention of homelessness, states are required to provide adequate shelter to children in an irregular situation without resorting to detention.<sup>413</sup>

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409 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009, para. 43.

410 ECSR, *European Roma Rights Centre (ERRC) v. Italy*, Complaint No. 27/2004, 7 December 2005, para. 41; ECSR, *Médecins du Monde – International v. France*, Complaint No. 67/2011, 11 September 2012, paras. 74–75 and 80.

411 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009, para. 62.

412 ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 23 October 2012, paras. 82–83. See also FRA (2010), p. 30.

413 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009, para. 64.

## 8.5. Right to an adequate standard of living and right to social security

### Key points

- Access to child allowances and parental leave must be non-discriminatory.
- Under EU law, the social security coverage of young workers in apprenticeship contracts should not be so low that it excludes them from the general range of protection.
- Under the ESC, the suspension of family allowances in case of truancy is a disproportionate limitation to the right of the family to economic, social and legal protection.

**Under EU law**, Article 34 (1) of the EU Charter of Fundamental Rights stipulates that the “Union recognises and respects the entitlement to social security benefits and social services” in cases that correspond to the traditional branches of social security (maternity, illness, industrial accidents, dependency or old age, and loss of employment). Entitlement extends to everyone residing and moving legally within the EU. The right to social assistance is recognised to ensure a decent existence for those who lack sufficient resources and to combat social exclusion and poverty. All these aspects are qualified by the “rules laid down by Union Law and national laws and practices” (Article 34 (1) of the Charter).

The CJEU holds that, where a Member State’s own nationals are only required to reside in the Member State to access a child-raising allowance, nationals of other EU Member States cannot be made to produce a formal residence permit to access the same benefits.<sup>414</sup> The refusal of parental leave to certain categories of persons, such as commissioning mothers who have a baby through a surrogacy arrangement, is discriminatory.<sup>415</sup> The same applies to male civil servants who are refused parental leave if their wives do not work or exercise any profession, unless the wives are unable to meet the needs related to the upbringing of the child due to serious illness or injury.<sup>416</sup> Similarly, Member States have to establish a parental leave regime in the event of the birth of

414 CJEU, C-85/96, *Maria Martínez Sala v. Freistaat Bayern*, 12 May 1998, paras. 60–65.

415 CJEU, C363/12, *Z v. A Government Department, The Board of Management of a Community School* [GC], 18 March 2014.

416 CJEU, C-222/14, *Konstantinos Maistrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthroponon Dikaiomaton*, 16 July 2015, para. 53.

twins that ensures these parents receive treatment particular to their needs. This can be ensured through basing the length of parental leave on the number of children born, and providing for other measures, such as material assistance or financial aid.<sup>417</sup>

**Under CoE law**, the ECtHR examined alleged discrimination in the granting of parental leave and parental allowances in Russia.

Example: In *Konstantin Markin v. Russia*,<sup>418</sup> parental leave was refused to a serviceman in the Russian army, while servicewomen were entitled to such leave. In the Court's view, the exclusion of servicemen from the entitlement to parental leave could not be reasonably justified. Neither the special armed forces context and assertions about the risk to operational effectiveness, nor the arguments about the special role of women in raising children or the prevailing traditions in the country were found to justify the differential treatment. The Court found that Article 14 in conjunction with Article 8 of the ECHR had been violated.

More extensive provisions on the right to social security, the right to social and medical assistance, and the right to benefit from social welfare services can be found in Articles 12–14 of the ESC. Article 16 of the ESC explicitly mentions social and family benefits as a way the economic, legal and social protection of the family life can be promoted. Article 30 of the ESC provides for a right to protection against poverty and social exclusion. Certain social security claims may fall within the scope of Article 1, Protocol No. 1 to the ECHR, provided that national legislation generates a proprietary interest by providing for the payment as of right of a welfare benefit, whether conditional or not on the prior payment of contributions.<sup>419</sup>

Article 12 of the ESC requires states to establish or maintain a social security system, and to endeavour to raise it progressively to a higher level.

Article 16 of the ESC requires states to ensure the economic, legal and social protection of the family by appropriate means. The primary means should be family or child benefits, provided as part of social security and available either

417 CJEU, C-149/10, *Zoi Chatzi v. Ypourgos Oikonomikon*, 16 September 2010, paras. 72–75.

418 ECtHR, *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012.

419 ECtHR, *Stummer v. Austria* [GC], No. 37452/02, 7 July 2011, para. 82.



universally or subject to a means-test. These benefits must constitute an adequate income supplement for a significant number of families. The ECSR assesses the adequacy of family (parental) benefits with respect to the median equivalised income (Eurostat).<sup>420</sup> The ECSR finds that the absence of any general system of family benefits is not in conformity with the ESC.<sup>421</sup>

The ECSR accepts, however, that the payment of child benefits may be made conditional based on the child's residence.<sup>422</sup> It holds that the introduction of only very limited protection against social and economic risks given to children (15–18 years old) in special apprenticeship contracts (they were only entitled to sickness benefits in kind and to occupational accident coverage at a rate of 1 %) effectively excludes a distinct category of (minor) workers from the "general range of protection offered by the social security system at large". It is hence in violation of the state's obligation to progressively raise the system of social security.<sup>423</sup>

The suspension of family allowances in cases of truancy is also a disproportionate limitation on the right of the family to economic, social and legal protection.

Example: In a complaint against France, the European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) argued that suspending family allowances as a measure to address truancy was a violation of the right of families to social, legal and economic protection under Article 16 of the ESC. In finding the measure disproportionate to the aim pursued, the Committee noted that "the contested measure of suspending and possibly suppressing family allowances makes parents exclusively responsible for pursuing the aim of reducing truancy and increases the economic and social vulnerability of the families concerned".<sup>424</sup>

420 ECSR, Conclusions 2006, Estonia, p. 215

421 ECSR, Conclusions 2011, Turkey, Art. 16.

422 ECSR (2007), Conclusions XVIII-1 – General Introduction, p. 11.

423 ECSR, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*, Complaint No. 66/2011, 23 May 2012, para. 48.

424 ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EU-ROCEF) v. France*, Complaint No. 82/2012, 19 March 2013, para. 42.

The European Convention on the Legal Status of Migrant Workers<sup>425</sup> provides that migrant workers lawfully employed in another state as well as their families should receive equal access to social security (Article 18), and other “social services” that facilitate their reception in the host state (Article 10). Similarly, the European Convention on Social Security protects refugees and stateless persons’ rights to access social security provision in the host state (including family benefits for children).<sup>426</sup>

Under international law, the right to an adequate standard of living is guaranteed in Article 11 of the ICESCR and Article 27 of the CRC.

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425 Council of Europe, [European Convention on the Legal Status of Migrant Workers](#), CETS No. 93, 1977.

426 Council of Europe, [European Convention on Social Security](#), CETS No. 78, 1972.

# 9

## Migration and asylum



EU	Issues covered	CoE
<p>TFEU, Article 21</p> <p>Charter of Fundamental Rights, Article 45 (freedom of movement)</p> <p>Reception Conditions Directive (2013/33/EU)</p> <p>Return Directive (2008/115/EC)</p> <p>Asylum Procedures Directive (2013/32/EU)</p> <p>Dublin Regulation (No. 604/2013)</p> <p>Qualification Directive (2011/95/EU)</p> <p>Freedom of Movement Directive (2004/38/EC)</p> <p>CJEU, C-648/11, <i>The Queen, on the application of MA and Others v. Secretary of State for the Home Department</i>, 2013 (Dublin transfers)</p> <p>Schengen Borders Code Regulation (562/2006), Annex VII, 6</p>	<p>Entry and residence</p>	<p>ECHR, Article 8 (family life)</p>
<p>Asylum Procedures Directive (2013/32/EU), Article 25(5)</p>	<p>Age assessment</p>	
<p>TFEU, Articles 67, 73 and 79 (2) (a)</p> <p>Family Reunification Directive (2003/86/EC)</p> <p>Qualification Directive (2011/95/EU), Article 31</p> <p>Reception Conditions Directive (2013/33/EU)</p> <p>Temporary Protection Directive (2001/55/EC)</p> <p>Dublin Regulation (No. 604/2013)</p> <p>Return Directive (2008/115/EC), Article 13</p>	<p>Family reunification and separated children</p>	<p>ECHR, Article 8 (right to respect for private and family life)</p> <p>ECtHR, <i>Şen v. the Netherlands</i>, No. 31465/96, 2001 (balancing rights)</p> <p>ECtHR, <i>Jeunesse v. the Netherlands</i> [GC], No. 12738/10, 2014 (family life, child's best interests)</p>

EU	Issues covered	CoE
Reception Conditions Directive, (2013/33/EU), Article 11 Return Directive (2008/115/EC), Article 17	<b>Detention of children</b>	ECtHR, <i>Mubilanzila Mayeka and Kaniki Mitunga v. Belgium</i> , No. 13178/03, 2006 (detention in view of expulsion) ECtHR, <i>Popov v. France</i> , Nos. 39472/07 and 39474/07, 2012 (detention in view of expulsion) ECtHR, <i>Kanagaratnam v. Belgium</i> , No. 15297/09, 2011 (detention in view of expulsion)
Freedom of Movement Directive (2004/38/EC), Preamble (para. 24), Articles 7, 12, 13 and 28 (3) (b)	<b>Expulsion</b>	ECtHR, <i>Gül v. Switzerland</i> , No. 23218/94, 1996 (deportation of family) ECtHR, <i>Boultif v. Switzerland</i> , No. 54273/00, 2001 (deportation of children) ECtHR, <i>Tarakhel v. Switzerland</i> [GC], No. 29217/12, 2014 (deportation of children)
Charter of Fundamental Rights, Articles 47–48 (right to an effective remedy and to a fair trial, presumption of innocence and right of defence) Asylum Procedures Directive (2013/32/EU), Article 7 and 25 Victims’ Directive (2012/29/EU), Article 8	<b>Access to justice</b>	ECHR, Article 13 (right to an effective remedy) ECtHR, <i>Rahimi v. Greece</i> , No. 8687/08, 2011 (effective remedies to challenge conditions of detention)

The EU has clear competence to legislate in the area of migration and asylum. Provisions covering migrant children govern a range of migration situations, including long-term work-related migration, asylum, and subsidiary protection, and also addresses the situation of migrants in an irregular situation. In addition to the protection migrant children are entitled to under Article 24 of the EU Charter of Fundamental Rights, Articles 18 and 19 of the Charter deal with the right to asylum and protection in the event of removal, expulsion or

extradition. The EU has also paid attention to the specific needs of unaccompanied children, including regarding legal aspects such as legal guardianship and legal representation, age assessment, family tracing and reunification, asylum procedures, detention, and expulsion, as well as aspects relating to the living conditions of the children, including accommodation, healthcare, education and training, religion, cultural norms and values, recreation and leisure and social interaction and experiences of racism.<sup>427</sup>

Within the CoE system, four conventions in particular support the rights of migrant children in different contexts: the ECHR, the ESC, the European Convention on the Legal Status of Migrant Workers and the European Convention on Nationality. This chapter mainly focuses on the implementation of ECHR provisions, notably Article 3 (protection against inhuman, degrading treatment), Article 5 (deprivation of liberty), and Article 8 (right to respect for private and family life), taken alone or in conjunction with Article 14 (non-discrimination). These provisions are used to support migrant, refugee and asylum seeking children's and their family members' rights to family reunification, access to justice and ongoing residence in the host state.

At the international level, a number of CRC provisions uphold children's rights in the context of migration and asylum and have informed the development of legal measures at the European level. Specifically, Article 7 protects children's right to birth registration, nationality, and parental care; Article 8 protects the child's right to identity, including nationality, name and family relations; Article 9 ensures that separated children should maintain contact with both parents where it is in their best interests; and Article 22 provides refugee children with the right to special protection and help. Further, the UN Convention Relating to the Status of Refugees<sup>428</sup> along with its 1967 Protocol are universally regarded as the centrepiece of international refugee protection.

The following sections focus on entry and residence ([Section 9.1](#)); age assessment ([Section 9.2](#)); family reunification for separated children ([Section 9.3](#)); detention ([Section 9.4](#)); expulsion ([Section 9.5](#)) and access to justice ([Section 9.6](#)).

427 See further, FRA (2010); FRA (2011a), pp. 27–38; FRA (2011b), pp. 26–30.

428 UN, General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137.

## 9.1. Entry and residence

### Key points

- EU nationals enjoy the right to freedom of movement within the EU.
- Decisions on child entry and residence should be taken in the framework of appropriate mechanisms and procedures and in the child's best interests.

**Under EU law**, the nature and scope of children's rights differs largely according to the nationality of the child and the child's parents and according to whether the child is migrating with his/her parents or independently.

The migration of EU nationals is regulated by various legal instruments. The rights granted to EU nationals are far-reaching and aim to stimulate optimum mobility across the EU. First, Article 21 of the TFEU provides that EU citizens and their family members have a right to move and reside freely within the territory of any EU Member State. Moreover, once they arrive in the host state, they have a right to be treated equally to nationals of that state in relation to their access to and conditions of work, social and welfare benefits, school, healthcare, etc.<sup>429</sup> Article 45 of the EU Charter of Fundamental Rights equally guarantees the freedom of movement of EU citizens.

Further, the rights of children who move with EU-national parents/carers are also governed by the Free Movement Directive.<sup>430</sup> This stipulates that family members have a right to enter and reside in the host state either with or following the primary EU migrant's move there (Article 5 (1)). Family members, for the purposes of this instrument, include any biological children of either the EU migrant or their spouse or partner, provided they are under the age of 21 or are "dependent" (Article 2 (2)). They may be both EU and non-EU nationals, provided the primary migrant with whom they have moved is an EU

<sup>429</sup> Some restrictions have been imposed on migrants from Croatia, the most recent country to accede to the EU, for a transitional period up until June 2015, with the possibility for Member States of extending the period in which restrictions will be imposed until 2020.

<sup>430</sup> Please note that relevant provisions of the directive also apply in the EEA. See further Agreement on the European Economic Area, 2 May 1992, Part III, Free Movement of Persons, Services and Capital and Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, entered into force on 1 June 2002, OJ 2002 L 114/6.

national. For the first three months following their move, the family's right of residence is unconditional, but thereafter EU citizens who wish their children to remain with them in the host state must demonstrate that they have sufficient financial resources and comprehensive sickness insurance to support them (Article 7). Children and other family members automatically acquire permanent residence after a period of five consecutive years of residence in the host state with the EU citizen (Articles 16 (2) and 18). At that point, they are no longer subject to any resources/sickness insurance conditions.

The freedom of movement of third-country nationals who do not belong to the family of an EU migrant is subject to more restrictions. This area is partially regulated by EU law and partially regulated by national immigration laws.

In the context of international protection procedures, children are regarded as "vulnerable persons" whose specific situation Member States are required to take into account when implementing EU law.<sup>431</sup> This requires states to identify and accommodate any special provision that asylum-seeking children in particular might need when they enter the host state. Article 24 of the EU Charter of Fundamental Rights applies to the entry and residence requirements of the EU asylum *acquis* as it relates to children. It requires that in all actions relating to children, whether taken by public authorities or private institutions, EU Member States ensure that the best interests of the child are a primary consideration. More specifically, the best interests principle underpins the implementation of Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive)<sup>432</sup> and the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin Regulation) as they relate to children.<sup>433</sup> Both texts also contain specific guarantees for unaccompanied children, including their legal representation. The Regulation (562/2006) on the Schengen Borders Code

431 See specifically Reception Conditions Directive 2013/33/EU, Art. 21 and Return Directive 2008/115/EC, Art. 3 (9).

432 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, L 180/60, Art. 25(6).

433 Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ 2013 L. 180/31-180/59, Art. 6.

requires border guards to check that the persons accompanying children have parental care over them, especially where children are accompanied by only one adult and there are serious grounds for suspecting that the children may have been unlawfully removed from the custody of their legal guardian(s). In this case, the border guard must investigate further to detect any inconsistencies or contradictions in the information given. If children are travelling unaccompanied, border guards must ensure, by means of thorough checks on travel and supporting documents, that the children are not leaving the territory against the wishes of the person(s) responsible for their parental care.<sup>434</sup>

**Under CoE law**, states have the right, as a matter of well-established international law and subject to their treaty obligations, including the ECHR, to control the entry, residence and expulsion of aliens. The right to respect for private and family life in Article 8 of the ECHR is often invoked as a safeguard against expulsion in cases concerning children who otherwise would have been assessed as not in need of international protection, including subsidiary protection. Article 8 violations have been found in cases involving children, as forced separation from close family members is likely to have an acute impact on their education, social and emotional stability and identity.<sup>435</sup>

## 9.2. Age assessment<sup>436</sup>

### Key points

- Age assessment procedures must take account of the child's rights.
- Age assessment refers to the procedures through which authorities seek to establish the legal age of a migrant to determine which immigration procedures and rules need to be followed.

**Under EU law**, Article 25 (5) of the Asylum Procedures Directive allows Member States to resort to medical examinations, but requires that these be performed

434 Regulation (562/2006) of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) Annex VII, 6.

435 ECtHR, *Şen v. the Netherlands*, No. 31465/96, 21 December 2001 (available in French); ECtHR, *Tuqabo-Tekle and Others v. the Netherlands*, No. 60665/00, 1 December 2005.

436 See also FRA and ECtHR (2014), [Section 9.1.2](#).



“with full respect for the individual’s dignity, shall be the least invasive examination, and shall be carried out by qualified medical professionals”. This provision also requires that individuals are informed in a language they can understand that such an assessment may be carried out and their consent to examination should be obtained. The refusal to undergo age assessment cannot result in a rejection of the application for international protection.

There is significant variation in the nature and scope of age assessment methods applied across the EU.<sup>437</sup> In the UK for instance, the judiciary has reviewed domestic procedures on age assessment, and in the case of *Merton* it determined the minimum procedural requirements for assessing age when an individual claims to be an unaccompanied child.<sup>438</sup> Such requirements include, among others, the right of the asylum seeker to be informed about the reasons for rejection or objections of the interviewer.<sup>439</sup> National courts have also stated the need to apply the benefit of doubt in age assessment cases, although this has been interpreted by some national courts as a mere “sympathetic assessment of evidence” rather than a formal “benefit of doubt” principle.<sup>440</sup>

**Under CoE law**, there is no specific provision or ECtHR case law relating to children’s rights in the context of age assessment procedures. However, particularly invasive practices used to this end might raise an issue under Articles 3 or 8 of the ECHR. Article 3 has been interpreted to include a broad range of scenarios that might be considered inhumane or degrading, including invasive physical examinations of children.<sup>441</sup> Under Article 8, applied to an immigration context, the authorities could legitimately interfere with a child’s right to privacy and conduct age assessments if in accordance with the law and necessary to protect one of the legitimate aims listed in Article 8 (2) of the ECHR.

Under international law, Article 8 of the CRC obliges states to respect the child’s right to identity. This implies an obligation to assist a child in asserting

437 For an overview of the various methods applied in each country, see the European Asylum Support Office Guidelines on Age Assessment Practice in Europe, Luxembourg, 2014. See further, FRA (2010), pp. 53–55.

438 United Kingdom, Court of Appeal, *R (on the application of B) v. The Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689, 14 July 2003.

439 See FRA (2010), pp. 61–66.

440 United Kingdom, Court of Appeal, *R (on the application of CJ) v. Cardiff County Council* [2011] EWCA Civ 1590, 20 December 2011, reaffirmed in United Kingdom, Upper Tribunal, *R (on the application of MK) v. Wolverhampton City Council* [2013] UKUT 00177 (IAC), 26 March 2013.

441 ECtHR, *Yazgül Yilmaz v. Turkey*, No. 36369/06, 1 February 2011 (available in French).

his or her identity, which may involve confirming the child's age. Age assessment procedures, however, should be a last resort.

In any case, the best interests principle should underpin national procedures on age assessment. The UN Committee on the Rights of the Child affirms that age assessment should take into account the physical appearance of the child and his or her psychological maturity. The assessment must be conducted in a scientific, safe, child- and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child, and giving due respect to human dignity.<sup>442</sup>

### 9.3. Family reunification for separated children<sup>443</sup>

#### Key points

- European-level provisions focus mainly on reuniting children safely with their parents, either in the host country or their country of origin.
- Preference will be given to the child's parents and/or primary carers when determining which family members should be reunited with the family.
- The child's best interests must guide family reunification cases.

**Under EU law**, the most notable instrument is the Family Reunification Directive, which requires Member States to authorise the entry and residence of the unaccompanied child's parents who are third-country nationals – in those situations where it is not in the child's best interest to join his/her parents abroad instead. In the absence of a parent, Member States have the discretion to authorise the entry and residence of the child's legal guardian or any other member of the family.<sup>444</sup> The definition and rights attached to 'family' are therefore more generous in the context of unaccompanied children than for most other categories of child migrants.

442 General Comment 6 (2005) on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, (V)(a)(31)(A).

443 See also FRA and ECtHR (2014), [Section 5.3](#) on family reunification.

444 Arts. 10 (3) (a) and (c), respectively.

As to asylum-seeking children, the Qualification Directive emphasises the need to ensure, where possible, that an unaccompanied child is placed with adult relatives in the host state, that he or she remains with any siblings, and that absent family members are located in a sensitive and safe manner as soon as practicable (Article 31). The Reception Conditions Directive makes similar provisions for unaccompanied children who have not yet acquired refugee status (Article 24).

Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive) also seeks to expedite the reunification of family members (including children) who have been separated from one another following a sudden evacuation from their country of origin (Article 15).<sup>445</sup> However, this directive has to date not been applied; for it to be 'triggered', a Council decision is required – and such a decision has not yet been taken.

Article 24.3 of the Reception Conditions Directive (Recast) also requires that Member States start tracing the members of the unaccompanied child's family, where necessary. This is done with the assistance of international or other relevant organisations as soon as possible after an application for international protection is made, whilst protecting the child's best interests. In cases of a possible threat to the life or integrity of a child or his/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 them is undertaken on a confidential basis to avoid jeopardising their safety. Further, in accordance with Article 31 (5) of the Qualifications Directive (Recast), the granting of international protection to the child should not interfere with the start or continuation of the tracing process.

The Dublin Regulation provides, in addition, that if an unaccompanied child has a relative or relatives living in another Member State who can take care of him or her, Member States are obliged, where possible, to unite the child with them, unless this is contrary to the child's best interests (Article 8). In addition,

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<sup>445</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212.

the Regulation contains an obligation to trace the relatives on the territory of Member States, while protecting the best interests of the child (Article 6). Furthermore, the Reception Conditions Directive contains an obligation to start tracing the members of the child's family, where necessary with the assistance of international or other relevant organisations (Article 24). The latter type of assistance is also envisaged under the Dublin Regulation (Article 6).

The best interests principle must always be applied when considering a decision concerning family reunification. For example, parents must be able to prove that they are capable of exercising their parental duties to the benefit of the child. National courts will find a child's return to his or her country of origin unlawful when authorities have failed to gather evidence that there are adequate arrangements for the child's reception and care in that country (Return Directive, Article 10 (2)).

**Under CoE law**, Article 8 of the ECHR does not allow migrant parents and their children an absolute right to choose where they want to live. National authorities can legitimately deport or refuse entry to family members provided there are no insurmountable obstacles to establishing family life elsewhere.<sup>446</sup> Such decisions must always be a proportionate response to wider public policy concerns, including the desire to deport or prevent the entry of a parent who has been involved in criminal activity.

Example: In *Şen v. Netherlands* the ECtHR confirmed that in striking a balance between the rights of the child/family and wider public policy interests, three key factors must be taken into account: the age of the children; their situation in the country of origin; and the degree to which they actually depend on their parents.

Example: The case of *Jeunesse v. the Netherlands*<sup>447</sup> concerns the Dutch authorities' refusal to allow a Surinamese woman married to a Dutch national, with whom she had three children, to reside in the Netherlands on the basis of her family life in the country. The ECtHR considered that the authorities had not paid enough attention to the impact of their re-

446 ECtHR, *Bajsultanov v. Austria*, No. 54131/10, 12 June 2012; ECtHR, *Latifa Benamar and Others v. the Netherlands*, Decision of inadmissibility, No. 43786/04, 5 April 2005.

447 ECtHR, *Jeunesse v. the Netherlands* [GC], No. 12738/10, 3 October 2014.

fusal on the applicant's children and their best interests. The ECtHR found a violation of Article 8 of the ECHR on account that a fair balance had not been struck between the personal interests of the applicant and her family in maintaining their family life in the Netherlands and the public order interests of the Government in controlling immigration.

Under international law, a child has the right not to be separated from his or her family unless separation is deemed to be in the child's best interests (Article 9 (1) CRC). Article 10 of the CRC provides that a child whose parents live in different countries should be allowed to move between those countries to stay in contact with them both, or to reunify, subject to national immigration law. The best interests principle, as enshrined in Article 3 of the CRC, underpins all decisions relating to family reunification with a child or unaccompanied child.<sup>448</sup>

## 9.4. Detention

### Key points

- European law authorises the detention of children in an immigration context only as a measure of last resort.
- National authorities are obliged to place children in appropriate alternative accommodation.

**Under EU law**, Article 11 of the Reception Conditions Directive (Recast) requires that children should only be detained as a last measure and only if less coercive measures cannot be applied effectively. Such detention should be for the shortest period of time possible, and all efforts made to release those detained and to place them in a suitable accommodation. Where children are detained, they should have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age. According to the same article, unaccompanied children too should only be detained in exceptional circumstances, and all efforts should be made to release them as soon as

<sup>448</sup> According to UNICEF, in relation to claims to reunite the child with his/her family in the host state, national courts must also ensure that parents are not exploiting their children in order to obtain residence permits for that country. See UNICEF, *Judicial implementation of Art. 3 of the CRC in Europe*, p. 104. See also UNHCR, *Guidelines on Determining the Best Interests of the Child*, May 2008.

possible. They should never be detained in prison accommodation, but rather be provided with accommodation in institutions equipped with personnel and age-appropriate facilities. Their accommodation should be separate from adults.

Article 17 of the Return Directive envisages the detention of children and families whose asylum application has been rejected subject to certain conditions. With regard to unaccompanied children, however, it requires that they be placed in institutions provided with staff and facilities which respond to the needs of persons of their age. There is as of yet no CJEU case law relating specifically to the detention of children.

**Under CoE law**, the detention of migrant children has been addressed in the context of Articles 3 and 5 of the ECHR.

Example: *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,<sup>449</sup> concerns an unaccompanied child held in detention. A five year old child was detained in a transit centre for adults for two months without appropriate support. The child had travelled from the Democratic Republic of Congo without the necessary travel papers in the hope of being reunited with her mother, who had obtained refugee status in Canada. The child was subsequently returned to the Democratic Republic of Congo, despite the fact that she had no family members waiting there to care for her. The ECtHR ruled that in the absence of any risk of the child seeking to evade the supervision of the Belgian authorities, detaining her in a closed centre for adults had been unnecessary. The ECtHR also noted that other measures – such as placing her in a specialised centre or with foster parents – could have been taken that would have been more conducive to the best interest of the child as enshrined in Article 3 of the CRC. The ECtHR found violations of Articles 3, 5 and 8 of the ECHR.

Other cases have highlighted the illegality of detention, even where the child in question was accompanied by a parent.

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

Example: In *Muskhadzhiyeva and Others v. Belgium*,<sup>450</sup> the ECtHR ruled that the month-long detention in a closed transit centre of a mother and her four children, aged between seven months and seven years, constituted a violation of Article 3 of the ECHR. In reaching its conclusions, the Court drew attention to the fact that the centre was “ill-equipped to receive children”, with serious consequences for their mental health.

Example: *Popov v. France*<sup>451</sup> concerns the administrative detention of a family for two weeks pending their deportation to Kazakhstan, confirms this ruling. The ECtHR found a violation of Article 3 of the ECHR insofar as the French authorities had not measured the inevitably harmful effects on the two children (who were five months and three years old) of being held in a detention centre in conditions that were “ill-adapted to the presence of children”.<sup>452</sup> The Court also found a violation of Article 5 and Article 8 in respect of the whole family and referred to Article 37 of the CRC, which provides that “[e]very 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”.<sup>453</sup>

Example: Similarly, in *Kanagaratnam v. Belgium*,<sup>454</sup> the detention of an asylum-seeking mother and her three children in a closed centre for aliens in an irregular situation for four months amounted to a breach of Articles 3 and 5 of the ECHR. Despite the fact that the children were accompanied by their mother, the Court considered that, by placing them in a closed centre, the Belgian authorities had exposed them to feelings of anxiety and inferiority and had, in full knowledge of the facts, risked compromising their development.<sup>455</sup>

450 ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010 (available in French).

451 ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012.

452 *Ibid.*, para. 95.

453 *Ibid.*, para. 90.

454 ECtHR, *Kanagaratnam v. Belgium*, No. 15297/09, 13 December 2011 (available in French).

455 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in its 19th General Report has described safeguards for irregular migrants deprived of their liberty, and additional safeguards for children; see further: *20 years of combating torture, 19th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 1 August 2008 to 31 July 2009.

Under international law, Article 9 (4) of the CRC provides that when a child is detained, state authorities must inform the child's parents of his or her whereabouts.<sup>456</sup>

## 9.5. Expulsion<sup>457</sup>

### Key points

- The vulnerability of migrant children to expulsion is intrinsically linked with their parents' residence status in the host state.
- The best interests principle should guide all decisions relating to the expulsion of immigrant children and their family/primary carers.
- Under EU law, there are circumstances in which migrant children can remain in a host state notwithstanding their parents' legal status, particularly with a view to completing their education or where establishing family life elsewhere would be difficult.

**Under EU law**, as with other areas of EU migration law, rules governing the expulsion of children differ according to their nationality, their parents' nationality and the context of their migration. Once a child obtains access to a Member State under EU free movement law, he/she is likely to be able to remain there, even if the EU migrant parent he/she originally moved with no longer qualifies for ongoing residence or decides to leave.

Specifically, under the Free Movement Directive, children and other family members can remain in the host state following the death of the EU citizen parent they initially moved with (Article 12 (2)), provided they lived in the host state for at least 12 months before their parent's death. Similarly, they can, in principle, remain in the host state following their parent's departure. However, in both cases, if the child/family member is a third-country national, their ongoing residence is contingent on their being able to demonstrate they have

456 On international safeguards for children in situation of detention see *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68.

457 Otherwise referred to as return, removal, repatriation, extradition, or deportation, depending on the legal context. For the purposes of this chapter, the term expulsion will be used to define the lawful removal of a non-national or other person from a state. See also FRA and ECtHR (2014), Section 5.4 on maintaining the family – protection from expulsion.



enough money to support themselves. They must also have sickness insurance (Article 7).

The rules are even more permissive for children enrolled in education facilities in the host state. In such cases, they and their custodial parent or carer are entitled to remain in the host state following the death or departure of the primary EU migrant citizen, irrespective of the child's nationality (Article 12 (3)). While originally it was thought that this education-related concession only applied to children in families with sufficient money to support themselves,<sup>458</sup> later case law has confirmed that it extends to children in education who may be dependent on social welfare support.<sup>459</sup>

Furthermore, family members and particularly third-country national parents also enjoy a right to remain in the host state following divorce from the partner who was an EU citizen, if they have primary custody of the couple's children or have been awarded rights of access to the children that must be exercised in the host state (Articles 13 (2) (b) and 13 (2) (d)).

The CJEU has referred to a child's status as an EU citizen under Article 20 of the TFEU to grant the child's third-country national parents a permit to work and reside in the EU Member State of the child's citizenship. This enables the child to enjoy the rights attached to his/her status as an EU citizen, in so far as the child would otherwise have to leave the EU to accompany his/her parents.<sup>460</sup> Subsequent CJEU jurisprudence indicates, however, that "the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted".<sup>461</sup>

458 CJEU C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002.

459 CJEU C-480/08, *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*, 23 February 2010; CJEU C-310/08, *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department* [GC], 23 February 2010. The education of migrant children is considered further in Section 8.2.

460 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEm)*, 8 March 2011.

461 CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 15 November 2011, para. 68. See also CJEU, C-40/11, *Yoshikazu Iida v. Stadt Ulm*, 8 November 2012. See further, FRA and ECtHR (2014), pp. 125–127.

The Free Movement Directive explicitly provides that any exceptional expulsion of children should be in line with the provisions of the CRC (Recital 24). Moreover, Article 28 (3) (b) endorses children's immunity from expulsion unless it is deemed to be in their best interests and in accordance with the CRC.

As far as asylum seeking children whose claim has been rejected are concerned, the Return Directive specifies that the best interests of the child should inform decisions relating to the return of unaccompanied children (Article 10). Moreover, before removing an unaccompanied child from a Member State, the authorities of that Member State must be satisfied that the child will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return (Article 10 (2)).

In circumstances where asylum seeking children are returned to another Member State to have their asylum claim assessed, the Dublin Regulation stipulates that the best interests principle must guide the application of such decisions (Article 6). Furthermore, the regulation provides a checklist of factors to assist the authorities' determination of what is in the child's best interests. This includes due account for the child's family reunification possibilities; the child's well-being and social development; safety and security considerations, in particular where there is a risk of the child being a victim of human trafficking; and the views of the child, in accordance with his or her age and maturity.

Example: In *The Queen, on the application of MA and Others v. Secretary of State for the Home Department*,<sup>462</sup> the CJEU had to determine which state was responsible in the case of an unaccompanied child who had submitted asylum applications in different EU Member States and who had no family or relatives in other EU Member States. The CJEU clarified that in the absence of a family member legally present in a Member State, the state in which the child is physically present is responsible for examining such a claim. In doing so, it relied on Article 24 (2) of the EU Charter of Fundamental Rights, whereby in all actions relating to children, the child's best interests are to be a primary consideration.

**Under CoE law**, states are, in principle, permitted to interfere with the right to respect for family life in accordance with Article 8 (2) of the ECHR.

<sup>462</sup> CJEU, C-648/11, *The Queen, on the application of MA and Others v. Secretary of State for the Home Department*, 6 June 2013.

Example: *Gül v. Switzerland*<sup>463</sup> concerns an applicant who lived in Switzerland with his wife and daughter, who were all granted residence permits on humanitarian grounds. He also wished to bring to Switzerland their minor son, whom they had left behind in Turkey, but the Swiss authorities refused to grant him this request, mainly on the grounds that he had insufficient means to provide for his family. The ECtHR held that by leaving Turkey the applicant had himself caused the separation with his son. His recent visits to Turkey showed that his initial reasons for applying for political asylum in Switzerland were no longer valid. There were no obstacles preventing the family from establishing themselves in their country of origin, where their minor son had always lived. While acknowledging that their family's situation was very difficult from the human point of view, the Court found no breach of Article 8 of the ECHR.

Example: In *Üner v. The Netherlands*<sup>464</sup> it was confirmed that consideration should be given to the impact that expulsion would have on any children in a family when determining whether it was a proportionate response. This involved considering: "the best interests and well-being of the children, in particular the seriousness of the difficulties which any children [...] are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination".

Example: The case of *Tarakhel v. Switzerland*<sup>465</sup> concerns the refusal of the Swiss authorities to examine the asylum application of an Afghan couple and their six children, and their decision to send them back to Italy. The ECtHR found that, in view of the current situation regarding the reception system in Italy, and in the absence of detailed and reliable information concerning the specific facility of destination, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. The ECtHR therefore found that there would be a violation of Article 3 of the ECHR if the Swiss authorities were to send the applicants back to Italy under the Dublin II Reg-

463 ECtHR, *Gül v. Switzerland*, No. 23218/94, 19 February 1996.

464 ECtHR, *Üner v. The Netherlands* No. 46410/99, 18 October 2006, paras. 57–58. See also *Boultif v. Switzerland*, No. 54273/00, 2 August 2001.

465 ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014.

ulation without having first obtained individual assurances from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.

Under international law, a state shall upon request provide the parent(s) or the child with essential information concerning the whereabouts of the absent family member(s) in instances of detention, imprisonment, exile, deportation or death, unless it would be detrimental to the well-being of the child (Article 9 (4) of the CRC).

## 9.6. Access to justice<sup>466</sup>

### Key point

- Migrant children have the right to an effective remedy.

**Under EU law**, children's rights to access justice in an immigration context are set out in a range of different instruments. First, the right to an effective legal remedy and to a fair trial is set out in Article 47 of the EU Charter of Fundamental Rights. This includes a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, including having the possibility of advice, a defence and appropriate legal representation under Article 48. For child migrants, this is reinforced by a range of secondary legislative provisions. In particular, the Dublin Regulation obliges Member States to ensure that an unaccompanied child is represented by an appropriately qualified professional who has access to all of the relevant information in the child's file (Article 6). Parallel provisions are found in the Qualification Directive (Article 31) and in the Asylum Procedures Directive (Article 25). Children's right to legal representation is also supported by their right to access victim services and special confidential support services under Article 8 of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (Victims' Directive).<sup>467</sup>

<sup>466</sup> See also FRA and ECtHR (2014), Section 4.5 on legal assistance in asylum and return procedures.

<sup>467</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L 315/55.

Rights associated with access to justice are not without their limitations, however, and may be subject to certain age conditions. For example, the Asylum Procedures Directive allows Member States to “refrain from appointing a [legal] representative where the unaccompanied minor will in all likelihood reach the age of 18 before a decision at first instance is taken” (Article 25 (2)).

**Under CoE law**, the ECtHR ruled out the applicability of Article 6 (right to a fair trial) in cases concerning decisions on entry, stay and deportation of aliens.<sup>468</sup> However, Article 13 of the ECHR (the right to an effective remedy) may be relied on in certain circumstances.

Example: *Rahimi v. Greece*<sup>469</sup> concerns the conditions in which a migrant child from Afghanistan, who had entered Greece irregularly, was held in a detention centre and subsequently released with a view to his expulsion. In finding a violation of Article 13 of the ECHR, the ECtHR noted that the information brochure provided to the applicant did not indicate the procedure to be followed to make a complaint to the chief of police. Moreover, the applicant was not informed in a language which he understood of the available remedies he could use to complain about the conditions of his detention. Relying on the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the ECtHR noted the absence in Greece of an independent authority for the inspection of detention facilities of the law-enforcement agencies. It also noted that there was no impartial authority to make the remedy effective. Accordingly, it found violations of Article 3, Article 5 paragraphs 1 and 4, and Article 13 of the ECHR.

The ESC requires states to promote the legal (as well as social and economic) development of the family (Article 16). Moreover, Article 19 (1) requires states to maintain “adequate and free services” and to ensure that migrant workers and their families receive accurate information relating to emigration and immigration. A similar ‘information’ requirement (central to migrants’ access to justice) is contained in Article 6 of the European Convention on the legal status of migrant workers, but the more extensive provisions governing “right

<sup>468</sup> ECtHR, *Maaouia v. France* [GC], No. 39652/98, 5 October 2000.

<sup>469</sup> ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011 (available in French).

of access to the courts and administrative authorities” (Article 26) are directed exclusively at migrant workers rather than their family members.<sup>470</sup>

In addition, it is worth noting that the CoE has developed very comprehensive guidelines on child-friendly justice, which set out how all justice and administrative proceedings, including immigration proceedings, should be adapted to meet the needs of children.<sup>471</sup>

Under international law, Article 37 of the CRC is particularly relevant for migrant children deprived of their liberty, as it ensures these children the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of their liberty before a court or other competent, independent and impartial authority, whose decision must furthermore be prompt.

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470 Council of Europe, [European Convention on the Legal Status of Migrant Workers](#), CETS No. 93, 1977.

471 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010.

# 10

## Consumer and personal data protection



EU	Issues covered	CoE
<p>Charter of Fundamental Rights, Article 38 TFEU, Article 169</p> <p>Consumer Rights Directive (2011/83/EU)</p> <p>Unfair Business-to-Consumer Commercial Practices Directive (2005/29/EC)</p> <p>General Product Safety Directive (2001/95/EC)</p> <p>Clinical Trials Directive (2001/20/EC)</p> <p>CJEU, C-244/06, <i>Dynamic Medien Vertriebs GmbH v. Avides Media AG</i>, 2008 (sale over the internet of DVDs)</p> <p>CJEU, C-36/02, <i>Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn</i>, 2004 (licence for playing a game)</p> <p>Regulation 536/2014 on clinical trials on medicinal products for human use</p> <p>Directive on foodstuffs intended for particular nutritional uses (2009/39/EC)</p> <p>Toy Safety Directive (2009/48)</p> <p>Directive concerning products which, appearing to be other than they are, endanger the health or safety of consumers (87/357/EEC)</p> <p>Television Without Frontiers Directive (89/552/EEC)</p> <p>Audiovisual Media Services Directive (2010/13/EU)</p>	<p>Protection of children as consumers</p>	<p>European Convention on Transfrontier Television</p>

EU	Issues covered	CoE
Charter of Fundamental Rights, Articles 7 (respect for private and family life), 8 (protection of personal data) and 52 (scope and interpretation of rights and principles) TFEU, Article 16 Data Protection Directive (95/46/EC)	Children and data protection	ECHR, Article 8 (right to respect for private and family life) ECtHR, <i>K.U. v. Finland</i> , No. 2872/02, 2008 (advertisement on the internet) ECtHR, <i>Avilkina and Others v. Russia</i> , No. 1585/09, 2013 (disclosure of medical records) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

This chapter addresses European legislation and case law in the field of consumer and data protection. There is an abundance of legislation and case law at the EU level, as the TFEU expressly lays down the EU’s competence in these matters. The CoE’s contribution in this field is more limited. At treaty level there are two main conventions on media and data protection. The ECtHR has also decided on a number of cases concerning the data protection of individuals.

The following sections shall concentrate on specific aspects of consumer law relating to children ([Section 10.1](#)) and data protection ([Section 10.2](#)). For each of these issues, the general legal framework and its applicability for children is analysed, as well as the specific norms for the protection of children, where relevant.



## 10.1. Protection of children as consumers

### Key points

- According to the CJEU, child consumers' best interests and the protection of their rights override requirements of public interest justifying limits to the free movement of goods, persons, services and capital.
- Children as consumers should be provided with relevant information so as to be able to consider all relevant facts and make an informed choice.
- Unfair commercial practices are those that do not comply with the principle of professional diligence and may influence adult and child consumers' transactional decisions.
- Children can be included in clinical trials only if the administered medicinal product is expected to be of direct benefit to them, thereby outweighing the risks.
- EU and CoE law limit the amount of marketing children may be exposed to, without banning it as such.
- Children are entitled to specific protection, which implies protection against any advertising as well as tele-shopping programmes which could cause moral or physical harm to them.
- The placement of products advertisements in children's programmes is forbidden.

### 10.1.1. Consumer rights

**Under EU law**, the main pillars of consumer protection are laid down in Article 169 (1) of the TFEU and Article 38 of the EU Charter of Fundamental Rights. The CJEU has recognised that the best interests of the child override requirements of public interest, justifying limits to the common market freedoms.

Example: The case of *Dynamic Medien*<sup>472</sup> concerns the sale over the internet in Germany of DVDs of Japanese cartoons. The cartoons had been approved for children over 15 years of age in the United Kingdom. They had not been rated as appropriate by the relevant German authority. The main question before the CJEU was whether the prohibition in Germany was contrary to the freedom of movement principle. The CJEU found that the

<sup>472</sup> CJEU, C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 14 February 2008.

main purpose of the German law was to protect children from information that would be detrimental to their well-being. It ruled that the restriction on the freedom of movement of goods was not disproportionate as long as it did not go beyond what was necessary to attain the objective of protecting children pursued by the Member State concerned.

Example: The case of *Omega*<sup>473</sup> concerns the operation of a 'laserdome' in Germany. The game played in the 'laserdome' included hitting sensory targets placed on the jackets worn by players. The equipment for the game was supplied by a British company and both the game and the equipment had been lawfully marketed in the United Kingdom. The game was prohibited in Germany on the ground that it was contrary to fundamental values such as human dignity. The CJEU found that the restriction imposed by the German authorities was not contrary to EU law, as it had been duly justified on public policy grounds.

The most recent review process of the EU consumer law resulted in the adoption of the Consumer Rights Directive 2011/83/EU (CRD), which aims to fully harmonise national laws on distance-selling and off-premises contracts, as well as other types of consumer contracts.<sup>474</sup> The intention is to balance a high level of consumer protection and the competitiveness of enterprises. As per Article 3 (3) (a), the CRD is not applicable to contracts for social services, including social housing, childcare and support of families and persons permanently or temporarily in need, including of long-term care. Social services include services for children and youth, assistance services for families, single parents and older persons, and services for migrants. The CRD dedicates specific attention to pre-contractual information. It bases its 'information requirements' on the assumption that if consumers, including children, are provided with due information, they will be able to consider all relevant facts and make an informed choice.

473 CJEU, C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 14 October 2004.

474 Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64 (it should have been implemented by 13 December 2013).

## 10.1.2. Unfair commercial practices on children

**Under EU law**, Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market (UCPD),<sup>475</sup> covers the totality of business-to-consumer transactions (whether operated offline or online, involving both goods and services). Children are included in the UCPD in the category of ‘vulnerable consumers’ (Article 5 (3)). Transactional decisions cannot be taken following harassment, coercion or undue influence or misleading information, and child consumers have the right to make these decisions freely. The directive prohibits product marketing and advertising activities which create confusion with another product or with a competitor’s trademark, and requires that all the necessary information for consumers be provided to them in a clear and comprehensible manner, and at a suitable time to enable them to make a transactional decision (Articles 6 and 7).

## 10.1.3. Products’ safety

**Under EU law**, there is a comprehensive framework to ensure that only safe and otherwise compliant products find their way on to the market. In particular, Directive 2001/95/EC on general product safety (GPSD) dedicates specific attention to the safety of children by including them in the category of consumers who can be particularly vulnerable to the risks posed by the products under consideration (Recital 8 of the GPSD). Therefore, the safety of the product needs to be assessed, taking into account all the relevant aspects, in particular the categories of consumers to which the product is destined.

Council Directive 87/357/EEC is a specific product safety directive on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers.<sup>476</sup> It prohibits the marketing, importing and manufacturing of products that look like foodstuffs, but that are not edible. Member States must carry out checks to ensure that no such products are marketed. If a Member State bans

<sup>475</sup> Directive 2005/29/EC of European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149/22.

<sup>476</sup> Council Directive 87/357/EEC of 25 June 1987 on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers, OJ 1987 L 192/49.

a product under the terms of this directive, it must inform the Commission and provide details to inform the other Member States. The question of toy safety in particular is discussed in more detail under [Section 10.1.6](#).

### 10.1.4. Clinical trials on children

**Under EU law**, Directive 2001/20/EC<sup>477</sup> on the approximation of national provisions relating to the implementation of ‘good clinical practice’ in the conduct of clinical trials on medicinal products for human use includes children among vulnerable persons who are incapable of giving legal consent to clinical trials (Recital 3). Children may only be included in clinical trials if they directly benefit from receiving the medicinal product and if such benefits outweigh the risks (Recital 3). Clinical trials should afford subjects the best possible protection (Article 4).

Similarly, Regulation (EU) No. 536/2014 on clinical trials on medicinal products for human use includes specific provisions for children in the vulnerable population category (Article 10 (1)). This regulation aims to gradually replace Directive 2001/20/EC.<sup>478</sup> It requires that applications for the authorisation of clinical trials involving children be carefully assessed. A child’s legal representative must consent to a clinical trial taking place, as must the child if he/she is capable of forming an opinion (Article 29 (1) and (8)). The regulation lays down specific conditions for conducting safe clinical trials on children and ensuring their informed consent (Article 32). These conditions are that: no incentives are given to the subject except for compensation for expenses and loss of earnings directly related to the participation in the clinical trial; the clinical trial is intended to investigate treatments for a medical condition that only occurs in children; and there are scientific grounds for expecting that participation in the clinical trial will produce: a direct benefit for the minor concerned outweighing the risks and burdens involved; or some benefit for the population represented by the minor concerned and such a clinical trial will pose only minimal risk to, and will impose minimal burden on, the minor concerned in comparison with the standard treatment of the minor’s condition. Only in emergency situations may

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477 Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, OJ 2001 L 121/34.

478 Regulation (EU) 536/2014 of the European Parliament and the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, OJ 2014 L 158/1.

clinical trials be performed on children without having previously obtained their consent or the consent of their legal representatives (Article 35 (1)).

### 10.1.5. Food intended for infants and young children

**Under EU law**, Directive 2009/39/EC on foodstuffs intended for particular nutritional uses<sup>479</sup> focuses on the nutritional composition and safety of foods specifically manufactured for infants and young children under the age of 12 months. Its rules concern infant and follow-on formulae, processed cereal-based foods and baby foods and additives in foods for infants and young children. The directive aims to guarantee product safety and to provide the consumer with suitable products and appropriate information. It specifies, amongst other things, that a particular nutritional use shall fulfil the particular nutritional requirements of certain categories of persons, including those of infants or young children in good health (Article 3 (3) (c)).

### 10.1.6. Toy safety

**Under EU law**, Directive 2009/48/EC on the safety of toys (TSD)<sup>480</sup> defines toys in its Article 2 as “products designed or intended, whether or not exclusively, for use in play by children under 14 years of age”.<sup>481</sup> Annex I provides a non-exhaustive list of items that are not considered toys, but that could be subject to confusion. Article 2 (2) also lists some toys that are excluded from its range of action. The TSD also reinforces health and safety standards by limiting the amounts of certain chemicals that may be contained in the material used for toys (Article 10).<sup>482</sup>

479 Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses, OJ 2009 L 124/21.

480 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ 2009 L 170.

481 *Ibid.*, Art. 2 (1).

482 The European Commission has also concluded ‘voluntary agreements’ with European toys industries/traders in order to improve toy safety. See further: [http://ec.europa.eu/growth/sectors/toys/safety/index\\_en.htm](http://ec.europa.eu/growth/sectors/toys/safety/index_en.htm).

## 10.1.7. Children and advertising

**Under EU law**, Directive 2010/13/EU on Audiovisual Media Services (AVMS Directive)<sup>483</sup> expanded the scope of legal regulation of the Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television Without Frontiers (TWF) Directive). The AVMS Directive deals with the limitation of the amount, quality and content of marketing children may be exposed to, regulating the duration of advertisement (Articles 20, 24 and 27). It forbids product placement in children's programmes (Article 11) and authorises Member States to prohibit the display of sponsorship logos during programmes for children (Article 10 (4)).<sup>484</sup> The AVMS Directive balances the protection of children with other important democratic values, such as the freedom of expression, supporting the idea that such protection is possible through the essential involvement of parental responsibility (Recitals 48 and 59).

The effective implementation of the AVMS Directive is supplemented by the 1998<sup>485</sup> and 2006<sup>486</sup> recommendations on the protection of children and human dignity.

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483 Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95/1.

484 For a more general overview of the functioning of the AMS Directive, please refer to: COM(2012) 203 final, Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on the application of Directive 2010/13/EU ('Audiovisual Media Service Directive'), Brussels, 4 May 2012 and SWD(2012) 125 final, Commission Staff Working Document attached to the First Report from the Commission to the European Parliament, the Council, The European Economic And Social Committee And The Committee of the Regions on the Application of Directive 2010/13/EU 'Audiovisual Media Services' accompanying the document, Brussels, 4 May 2012.

485 Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, OJ 1998 L 270.

486 Recommendation 2006/952/EC of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry, OJ 2006 L 378.

**Under CoE law**, the European Convention on Transfrontier Television<sup>487</sup> was the first international treaty to create a legal framework for the free circulation of transfrontier television programmes in Europe. It specifically protects children and youth (Article 7 (2)), for instance forbidding the screening of pornographic and violent material and of programmes inciting to racial hatred. It identifies advertising standards and regulates advertising time and advertising breaks.

## 10.2. Children and personal data protection

### Key points

- Under EU and CoE law, personal data protection has been acknowledged as a fundamental right.
- The right to respect for private and family life, home and correspondence (Article 8 of the ECHR) includes the right to protection of personal data.
- Children have, among other rights relating to their personal data, the right to object to the processing of their data, except on compelling legitimate grounds.

### 10.2.1. European data protection law

**Under EU law**, the EU has competence to legislate on data protection matters (Article 16 of the TFEU).<sup>488</sup> Article 8 (2) of the EU Charter of Fundamental Rights contains key data protection principles (fair processing, consent or legitimate aim prescribed by law, right to access and rectification), whereas Article 8 (3) requires that compliance with data protection rules be subject to control by an independent authority. The right to the protection of personal data established in Article 8 may be limited in accordance with the law and for the respect of the principles of a democratic society such as the freedoms and rights of others (Article 52 of the Charter).<sup>489</sup>

<sup>487</sup> Council of Europe, *European Convention on Transfrontier Television*, CETS No. 132, 1989. Amended according to the provisions of the *Protocol*, CETS No. 171, 2002.

<sup>488</sup> For a general overview of European data protection law, see: FRA and CoE (2014).

<sup>489</sup> CJEU, joined cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and Federación de Comercio Electrónico y Marketing Directo (FECEMD) v. Administración del Estado*, 24 November 2011, para. 48; CJEU, C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU* [GC], 29 January 2008, para. 68.

Personal data protection has emerged as one of the key areas of European law relating to privacy. Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive)<sup>490</sup> is the main instrument in this field.

Because data processing is operated in closed spaces not open to the public, children as well as other data subjects are usually unaware of the processing of their own personal data. To counteract the vulnerability of data subjects, European law guarantees children (and other data subjects) specific individual rights, such as the right to be informed that their data are being collected, the right to access the stored data and to learn about the details of the processing operation, the right to object in case of unlawful processing, the rights to rectification, erasure and blocking of data.

Controllers of processing operations must provide adequate information with regard to processing of data (Articles 10 and 11 of the Data Protection Directive). Interpreted in a child-friendly manner, this implies that the language and the form of the information need to be adapted to the level of maturity and understanding of children. As a minimum requirement, the information must include the purpose of processing, as well as the identity and contact details of the controller (Articles 10 (a) and (b) of the Data Protection Directive).

The Data Protection Directive provides for the consent of data subjects, regardless of the sensitivity of the data processed (Articles 7, 8 and 14). A child-friendly consent procedure would entail taking into account the child's evolving capacities, progressively involving him or her. The first step entails a child being consulted by his/her legal representative prior to providing consent, before moving on to a parallel consent of the child and his or her legal representative, to the sole consent of the adolescent child.

Data subjects have the right to erasure of data, which entails the possibility of having their personal data removed or deleted upon their request, and also the right to object to the processing of their personal data. The latter has become increasingly important for children because of the massive amount of children's personal data circulated and available through social networking. Although the CJEU has not yet addressed cases concerning children, in a recent

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<sup>490</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive), OJ 1995 L 281.



case concerning an adult applicant, it held that the right to object applies to data and information, “in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed”.<sup>491</sup> The CJEU also held that the applicability of the right to object needs to be balanced against other fundamental rights.

**Under CoE law**, the ECtHR has read the right to protection of personal data into Article 8 of the ECHR. The Court examines situations where the issue of data protection arises, including the interception of communications,<sup>492</sup> various forms of surveillance<sup>493</sup> and the protection against storage of personal data by public authorities.<sup>494</sup> Furthermore, the ECtHR ruled that national law must set out appropriate measures to ensure judicial remedies against infringements of data protection rights.

Example: In *K.U. v. Finland*,<sup>495</sup> the applicant was a child who complained that an advertisement of a sexual nature had been posted in his name on an internet dating site. The service provider refused to reveal the identity of the person who had posted the information because of confidentiality obligations under Finnish law. The applicant claimed that domestic law did not provide sufficient protection against the actions of a private person placing incriminating data about the applicant on the internet. The ECtHR held that states have positive obligations which involve adopting measures designed to secure respect for private life even in the sphere of relations between individuals. In the applicant’s case, his practical and effective protection required that effective steps be taken to identify and prosecute the perpetrator. However, such protection was not afforded by the state, and the Court found a violation of Article 8 of the ECHR.<sup>496</sup>

491 CJEU, C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [GC], 13 May 2014, para. 93.

492 See, for example: ECtHR, *Malone v. the United Kingdom*, No. 8691/79, 2 August 1984; ECtHR, *Copland v. the United Kingdom*, No. 62617/00, 3 April 2007.

493 See, for example: ECtHR, *Klass and Others v. Germany*, No. 5029/71, 6 September 1978; ECtHR, *Uzun v. Germany*, No. 35623/05, 2 September 2010.

494 See, for example: ECtHR, *Leander v. Sweden*, No. 9248/81, 26 March 1987; ECtHR, *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008.

495 ECtHR, *K.U. v. Finland*, No. 2872/02, 2 December 2008. See further [Chapter 4](#).

496 FRA and CoE (2014), p. 122.

Example: *Avilkina and Others v. Russia*<sup>497</sup> concerns the disclosure of a two year old girl's medical files to the prosecutor, following his request to be informed about all refusals by Jehovah's Witnesses concerning blood transfusions. Acknowledging that the interests of a patient and the community as a whole in protecting the confidentiality of medical data might be outweighed by the interests of investigating crime, the Court noted that the applicant was not a suspect or accused in any criminal proceedings. In addition, the medical professionals providing treatment to the applicant could have applied for judicial authorisation for a blood transfusion, had they believed her to be in a life-threatening situation. In the absence of any pressing social need for requesting the disclosure of the confidential medical information concerning the applicant, the ECtHR found a violation of Article 8 of the ECHR.

Example: In *S. and Marper v. the United Kingdom*,<sup>498</sup> an eleven year old's fingerprints and DNA taken in relation with the suspicion of attempted robbery were retained without a time limit, even though he was ultimately acquitted. Given the nature and amount of personal information contained in cellular samples and DNA profiles, their retention in itself amounted to an interference with the first applicant's right to respect for private life. The core principles of the relevant instruments of the Council of Europe and the law and practice of the other contracting states require the retention of data to be proportionate in relation to the purpose of collection and limited in time, particularly in the police sector. The protection afforded by Article 8 of the ECHR would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing their potential benefits against important private-life interests. In that respect, the blanket and indiscriminate nature of the power of retention in England and Wales was particularly striking, since it allowed data to be retained for an unlimited period of time and irrespective of the nature or gravity of the offence or of the age of the suspect. Retention could be especially harmful in the case of minors, given their special situation and the importance of their development and integration in society. In conclusion, the retention of data constituted a disproportionate interference with the applicant's right to respect for private life.

497 ECtHR, *Avilkina and Others v. Russia*, No. 1585/09, 6 June 2013.

498 ECtHR, *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008.

The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data<sup>499</sup> (Convention 108) applies to all data processing carried out both in the private and public sectors, and protects the individual, children included, against abuses which may accompany the processing of personal data. Convention 108 has an additional protocol which regulates the establishment of supervisory authorities and cross-border flow of personal data to non-Parties to the convention.<sup>500</sup>

The principles laid down in Convention 108 related to the processing of personal data concern fair and lawful collection and automatic processing of data, stored for specified legitimate purposes and not for use for ends incompatible with those purposes, nor kept for longer than is necessary. They also concern the quality of the data. In the absence of proper legal safeguards, the processing of 'sensitive' data, such as on a person's race, politics, health, religion, sexual life or criminal record, is prohibited. The convention also enshrines the individual's right, children included, to know that information is stored on him or her and, if necessary, to have it corrected. Restrictions on the rights laid down in the convention are possible only when overriding interests, such as state security or defence, are at stake.

Under international law, the right to data protection is part of the child's right to privacy contained in Article 16 of the CRC. This article provides that a child shall not be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. This right must be respected by everybody, including the child's legal representative.

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499 Council of Europe, [Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#), CETS No. 108, 1981.

500 Council of Europe, [Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#), regarding supervisory authorities and trans-border data flows, CETS No. 181, 2001.



# 11

## Children's rights within criminal justice and alternative (non-judicial) proceedings



EU	Issues Covered	CoE
<p>Charter of Fundamental Rights, Articles 47 (right to an effective remedy and to fair trial), 48 (presumption of innocence and right of defence) and 49 (principles of legality and proportionality of criminal offences and penalties)</p> <p>Right to Interpretation and Translation Directive (2010/64/EU)</p> <p>Right to Information Directive (2012/13/EU)</p> <p>Access to a Lawyer Directive (2013/48/EU)</p>	<p><b>Fair trial guarantees</b></p>	<p>ECHR, Article 6 (fair trial)</p> <p>ECtHR, <i>T. v. the United Kingdom</i> [GC], No. 24724/94, 1999 (children in court)</p> <p>ECtHR, <i>Panovits v. Cyprus</i>, No. 4268/04, 2008 (access to a lawyer)</p>
<p>Charter of Fundamental Rights, Articles 4 (torture, inhuman and degrading treatment) and 6 (right to liberty)</p>	<p><b>Detention</b></p>	<p>ECHR, Articles 3 (torture, inhuman and degrading treatment) and 5 (right to liberty)</p> <p>ECtHR, <i>Bouamar v. Belgium</i>, No. 9106/80, 1988 (detention for educational supervision)</p> <p>ECtHR, <i>D.G. v. Ireland</i>, No. 39474/98, 2002 (detention for educational supervision)</p> <p>ECtHR, <i>Nart v. Turkey</i>, No. 20817/04, 2008 (pre-trial detention)</p> <p>ECtHR, <i>Güveç v. Turkey</i>, No. 70337/01, 2009 (conditions of detention)</p>

EU	Issues Covered	CoE
<p>Victims' Directive (2012/29/EU) CJEU, C-105/03, <i>Criminal proceedings against Maria Pupino</i> [GC], 2005 (standing of child witnesses in court)</p>	<p>Child witnesses and victims</p>	<p>ECHR, Articles 3 (torture, inhuman and degrading treatment) and 8 (private life)                      ECtHR, <i>Kovač v. Croatia</i>, No. 503/05, 2007 (child witness)                      ECtHR, <i>S.N. v. Sweden</i>, No. 34209/96, 2002 (child witness)                      ECtHR, <i>R.R. and Others v. Hungary</i>, No. 19400/11, 2012 (exclusion of family from the witness protection programme)</p>

Children's rights in the context of juvenile justice proceedings concern children accused of, prosecuted for or sentenced for having committed criminal offences, as well as children who participate in justice or related proceedings as victims and/or witnesses. The position of children in the context of juvenile justice is regulated by general human rights provisions relevant to both adults and children.

This chapter presents an overview of the European norms relevant to children involved in judicial and alternative proceedings. It addresses fair trial guarantees, including effective participation and access to a lawyer, the rights of detained young offenders, including pre-trial detention (substantive and procedural safeguards), conditions of detention and protection against ill-treatment, and the protection of child witnesses and victims. Protection aspects are especially relevant for non-adversarial, alternative proceedings, which should be used whenever these may best serve the child's best interests.<sup>501</sup> In the case of children, objectives of criminal justice, such as social integration, education and prevention of re-offending, are basic principles that are valued.<sup>502</sup>

501 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010, para. 24.

502 See further, Council of Europe, Committee of Ministers (2008), Recommendation CM/Rec (2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008, Part I.A.2.

## 11.1. Fair trial guarantees

### Key points

- Children in criminal proceedings are entitled to be treated fairly and in a child-friendly manner.
- Court proceedings should be adjusted to children's needs to ensure their effective participation.
- Children have the right to access a lawyer from the initial stages of the criminal proceedings and from the first police interrogation.

While briefly outlining the general requirements for a fair trial at both the EU and CoE level, this section places particular emphasis on child-specific fair trial guarantees.

The right to a fair trial is a core pillar of a democratic society. Children suspected or accused of a crime have the right to a fair trial, and they benefit from the same guarantees as any other person in conflict with the law. Fair trial guarantees apply from the child's first interrogation and subsist during the trial. Children in conflict with the law are, however, particularly vulnerable and may therefore need additional protection. European bodies have developed specific requirements to ensure that these children's needs are effectively met.

**Under EU law**, several provisions of the EU Charter of Fundamental Rights establish basic rights of access to justice which sustain fair trial guarantees for both adults and children. Article 47 deals specifically with the right to an effective remedy and to fair trial, establishing requirements of particular relevance for children, such as the reasonability of time in having a fair and public hearing, and the rights to be defended, represented and advised as well as to legal aid. Similarly, the principles of legality and proportionality of criminal offences and penalties established in Article 49 are particularly relevant for children. In addition, several EU directives lay down specific fair trial guarantees in criminal proceedings: the Right to Interpretation and Translation Directive,<sup>503</sup> the Right

<sup>503</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280/1.

to Information Directive,<sup>504</sup> and the Access to a Lawyer Directive.<sup>505</sup> The first two directives do not include child-specific guarantees, although the Right to Information Directive contains provisions addressing the situation of vulnerable suspects or accused persons more generally. The child-related provisions of the Access to a Lawyer Directive are elaborated upon in [Section 11.2.2](#).

Even in the absence of child-specific provisions, Member States must observe the EU Charter of Fundamental Rights when implementing the provisions of the aforementioned directives. Therefore, principles such as the child's best interests, enshrined in Article 24, should be given due weight in cases where children are the subject of any of the provisions of the directives. To date, no cases have been brought to the CJEU concerning the interpretation of Article 24 of the Charter in conjunction with one the mentioned directives.<sup>506</sup>

Of specific importance is the European Commission proposal for a directive on procedural safeguards for criminally suspected or accused children,<sup>507</sup> which aims to provide children mandatory access to a lawyer at all stages of criminal proceedings. It also provides that children should benefit from prompt information about their rights, the assistance of parents (or other appropriate persons) and questioning behind closed doors. In addition, children deprived of liberty should be entitled to receive appropriate education, guidance, training, and medical care, and to be kept separate from adults.<sup>508</sup>

**Under CoE law**, the ECHR fair trial guarantees are laid down in Article 6, which generates the most extensive case law of the ECtHR. Article 6 (1) of the ECHR includes some express fair trial guarantees: the right to a fair public hearing/

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504 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142/1.

505 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1.

506 The CJEU has dealt with the interpretation of Art. 24 in proceedings relating to international child abduction (see [Section 5.4](#)).

507 European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, Brussels, 27 November 2013.

508 See further [Section 11.2](#). Of relevance for child protection can also be the European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, COM(2013) 824 final, Brussels, 27 November 2013.



pronouncement (unless it is contrary to, among others, the interests of juveniles); the right to a trial within reasonable time; the right to a trial by an independent and impartial tribunal;<sup>509</sup> and the right to a trial by a tribunal established by law. Inherent in the concept of a fair trial, the ECtHR has developed guarantees: equality of arms and adversarial proceedings; the right to remain silent; access to a lawyer; effective participation; presence at the hearing; and reasoned decisions. In addition, everyone must be presumed innocent until proven guilty, according to law (Article 6 (2) of the ECHR).

Everyone charged with a criminal offence shall have the following minimum rights: the right to be informed promptly about the charges in a language she/he understands (Article 6 (3) (a) of the ECHR); the right to have adequate time and facilities for the preparation of her/his defence (Article 6 (3) (b) of the ECHR); the right to have legal assistance of her/his own choosing (Article 6 (3) (c) of the ECHR); the right to examine or have witnesses examined (Article 6 (3) (d) of the ECHR); and the right to have the free assistance of an interpreter (Article 6 (3) (e) of the ECHR). These guarantees apply to adults and children alike. However, aspects of particular importance to children which have generated child-specific case law include the right to effective participation, as well as the right to access a lawyer. These two specific fair trial guarantees are therefore further elaborated upon in this chapter.

Of high importance for child suspects/accused are the CoE's *Guidelines on child friendly justice*.<sup>510</sup> Even if the guidelines are not legally binding, they represent a stepping stone in ensuring that justice proceedings, including those part of the criminal justice system, take into account the specific needs of children. They are built on existing ECtHR case law and other European and international legal standards, such as the UN Convention on the Rights of the Child. They are a useful tool for professionals dealing with children. According to Section I (1), the guidelines apply to children in judicial (criminal or non-criminal) proceedings or in alternatives to such proceedings. Of specific importance for children in criminal proceedings is the right to have the information on criminal charges explained to both the child and the parents in a way that they understand the exact charge (Section IV.A.1.5); the right to be questioned only in the presence of the lawyer/parents or a person of trust (Section C (30)); the right to

509 ECtHR, *Nortier v. the Netherlands*, No. 13924/88, 24 August 1993; ECtHR, *Adamkiewicz v. Poland*, No. 54729/00, 2 March 2010.

510 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010.

speedy proceedings (Section D (4)) and the right to child-sensitive interviews or hearings (Section D (5)).

In June 2014, PACE adopted a resolution on child-friendly juvenile justice, with which it underscores the need for a rights-based and child-specific treatment of children in conflict with the law.<sup>511</sup> PACE calls upon Member States to implement international human right standards regarding juvenile justice, including the CoE's Guidelines on child friendly justice, and to bring national laws and practice in conformity with these standards. PACE suggests using liberty deprivation only as a measure of last resort and for the shortest possible period of time, setting the minimum age of criminal responsibility at 14 years old, without allowing for exceptions in cases of serious offences, and establishing a specialised juvenile justice system, including diversion mechanisms, non-custodial measures and specialised professionals.

Under international law, Article 40 of the CRC acknowledges that every child alleged as, accused of, or recognised as having infringed penal law is entitled to be treated fairly and in a manner that takes into account his/her age. The key objective of juvenile justice according to Article 40 of the CRC is to reintegrate children in society, in which they can play a constructive role. Article 40 (2) of the CRC recognises children's right to a fair trial and that children have some additional entitlements, including the right to be assisted by parents, the right to appeal and the right to have their privacy fully protected at all stages of the proceedings.

Further, other instruments have developed the CRC principles of fair trial and the right to be treated in a child-specific way, including the use of liberty deprivation as a measure of last resort and only for the shortest appropriate period of time (see Article 37 (b) of the CRC). Of particular importance are the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules),<sup>512</sup> the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines)<sup>513</sup> and the UN Rules for the Protection of Juveniles Deprived

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511 Parliamentary Assembly of the Council of Europe, Resolution 2010 (2014), "Child-friendly juvenile justice: from rhetoric to reality".

512 UN, General Assembly (GA) (1985), *UN Standard Minimum Rules for the Administration of Juvenile Justice*, UN Doc. GA Res. 40/33, 19 November 1985.

513 UN, General Assembly (GA) (1990), *UN Guidelines for the Prevention of Juvenile Delinquency*, UN Doc. GA Res. 45/112, 14 December 1990.

of their Liberty (also known as the 'Havana Rules').<sup>514</sup> The Beijing Rules provide detailed guidance on the implementation of Article 40 of the CRC's fair trial requirements and child-specific treatment, including the aims of juvenile justice, protection of privacy, investigation and prosecution, pre-trial detention, adjudication and disposition, and institutional and non-institutional treatment. The Havana Rules concern the treatment of juveniles deprived of their liberty and include rules regarding the definition of liberty deprivation, police custody and pre-trial detention, juvenile institution conditions, disciplinary procedures, screening methods and the use of force or restraint, complaint mechanisms, inspection and monitoring mechanisms and the reintegration of juveniles. Finally, the Riyadh Guidelines provide detailed guidelines regarding policies aiming at the prevention of juvenile delinquency.

The UNCRC issued one General Comment (No. 10)<sup>515</sup> on children and juvenile justice, which offers detailed guidance on how to interpret and implement the CRC as far as juvenile justice is concerned. This comment deals with important juvenile justice principles, including the right to effective participation as part of the right to a fair trial (see further in [Section 11.1.1](#)), the use of deprivation of liberty as a measure of last resort and for the shortest appropriate period of time, the use of diversion and prevention of juvenile delinquency, the embedment of the best interests of the child principle and the principle of non-discrimination in the juvenile justice system, and age limits. The UNCRC recommends to set the minimum age of criminal responsibility at 12, or preferably higher. It also recommends to grant all children the right to be dealt with in the context of juvenile justice and prohibits transferring 16 and 17 year olds to the adult criminal system in cases of serious offences. Other general comments, e.g. regarding the right to be heard (which is connected to the right to participate effectively in justice proceedings), and the protection against all forms of violence, are also relevant for juvenile justice.<sup>516</sup>

514 UN, General Assembly (GA) (1990), UN Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc. GA Res. 45/113, 14 December 1990.

515 UN, Committee on the Rights of the Child (2007), *General Comment No. 10 on Children's rights in juvenile justice*, CRC/C/GC/07, 25 April 2007.

516 UN, Committee on the Rights of the Child (CRC) (2009), *General Comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, 1 July 2009; UN, Committee on the Rights of the Child (2011), *General Comment No. 13 (2011) – The right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011.

### 11.1.1. Effective participation

**Under EU law**, Article 47 of the EU Charter of Fundamental Rights lays down similar guarantees to those provided under Article 6 of the ECHR, including the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, the right to legal representation and the right to effective remedies. The proposed directive on procedural safeguards for criminally suspected or accused children includes the right to effective participation, as well as the right to legal representation.<sup>517</sup>

**Under CoE law**, the ECtHR has elaborated under Article 6 specific requirements for ensuring children's effective participation in criminal trials. As a general rule, proceedings should ensure that account is taken of the child's age, level of maturity and emotional capacities.<sup>518</sup> Concrete examples of 'effective participation' requirements include the child's presence during the hearings, holding of *in camera* hearings, limited publicity, ensuring that the child understands what is at stake and limited formality of court sessions. So far the ECtHR has not held that setting the age of criminal responsibility too low constitutes in itself a violation of Article 6 of the ECHR. When assessing whether a child was able to participate effectively in the national proceedings the ECtHR looks at the concrete circumstances of each case.

Example: The case of *T. v. the United Kingdom*<sup>519</sup> concerns the murder of a two year old by two ten year olds. They were committed to public trial under big media attention. The court procedure was partly modified, in that shorter sessions were held, the applicant's parents were placed close to him, a playing area was available during breaks, etc. Nevertheless, the applicant and his co-accused were tried in an adult court, and most of the rigors of a criminal trial were preserved. The ECtHR held that the applicant had not been able to participate effectively in the proceedings due to the publicity of the sessions combined with the high level of media attention and to his limited capacity to instruct his lawyers and to provide adequate testimonies. His rights under Article 6 of the ECHR were therefore violated.

517 European Commission (2013), Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, Brussels, 27 November 2013.

518 ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999, para. 61.

519 ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999.

The recognition of the right to effective participation is also at the core of the Council of Europe's Guidelines on child-friendly justice. Justice for children, including juvenile justice, should be "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 right to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity".<sup>520</sup> The guidelines provide specific guidance on how children should be treated during juvenile justice or other justice proceedings. Children should have access to court and judicial proceedings, and their rights to legal counsel and representation and to be heard and express their views should be safeguarded; undue delay should be avoided, proceedings should be organised in a child-friendly way (which affects the environment and language) and special safeguards should be in place to take and respond to evidence/statements provided by children.<sup>521</sup>

## 11.1.2. Access to a lawyer

**Under EU law**, the Access to a Lawyer Directive 2013/48/EU<sup>522</sup> – to be implemented by 27 November 2016 – includes direct references to children in Recitals 52 and 55 of its preamble, as well as in Articles 5 (2)–(4) and (5). Pursuant to Recital 55 and Article 5 (2), if a child is deprived of liberty, the holder of parental responsibility shall be notified and be given reasons thereof, unless this would be contrary to the child's best interests. In the latter case, another appropriate adult shall be informed. According to Article 2, the directive applies from the moment suspects or accused are made aware of having committed a criminal offence until the conclusion of the proceedings by a final determination of guilt or innocence. Further, Article 3 (3) lays down that access to a lawyer includes the right of suspects/accused to meet and communicate with the lawyer in private, including before the first interrogation, the presence and effective participation of the lawyer during questioning and the lawyer's presence during several investigative or evidence gathering acts.

<sup>520</sup> Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010, para. II. C.

<sup>521</sup> *Ibid.*, Section D.

<sup>522</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294/1.

**Under CoE law**, the ECtHR considers access to a lawyer to be one of the fundamental elements of the right to a fair trial.<sup>523</sup> Individuals charged with a criminal offence have the right to access a lawyer from the early stages of a police investigation. That right may be limited in exceptional circumstances, provided that the limitation does not unduly prejudice the rights of the accused. The ECtHR has found that this could occur when statements given without having had access to a lawyer are used for conviction.<sup>524</sup> The ECtHR's scrutiny of whether an applicant had effective access to a lawyer is stricter in cases involving children.<sup>525</sup>

Example: The case of *Panovits v. Cyprus*<sup>526</sup> concerns a 17 year old who was charged with murder and robbery. He was brought to the police station, accompanied by his father. He was then arrested and taken to a separate room for questioning, in the absence of the father or a lawyer. While the applicant was being questioned, his father was informed of the applicant's right to contact a lawyer. Several minutes later, the father was told that his son had meanwhile confessed to having committed the crime. The ECtHR found that, in view of his age, the applicant could not have been considered to be aware of his right to legal representation before making any statement. It was also unlikely that he could reasonably have appreciated the consequences of his being questioned without the assistance of a lawyer in criminal proceedings concerning a murder. Even though the authorities appeared to have at all times been willing to allow the applicant to be assisted by a lawyer if he so requested, they had failed to make him aware of his right to request the assignment of a lawyer free of charge if necessary. There was no evidence that the applicant or his father expressly and unequivocally waived their right to legal assistance. Consequently, the Court found a violation of Article 6 (3) (c) in conjunction with Article 6 (1) of the ECHR.

523 ECtHR, *Salduz v. Turkey* [GC], No. 36391/02, 27 November 2008, para. 51.

524 *Ibid.*, para. 62.

525 *Ibid.*, para. 60.

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

## 11.2. Rights of young offenders in relation to detention

### Key points

- Children may only be deprived of their liberty as a last resort and for the shortest appropriate period of time.
- If detained, children are to be treated age-appropriately and with respect for their dignity.
- Children should not be detained together with adults.

Every person has the right to liberty. Deprivation of liberty therefore constitutes an exception and includes any form of placement in an institution by decision of a judicial or administrative authority, from which the juvenile is not permitted to leave at will.<sup>527</sup> Given the importance of safeguarding the rights of the child, including their best interests, situations of liberty-deprivation should be considered from that particular angle when concerning children.

While detention occurs in various circumstances, this section focuses on children in contact with the criminal justice systems.

International instruments universally affirm that detention must be a measure of last resort. This means that state authorities faced with the question of placing a child in detention should first give adequate consideration to alternatives to protect the best interests of the child, as well as to further the reintegration of the child (Article 40 (1) of the CRC). Alternatives can include, for example: "care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes" (Article 40 (3) (b) of the CRC). Only where alternatives are not feasible should detention be considered. Moreover, detention should only be ordered for the shortest period of time and under appropriate substantive and procedural guarantees. In view of their age and vulnerability, children benefit from special rights and guarantees when placed in detention.

<sup>527</sup> Rule 21.5 of Council of Europe, Committee of Ministers (2008), Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008.

## 11.2.1. Forms of detention (substantive and procedural guarantees)

**Under EU law**, the current legal framework for criminal justice proceedings does not include a binding instrument regarding the detention of children.

**Under CoE law**, Article 5 of the ECHR provides that everyone has the right to liberty. Detention is an exception which should be provided for by national law and should not be arbitrary. In addition, detention has to be justified under one of the six exhaustive situations listed under Articles 5 (1) (a) to (f). Detention of children in contact with the criminal justice system can be justified under paragraphs (a) detention after conviction by a competent court; (c) pre-trial detention; or (d) detention for the purpose of educational supervision in particular. The latter two shall be analysed, as they have given rise to specific duties on the part of the state authorities.

### Pre-trial detention

‘Pre-trial detention’ refers to situations where individuals are taken into police custody on suspicion of having committed a criminal offence, or are held in remand. It starts when an individual is taken into custody and ends with the determination on the merits of the case by a court of first instance.<sup>528</sup> While children benefit from the same guarantees as adults, the ECtHR has laid down several additional principles to strengthen the position of children in domestic criminal proceedings.

The ECtHR has generally interpreted Article 5 (1) (c) and Article 5 (3) as requiring that a person be placed in pre-trial detention only if there is a reasonable suspicion of him/her having committed a criminal offence. Further, pre-trial detention should not exceed a reasonable time and should be reviewed at reasonable intervals. The longer the period of detention, the stronger the reasons put forward by the authorities to justify it need to be. According to ECtHR case law, a person charged with an offence must always be released pending trial, unless the state can show that there are “relevant and sufficient” reasons to justify the continued detention.<sup>529</sup>

<sup>528</sup> ECtHR, *Idalov v. Russia*, No. 5826/03, 22 May 2012, para. 112.

<sup>529</sup> ECtHR, *Smirnova v. Russia*, No. 46133/99 and 48183/99, 24 July 2003, para. 58.



The ECtHR developed four basic acceptable reasons for refusing bail to the detainee in cases of pre-trial detention: the risks of absconding, of prejudicing the administration of justice, of committing further offences or of causing public disorder. In addition, the continuation of pre-trial detention should be strictly necessary, and the state must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying a continued deprivation of liberty.<sup>530</sup>

In cases involving children, the ECtHR mandates that state authorities should pay particular attention to the child's age when balancing the relevant arguments for and against pre-trial detention; it should be used as a measure of last resort and for the shortest possible period.<sup>531</sup> This implies that the authorities should consider alternatives to pre-trial detention.<sup>532</sup> Furthermore, state authorities should display special diligence in bringing children to trial within a reasonable time.<sup>533</sup>

Example: In *Nart v. Turkey*,<sup>534</sup> the 17 year old applicant was arrested on suspicion of having robbed a grocery shop. He was placed in pre-trial detention, in an adult prison, for 48 days. With particular reference to the fact that the applicant was a child, the ECtHR stated that "pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults".<sup>535</sup> In this particular case the authorities attempted to justify the pre-trial detention on the basis of the 'state of evidence', but the ECtHR found that this reason alone could not justify the length of the applicant's detention. Consequently, the ECtHR found a violation of Article 5 (3) of the ECHR.

530 *Ibid.*, paras. 58–59; ECtHR, *Ladent v. Poland*, No. 11036/03, 18 March 2008, para. 55.

531 ECtHR, *Korneykova v. Ukraine*, No. 39884/05, 19 January 2012, paras. 43–44. See also ECtHR, *Selçuk v. Turkey*, No. 21768/02, 10 January 2006, paras. 35–36; ECtHR, *J.M. v. Denmark*, No. 34421/09, 13 November 2012, para. 63.

532 ECtHR, *Diñç and Çakır v. Turkey*, No. 66066/09, 9 July 2013, para. 63 (available in French); ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009, para. 108.

533 ECtHR, *Kuptsov and Kuptsova v. Russia*, No. 6110/03, 3 March 2011, para. 91.

534 ECtHR, *Nart v. Turkey*, No. 20817/04, 6 May 2008.

535 *Ibid.*, para. 31.

## Detention for the purpose of educational supervision

This form of detention has been ordered in situations where the child has a particular need for educational supervision because of a disturbed personality and violent behaviour. Article 5 (1) (d) of the ECHR primarily targets forms of detention outside the scope of the juvenile justice system.

Example: The case of *Bouamar v. Belgium*<sup>536</sup> concerns the placement of a child in a remand prison on nine occasions for periods of around 15 days. The applicant was an adolescent considered to have a disturbed personality and violent behaviour. The Belgian Government submitted that he had been placed in the remand prison for the purpose of educational supervision. The ECtHR noted that interim placements in a remand prison are not in themselves contrary to Article 5 (1) (d), as long as the authorities pursue the purpose of placing the juvenile under educational supervision. However, the ECtHR found that in the applicant's case the authorities failed to show that they had the intention or possibility to place him in an institution where he could benefit from educational supervision. Consequently, the ECtHR found a violation of Article 5 (1) (d) of the ECHR.

Example: *D.G. v. Ireland*<sup>537</sup> concerns the placement of a violent child in a detention centre. The ECtHR held that the notion of 'educational supervision' should not be equated strictly with classroom teaching. Educational supervision entails many aspects of the exercise of parental rights by the local authority for the benefit and protection of the person concerned. The ECtHR held that it is permissible for domestic authorities to place juveniles in detention facilities on a temporary basis until suitable accommodation is found, as long as this happens speedily. In the applicant's case the speediness requirement was not met as he was only placed in a suitable accommodation more than six months after his release from detention. The ECtHR therefore found a violation of Article 5 (1) (d) of the ECHR.

<sup>536</sup> ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

<sup>537</sup> ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002.

## Appeals to detention, speediness of review and access to a lawyer

The ECtHR requires particular diligence from national authorities in cases involving children in detention. In addition to the guarantees mentioned above, state authorities must ensure that children have the right to challenge the lawfulness of the detention at reasonable intervals, and that they have access to a lawyer during the proceedings determining the lawfulness of their detention. Furthermore, these legal challenges need to be decided speedily by domestic courts. The ECtHR derives these procedural guarantees from the text of Article 5 (4) of the ECHR.

Example: In *Bouamar v. Belgium*,<sup>538</sup> the ECtHR found a violation of Article 5 (4) because: the hearings for the determination of the applicant's detention took place in the absence of his lawyers; they were not decided speedily; there was no actual decision on the 'lawfulness of the detention', since the domestic courts dismissed the applicant's appeals as devoid of purpose.

### 11.2.2. Conditions of detention

**Under EU law**, Article 4 of the EU Charter of Fundamental Rights prohibits torture and inhuman or degrading treatment. However, as the Charter only applies within the scope of EU law, this provision has to be linked to another EU legal instrument dealing with detention in order to bind Member States in this respect. So far, there have not been any cases before the CJEU in relation to Article 4 of the Charter.

**Under CoE law**, the ECtHR found that detaining children together with adults might lead to a breach of Article 3<sup>539</sup> or Article 5 of the ECHR.<sup>540</sup> Further, lack of adequate medical care in detention could also raise issues under Article 3.<sup>541</sup> Other aspects which may potentially raise issues under Article 3 include available cell space, lighting, and recreational activities.<sup>542</sup> In assessing the compatibility of conditions of detention with the standards of Article 3 of

538 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

539 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

540 ECtHR, *Nart v. Turkey*, No. 20817/04, 6 May 2008.

541 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009; ECtHR, *Blokhin v. Russia*, No. 47152/06, 14 November 2013 (referred to the GC on 24 March 2014).

542 ECtHR, *Kuptsov and Kuptsova v. Russia*, No. 6110/03, 3 March 2011, para. 70.

the ECHR, the ECtHR often relies on the set of standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which monitors prison conditions under the umbrella of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment by conducting site visits to CoE member states.<sup>543</sup>

Example: In *Güveç v. Turkey*,<sup>544</sup> a fifteen year old boy was arrested on suspicion of membership of the Kurdistan Working Party (PKK). He was detained by the State Security Court in a prison for adults for five years. The ECtHR observed that his detention contravened Turkish regulations and obligations under international treaties, including, among others, Article 37 (c) of the CRC, which requires that children are kept separately from adults. The Court also noted that the applicant began to have psychological problems in prison, as a result of which he repeatedly attempted to commit suicide. In addition, the authorities failed to provide the applicant with adequate medical care. Consequently, given the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and their failure to take steps to prevent his repeated attempts to commit suicide, the ECtHR had no doubt that the applicant was subjected to inhuman and degrading treatment. There had accordingly been a violation of Article 3 of the ECHR.

The ECSR has consistently interpreted Article 17 of the ESC to the effect that if children are detained or imprisoned, they should be separated from adults.

The CoE European Rules for juvenile offenders subject to sanctions or measures provide detailed guidance on conditions of detention. They also provide that juveniles should not be held in institutions for adults, but in institutions specially designed for them.<sup>545</sup>

543 See, for example, ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

544 *Ibid.*

545 Council of Europe, Committee of Ministers (2008), CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, 5 November 2008, Rule 59.1.

Under international law, the CRC contains a separate provision on deprivation of liberty of children, which states that children must be separated from adults, unless it is not in their best interest to do so (Article 37 (c) of the CRC). This article also stipulates that children, in principle, have the right to maintain contact with their family through correspondence or visits.

### 11.2.3. Protection against abuse and ill-treatment

**Under CoE law**, the ECtHR has repeatedly held that domestic authorities are responsible for protecting persons in detention from death, abuse or ill-treatment caused by other inmates or the authorities themselves. States' obligations in this respect are particularly strong, since detainees are under the authority and control of the state.<sup>546</sup> In addition to taking reasonable measures to protect inmates, state authorities must also conduct effective investigations into arguable allegations of ill-treatment or death.

Example: The case of *Coselav v. Turkey* concerns the suicide of an adolescent in prison,<sup>547</sup> who had previously unsuccessfully attempted to commit suicide on several occasions. Following those attempts, the authorities transferred him from a wing for juveniles to a detention facility for adults. Having first established that the authorities knew or ought to have known of the existence of a real and immediate risk to the life of the applicants' son, the Court then noted that the authorities failed to take reasonable measures to prevent the risk of suicide. The ECtHR placed a strong emphasis on the age of the deceased and the fact that he had been detained together with adults. Consequently, the ECtHR found a violation of the substantive aspect of Article 2 of the ECHR. In addition, the Court also found a violation of the procedural limb of Article 2 due to the authorities' failure to conduct an effective investigation into the death of the applicants' son. The reasons supporting these findings include: the failure of the authorities to promptly inform the applicants of their son's death; the failure of the prosecution to examine the alleged failures in preventing the suicide; and the excessive length of the ensuing administrative proceeding.

546 ECtHR, *Anguelova v. Bulgaria*, No. 38361/97, 13 June 2002; ECtHR, *H.Y. and Hü.Y. v. Turkey*, No. 40262/98, 6 October 2005.

547 ECtHR, *Çoşelav v. Turkey*, No. 1413/07, 9 October 2012.

## 11.3. Protection of child victims and witnesses

### Key point

- Child victims and witnesses are entitled to protection against further victimisation, to recovery and reintegration and to effective participation in criminal and alternative proceedings.

**Under both EU and CoE law**, the position of child victims and witnesses has been recognised.

**Under EU law**, the Victim's Rights Directive 2012/29/EU<sup>548</sup> explicitly recognises the position of child victims. It provides that, when the victim is a child, his or her best interests are a primary consideration and must be assessed on an individual basis. In addition, a child-sensitive approach must prevail, which means the child's age, maturity, views, needs and concerns must be taken into account. Moreover, the directive aims to ensure that the child and the holder of parental responsibility (or another legal representative) will be informed of any measures or rights specifically focused on the child (Article 1 (2)). Child victims also have the right to be heard during criminal proceedings, and Member States must ensure that they can also provide evidence. Due account must be taken of the child's age and maturity (Article 10 (1)). Furthermore, the directive aims to protect the privacy and identity of child victims during criminal proceedings, to prevent secondary victimisation, among other reasons (Article 21 (1), see also Article 26). Moreover, the directive establishes a special provision on the right to protection of child victims during criminal proceedings (Article 24), which deals with the audiovisual recording of interviews with child victims and its use as evidence in criminal proceedings, the appointment of special representatives, and the right to legal representation in the child's own name if there is a conflict of interests between the child victim and the holders of parental responsibility. The directive furthermore contains various provisions for the protection of victims in general, such as access to victim support services. In the case of children or other vulnerable groups, specialist support

<sup>548</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L 315/55.

services should be made available (see Section 38 of the resolution accompanying the directive).<sup>549</sup>

Before being replaced by the Victims' Directive, Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings covered among other things the participation of victims, their rights and fair treatment. It recognised the special position of vulnerable victims, although it did not explicitly refer to children. Pursuant to this framework decision, the CJEU has ruled that children can be qualified as vulnerable when taking into account their age and the offences of which they consider themselves to have been victims. This consequently entitles them to special measures of protection, such as hearing them outside the trial court and before the trial takes place.<sup>550</sup> The CJEU has also ruled that all measures taken to protect victims must be designed in a way that the accused still receives a fair trial. In other words, the protection of victims and witnesses may not jeopardise the right of the accused person to a fair trial (see also the examples of case law of the ECtHR).<sup>551</sup>

Example: In the *Pupino* case,<sup>552</sup> an Italian school teacher was prosecuted for maltreating a pupil. Under the Italian Code of Criminal Procedure, witnesses must, as a rule, testify in court during the trial. In certain circumstances, however, their evidence may be taken before a judge ahead of trial through a special procedure (*incidente probatorio*). In this case, the public prosecutor asked the national court to allow the testimonies of the young children given in advance as evidence, but the national court refused. For the first time, the CJEU gave its interpretation of some of the provisions relevant to the standing of children as victims and witnesses in criminal proceedings. It underscored that the Framework Decision 2001/220/JHA requires Member States to ensure the specific protection of vulnerable victims, which means that the national court must be able to authorise vulnerable victims to testify in a way that guarantees their protection, for example outside the trial and before it takes place. The CJEU stated: "However, independently of whether a victim's minority is as a general rule sufficient to classify such a victim as particularly vulnerable

549 See FRA (2014b), p. 36.

550 CJEU, C-105/03, *Criminal proceedings against Maria Pupino* [GC], 16 June 2005, para. 53.

551 CJEU, C-105/03, *Criminal proceedings against Maria Pupino* [GC], 16 June 2005. See also CJEU, C-507/10, *Criminal proceedings against X*, 21 December 2011.

552 CJEU, C-105/03, *Criminal proceedings against Maria Pupino* [GC], 16 June 2005.

within the meaning of the Framework Decision, it cannot be denied that where, as in this case, young children claim to have been maltreated, and maltreated, moreover, by a teacher, those children are suitable for such classification, having regard in particular to their age and to the nature and consequences of the offences of which they consider themselves to be a victim".<sup>553</sup> Furthermore, the CJEU ruled that all measures concerning the protection and prevention of secondary victimisation must be designed in such a way that the defendant is still granted a fair trial.<sup>554</sup>

**Under CoE law**, the ECtHR ruled that there is a duty of the state to protect victims' interests. This is true for victims who participate as witnesses in criminal proceedings. Their interests under ECHR provisions, such as Article 2 and Article 8, must be balanced against the interests of the defence.<sup>555</sup> The ECtHR has a number of rulings concerning sexual offences in which children testified against the alleged perpetrators. This case law shows that the Court recognised that criminal proceedings concerning sexual offences "are often conceived of as an ordeal by the victim, in particular when the latter was unwillingly confronted with the defendant" and that this was even more prominent when children were concerned.<sup>556</sup> Consequently, the Court accepted that in such cases certain measures may be taken for the purpose of protecting the child victims. However, it also noted that such measures may not jeopardise the adequate and effective exercise of the rights of the defence, and the judicial authorities may therefore be required to take measures which counterbalance the handicaps under which the defence operates.<sup>557</sup>

Example: In *Kovač v. Croatia*,<sup>558</sup> a 12 year old girl testified before an investigating judge that the applicant had committed indecent acts on her. The applicant had not been present or represented during the said testimony, nor was he given the opportunity to contest the victim's statement. The ECtHR reiterated that, as a rule, all evidence must be provided in

<sup>553</sup> *Ibid.*, para. 53.

<sup>554</sup> *Ibid.*, para. 59.

<sup>555</sup> ECtHR, *Doorson v. the Netherlands*, No. 20524/92, 26 March 1996.

<sup>556</sup> ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002, para. 47.

<sup>557</sup> ECtHR, *Bocos-Cuesta v. the Netherlands*, No. 54789/00, 10 November 2005; ECtHR, *A.L. v. Finland*, No. 23220/04, 27 January 2009; ECtHR, *W. v. Finland*, No. 14151/02, 24 April 2007; ECtHR, *Kovač v. Croatia*, No. 503/05, 12 July 2007.

<sup>558</sup> ECtHR, *Kovač v. Croatia*, No. 503/05, 12 July 2007.



the presence of the accused at a public hearing with a view to adversarial arguments. If statements at the stage of the police inquiry or the judicial investigation are used as evidence, this is not in itself inconsistent with Article 6 of the ECHR, provided that the defendant is given an adequate and proper opportunity to challenge and question the witness concerned, either at the time of making the statements or at a later stage of the proceedings. In the applicant's case, the victim's statements were the only direct evidence of the facts held against the applicant, and this evidence was decisive in the court's decision to issue a guilty verdict. However, the applicant had been unable to contest or obtain a reply from the domestic courts concerning his complaint in that respect. What is more, the victim's actual statement had never been read out before the trial court. Instead, the judge merely noted that the victim upheld her statement made before the investigating judge. Therefore, the ECtHR concluded that the applicant had not been afforded a fair trial, a breach of Article 6 (1) in conjunction with Article 6 (3) (d) of the ECHR.

Example: In *S.N. v. Sweden*,<sup>559</sup> a ten-year-old boy testified to the police that he was sexually abused by the applicant. The boy was interviewed twice by a police inspector with significant experience in child abuse cases. The first interview was videotaped, the second audiotaped. The lawyer of the applicant did not attend the second interview, but agreed with the police-inspector on the issues that needed to be discussed. During the trial, the District Court played the recordings of the child's interviews, but did not examine him in person. The court ultimately convicted the applicant, relying almost entirely on the child's testimonies. The Court of Appeal upheld the conviction. It found that the police interviews provided sufficient evidence for the applicant's guilt to be established, even though it acknowledged that there was no technical evidence supporting the child's allegations, which were sometimes imprecise. The ECtHR accepted that, in sexual offence cases, cross-examination of a witness is not always possible and that, in such cases, witness testimonies should be treated with extreme care. Although the statements made by the child were virtually the sole evidence against the accused, the proceedings as a whole were fair. The videotape was shown during the trial and appeal hearings and the transcript of the second interview was read out before the District Court; the audiotape was also played before the Court of Appeal. This gave the

559 ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.

applicant sufficient opportunity to challenge the child's testimony and his credibility in the course of the criminal proceedings. Consequently, there had been no violation of Article 6 (3) (d) of the ECHR.

The case law of the ECtHR is not only about balancing the protection of child victims and the right of the defendant to a fair trial, but also about the protection of the right to life of witnesses and their families, including children, under Article 2 of the ECHR, as shown by the following example.

Example: *R.R. and Others v. Hungary*<sup>560</sup> concerns a prisoner who testified in open court about his drug-trafficking activities and who was, along with his wife and two children, put in the official witness-protection programme for risk of retribution. When the authorities realised that the prisoner was still in contact with criminal circles, they removed him and his family from the witness protection programme for having breached its terms. Under Article 2 of the ECHR, the family claimed that their exclusion from the witness-protection programme had put their lives at risk of mafia retribution. The Court accepted that the applicants' inclusion in the witness protection programme and the father's collaboration with the authorities meant that the applicants' lives had been at risk when the measure was originally put in place. As the cancellation of their protection by the programme was not motivated by a reduction of that risk, but by a breach of its terms, the Court was not persuaded that the authorities had proven that the risk had ceased to exist. Furthermore, it was not unreasonable to suppose that, following the withdrawal of the family's cover identities, their identities and whereabouts became accessible to anyone wishing to harm them. In that way, the authorities potentially exposed the family to a life-threatening danger, in breach of Article 2 of the ECHR.

Article 31 of the Lanzarote Convention indicates which general measures of protection Member States should take to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings (Article 31 (1)). These measures include information about their rights as victims, the availability of services and the general progress of the investigation or proceedings, the protection of their privacy and safety (including information on the release of the person prosecuted or convicted) and the avoidance of contact between victims and perpetrators in

<sup>560</sup> ECtHR, *R.R. and Others v. Hungary*, No. 19400/11, 4 December 2012.

court and law enforcement agency premises. In addition, Article 31 provides that victims must have access to legal aid (Article 31 (3)). The information provided must be adapted to children's age and maturity and be in a language he or she understands (Article 31 (6)).

The CoE's *Guidelines on child friendly justice*<sup>561</sup> also pay attention to the position of the child victim and witness, particularly when he or she gives evidence in judicial proceedings. The guidelines call upon member states to make "[e]very effort [...] for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have".<sup>562</sup> To this end, trained professionals should be involved, and, for example, audiovisual statements encouraged. Children should also have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator. The guidelines also recognise that this child-friendly approach should respect the right of other parties to contest the content of the child's statements. In addition, the guidelines provide that the privacy and family life of child witnesses should be protected (Section IV (a) (9)) and proceedings should preferably be held *in camera*.

Under international law, the position of child victims has been explicitly recognised in Article 39 of the CRC. This provision stipulates that States Parties must take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims. This recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child.

It is also important to note that the UN has adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.<sup>563</sup> These guidelines call for child victims and witnesses to be treated in a "child-sensitive manner", which "denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views".<sup>564</sup> The guide-

561 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010. See also FRA (2015b).

562 Council of Europe, Committee of Ministers (2010), *Guidelines on child friendly justice*, 17 November 2010, para. 64.

563 UN Economic and Social Council (ECOSOC), Resolution 2005/20, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, 22 July 2005.

564 *Ibid.*, para. 9 (d).

lines provide very detailed guidance on how to implement these aspects. The UN Committee on the Rights of the Child has also underscored the relevance of these UN Guidelines under Article 12 of the CRC (right to be heard) in its General Comment.<sup>565</sup> According to the committee, child victims and child witnesses of a crime must be given an opportunity to fully exercise their rights to freely express their views, which in particular “means that every effort has to be made to ensure that a child victim and/or witness is consulted on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process”.<sup>566</sup> The Committee also argues that “the right of the child victim and witness is [...] linked to the right to be informed about issues such as availability of health, psychological and social services, the role of a child victim and/or witness, the ways in which ‘questioning’ is conducted, existing support mechanisms in place for the child when submitting a complaint and participating in investigations and court proceedings, the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal”.<sup>567</sup>

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565 UN, Committee on the Rights of the Child (2009), *General Comment (2009): The right of the child to be heard*, CRC/C/GC/12, 1 July 2009, paras. 62–64.

566 *Ibid.*, para. 63.

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# How to find case law of the European Courts

## European Court of Human Rights: HUDOC case law database

The **HUDOC database** provides free access to ECtHR case law: <http://HUDOC.echr.coe.int>.

The database is available in English and French and provides a user-friendly search engine that makes it easy to find case law.

Video tutorials and user manuals are available on the HUDOC **Help** page. For details and examples of how to use filters and search fields, the user can place the mouse pointer on the **?** at the right of every search tool in the Hudoc interface.

The case law references in this handbook provide the reader with comprehensive information that will enable them to easily find the full text of the judgment or decision cited.

Before starting a search, please note that the default settings show the Grand Chamber and Chamber judgments in the order of the latest judgment published. To search in other collections such as decisions, the user should tick the appropriate box in the **Document Collections** field appearing on the upper left side of the screen.

The simplest way to find cases is by entering the application number into the **Application Number** field under the **Advanced Search** on the upper right side of the screen and then clicking the blue 'Search' button.

To access further case law pertaining to other issues, for example, children-related issues, the user can use the **Search field** indicated with a magnifying glass on the top right part of the screen. In the search field, the user can search in the text using a:

- single word (e.g. child)
- phrase (e.g. “migrant children”)
- case title
- State
- Boolean phrase (e.g. child IN alternative care)

To help the user perform a text search, the **Simple Boolean search** is available by clicking on the arrow appearing inside the **Search field**. The Simple Boolean search offers six search possibilities: this exact word or phrase, all of these words, any of these words, none of these words, near these words, free Boolean search.

Once the search results appear, the user can easily narrow the results using the filters appearing in the **Filters** field on the left side of the screen, for example, “Language” or “State”. Filters can be used individually or in combination to further narrow the results. The “Keywords” filter can be a useful tool, as it often comprises terms extracted from the text of the ECHR and is directly linked to the Court’s reasoning and conclusions.

**Example:** Finding the Court’s case law on the issue of expulsion of asylum seekers putting them at risk of torture or inhuman or degrading treatment or punishment under Article 3 ECHR

- 1) The user first enters the phrase “asylum seekers” into the **Search field** and clicks the blue **Search button**.
- 2) After the search results appear, the user then selects the “3” under the **Violation filter** in the **Filters field** to narrow the results to those related to a violation of Article 3.
- 3) The user can then select the relevant keywords under the **Keywords filter** to narrow the results to those relevant to Article 3, such as the keyword “(Art. 3) Prohibition of torture”.

For more significant cases, a legal summary is available in HUDOC. The summary comprises a descriptive head note, a concise presentation of the facts and the law, with emphasis on points of legal interest. If a summary exists, a link **Legal Summaries** will appear in the results together with the link to the judgment text or decision. Alternatively, the user can search exclusively for legal summaries by ticking the “Legal Summaries” box in the **Document Collections** field.

If non-official translations of a given case have been published, a link **Language versions** will appear in the results together with the link to the judgment text or decision. HUDOC also provides links to third-party internet sites that host other translations of ECtHR case law. For more information, see “Language versions” under the HUDOC “Help” section.

## Court of Justice of the European Union: CURIA case law database

The **CURIA case law database** provides free access to ECJ/CJEU case law: <http://curia.europa.eu>.

The search engine is available in all official EU languages.<sup>568</sup> The **language** can be selected on the upper right side of the screen. The search engine can be used to search for information in all documents related to concluded and pending cases by the Court of Justice, the General Court and the Civil Service Tribunal.

There is a **Help** section available at <http://curia.europa.eu/common/juris/en/aideGlobale.pdf#>. Each search box also has a help page that can be accessed by clicking the icon and contains useful information to help the user make the best possible use of the tool.

The simplest way to find a specific case is to enter the full case number into the search box entitled **Case number** and then clicking the green ‘Search’ button. It is also possible to search for a case using a part of the case number. For example, entering 122 in the ‘Case number’ field will find Case No. 122 for

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<sup>568</sup> Available since 30 April 2004: Spanish, Danish, German, Greek, English, French, Italian, Dutch, Portuguese, Finnish and Swedish; since 1 May 2004: Czech, Estonian, Latvian, Lithuanian, Hungarian, Polish, Slovak and Slovene; since 1 January 2007: Bulgarian and Romanian; since 30 April 2007: Maltese; since 31 December 2011: Irish; temporary derogations have been laid down by [Regulation \(EC\) No. 920/2005](#) and [Regulation \(EU\) No. 1257/2010](#). Secondary legislation in force at the date of accession is being translated into Croatian and will gradually be published in the [Special edition of the Official Journal of the European Union](#).

cases from any year and before any of the three courts: Court of Justice, the General Court and/or the Civil Service Tribunal.

Alternatively, one can also use the **Name of parties** field to search with the common name of a case. This is usually the simplified form of the names of the parties to the case.

There are a total of 16 multi-functional search fields available to help narrow the search results. The different search fields are user-friendly and can be used in various combinations. The fields often have search lists that can be accessed by clicking the icon and selecting available search terms.

For more general searches, using the **Text** field produces results based on keyword searches in all documents published in the European Court Reports since 1954, and since 1994 for the European Court Reports – Staff Cases (ECR-SC).

For more subject-specific searches, the **Subject-matter** field can be used. This requires clicking the icon to the right of the field and selecting the relevant subject(s) from the list. The search results will then produce an alphabetised list of selected documents related to the legal questions dealt with in the decisions of the Court of Justice, the General Court, the Civil Service Tribunal and in the Opinions of the Advocates General.

The CURIA website also has additional case law tools:

**Numerical access:** this section is a collection of case information for any case brought before one of the three courts. The cases are listed by their case number and in the order in which they were lodged at the relevant registry. Cases can be consulted by clicking on their case number. The ‘Numerical access’ section is available at: [http://curia.europa.eu/jcms/jcms/Jo2\\_7045/](http://curia.europa.eu/jcms/jcms/Jo2_7045/).

**Digest of the case-law:** this section offers a systematic classification of case law summaries on the essential points of law stated in the decision in question. These summaries are based as closely as possible on the actual wording of that decision. The ‘Digest’ section is available at: [http://curia.europa.eu/jcms/jcms/Jo2\\_7046/](http://curia.europa.eu/jcms/jcms/Jo2_7046/).

**Annotation of judgments:** this section contains references to annotations by legal commentators relating to the judgments delivered by the three courts

since they were first established. The judgments are listed separately by court or tribunal in chronological order according to their case number, while the annotations by legal commentators are listed in chronological order according to their appearance. References appear in their original language. The 'Annotation of judgments' section is available at: [http://curia.europa.eu/jcms/jcms/Jo2\\_7083/](http://curia.europa.eu/jcms/jcms/Jo2_7083/).

**National case-law database:** this external database can be accessed through the CURIA website. It offers access to relevant national case law concerning EU law. The database is based on a collection of case law from EU Member State national courts and/or tribunals. The information has been collected by a selective trawl of legal journals and direct contact with numerous national courts and tribunals. The 'National case-law database' is available in English and in French and is available at: [http://curia.europa.eu/jcms/jcms/Jo2\\_7062/](http://curia.europa.eu/jcms/jcms/Jo2_7062/).







# Legal instruments referenced

## UN legal instruments

On core UN treaties, including the CRC and their monitoring bodies see:  
[www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx).

On the Hague Conference on Private International Law Conventions relating to the International Protection of Children family and property relations see:  
[www.hcch.net/index\\_en.php?act=text.display&tid=10#family](http://www.hcch.net/index_en.php?act=text.display&tid=10#family).

## CoE legal instruments

All CoE legal instruments are available online at  
<http://conventions.coe.int/Treaty/>.

For information about the status of acceptance of CoE legal instruments by EU Member States, see 'International obligations' on the FRA website at:  
<http://fra.europa.eu/en/publications-and-resources/data-and-maps/int-obligations>.

	<b>Title</b>
<b>Children's rights/civil rights</b>	
<i>European Convention on Human Rights</i>	Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, CETS No.: 005, Rome, 4.11.1950, pp. 1-15.
<i>Protocol to the European Convention on Human Rights</i>	Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, CETS No.: 009, Paris, 20.3.1952, pp. 1-3.
<i>Protocol No. 12 to the European Convention on Human Rights</i>	Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 177, Rome, 4.11.2000, pp. 1-3.
<i>European Convention on the Exercise of Children's Rights</i>	European Convention on the Exercise of Children's Rights, CETS No.: 160, Strasbourg, 25.1.1996, pp. 1-10.
<i>European Convention on the Legal Status of Children born out of Wedlock</i>	European Convention on the Legal Status of Children born out of Wedlock, CETS No.: 085, Strasbourg, 15.10.1975, pp. 1-5.
<i>Convention on Human Rights and Biomedicine (Oviedo Convention)</i>	Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, CETS No.: 164, Oviedo, 4.4.1997, pp. 1-12.
<b>Personal identity issues</b>	
<i>Framework Convention for the Protection of National Minorities</i>	Framework Convention for the Protection of National Minorities, CETS No.: 157, Strasbourg, 1.2.1995, pp. 1-10.
<i>European Convention on Nationality</i>	European Convention on Nationality, CETS No.: 166, Strasbourg, 6.11.1997, pp. 1-13.
<i>Convention on the Avoidance of Statelessness in relation to State Succession</i>	Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, CETS No.: 200, Strasbourg, 19.5.2006, pp. 1-7.
<b>Family life and parental care</b>	
<i>Convention on Contact concerning Children</i>	Convention on Contact concerning Children, CETS No.: 192, Strasbourg, 15.5.2003, pp. 1-13.
<i>European Convention on the Adoption of Children (revised)</i>	European Convention on the Adoption of Children (revised), CETS No.: 202, Strasbourg, 27.11.2008, pp. 1-11.
<i>European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children</i>	European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, CETS No.: 105, Luxembourg, 20.5.1980, pp. 1-12.

<b>Child protection against violence and exploitation</b>	
<i>Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)</i>	Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No.: 201, Lanzarote, 25.10.2007, pp. 1–21.
<i>European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</i>	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CETS No.: 126, Strasbourg, 26.11.1987, pp. 1–9.
<i>Convention on Cybercrime</i>	Convention on Cybercrime, CETS No.: 185, Budapest, 23.11.2001, pp. 1–27.
<i>Council of Europe Convention on Action against Trafficking in Human Beings</i>	Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197, Warsaw, 16.5.2005, pp. 1–21.
<i>Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)</i>	Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.: 210, Istanbul, 11.5.2011, pp. 1–31.
<b>Economic, social and cultural rights</b>	
<i>European Social Charter</i>	European Social Charter, CETS No. 035, Turin, 18.10.1961, pp. 1–18.
<i>European Social Charter (revised)</i>	European Social Charter (revised), CETS No. 163, Strasbourg, 3.5.1996, pp. 1–29.
<b>Issues on migration and asylum</b>	
<i>European Convention on the Repatriation of Minors</i>	European Convention on the Repatriation of Minors, CETS No.: 071, The Hague, 28.5.1970, pp. 1–9.
<i>European Convention on the Legal Status of Migrant Workers</i>	European Convention on the Legal Status of Migrant Workers, CETS No.: 093, Strasbourg, 24.11.1977, pp. 1–14.
<i>European Convention on Social Security</i>	European Convention on Social Security, CETS No.: 078, Paris, 14.12.1972, pp. 1–42.
<i>European Code of Social Security</i>	European Code of Social Security, CETS No.: 048, Strasbourg, 16.4.1964, pp. 1–33.
<b>Consumer and data protection</b>	
<i>Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data</i>	Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No.: 108, Strasbourg, 28.1.1981, pp. 1–10.
<i>European Convention on Transfrontier Television</i>	European Convention on Transfrontier Television, CETS No.: 132, Strasbourg, 5.5.1989, pp. 1–20.

## EU legal instruments

All EU legal instruments are available online at <http://eur-lex.europa.eu>.

Short-hand name	Title
<b>Non-discrimination</b>	
<i>Racial Equality Directive (2000/43/EC)</i>	Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22–26.
<i>Employment Equality Directive (2000/78/EC)</i>	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.
<i>Gender Goods and Services Directive (2004/113/EC)</i>	Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004, pp. 37–43.
<b>Family life and parental care</b>	
<i>Brussels II bis Regulation (EC) No. 2201/2003</i>	Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338, 23.12.2003, pp. 1–29.
<i>Maintenance Regulation (EC) No. 4/2009</i>	Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, pp. 1–79.
<i>Mediation Directive (2008/52/EC)</i>	Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, pp. 3–8.
<i>Access to Justice Directive (2002/8/EC)</i>	Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26, 31.1.2003, pp. 41–47.
<b>Child protection against violence and exploitation</b>	
<i>Young Workers Directive (94/33/EC)</i>	Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ L 216, 20.8.1994, pp. 12–20.
<i>Anti-Trafficking Directive (2011/36/EU)</i>	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, pp. 1–11.

<i>Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU)</i>	Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, pp. 1–14.
<i>Victims' Directive (2012/29/EU)</i>	Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73.
<i>Residence Permits for Victims of Anti-Trafficking Directive (2004/81/EC)</i>	Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 6.8.2004, pp. 19–23.
<i>Commission Decision 2007/689/EC</i>	Commission Decision of 29 October 2007 amending Decision 2007/116/EC as regards the introduction of additional reserved numbers beginning with 116 (notified under document number C(2007) 5139) (Text with EEA relevance), OJ L 284, 30.10.2007, pp. 31–32.
<b>Migration and asylum, including social rights of migrant children</b>	
<i>Asylum Procedures Directive (2013/32/EU)</i>	Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180, 29.6.2013, pp. 60–95.
<i>Dublin Regulation (EU) No. 604/2013</i>	Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29.6.2013, pp. 31–59.
<i>Qualification Directive (2011/95/EU)</i>	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, pp. 9–26.
<i>Regulation (EU) No. 492/2011</i>	Regulation (EU) No. 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, OJ L 141, 27.5.2011, pp. 1–12.

<i>Free Movement Directive (2004/38/EC)</i>	Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance), OJ L 158, 30.4.2004, pp. 77-123.
<i>Council Directive 77/486/EEC on the education of the children of migrant workers</i>	Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers, OJ L 199, 6.8.1977, pp. 32-33.
<i>Family Reunification Directive (2003/86/EC)</i>	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, pp. 12-18.
<i>Temporary Protection Directive (2001/55/EC)</i>	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7.8.2001, pp. 12-23.
<i>Reception Conditions Directive (2013/33/EU)</i>	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, OJ L 180, 29.6.2013, pp. 96-116.
<i>Return Directive (2008/115/EC)</i>	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, pp. 98-107.
<i>Long-Term Residents Directive (2003/109/EC)</i>	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, pp. 44-53.
<i>Schengen Borders Code Regulation (EC) No. 562/2006</i>	Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006, pp. 1-32.
<b>Consumer and personal data protection</b>	
<i>Consumer Rights Directive (2011/83/EU)</i>	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance, OJ L 304, 22.11.2011, pp. 64-88.

<i>Directive 87/357/EEC concerning products which, appearing to be other than they are, endanger the health or safety of consumers</i>	Council Directive 87/357/EEC of 25 June 1987 on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers, OJ L 192, 11.7.87, pp. 49–50.
<i>Distance Selling Directive (97/7/EC)</i>	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts – Statement by the Council and the Parliament re Article 6 (1) – Statement by the Commission re Article 3 (1), first indent, OJ L 144, 4.6.1997, pp. 19–27.
<i>General Product Safety Directive (2001/95/EC)</i>	Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (Text with EEA relevance), OJ L 11, 15.1.2002, pp. 4–17.
<i>Directive 2009/39/EC on foodstuffs intended for particular nutritional uses</i>	Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses (recast) (Text with EEA relevance), OJ L 124, 20.5.2009, pp. 21–29.
<i>Toy Safety Directive (2009/48/EC)</i>	Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (Text with EEA relevance), OJ L 170, 30.6.2009, pp. 1–37.
<i>Television Without Frontiers Directive (89/552/EEC)</i>	Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, pp. 23–30.
<i>Audiovisual Media Services Directive (2010/13/EU)</i>	Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Text with EEA relevance), OJ L 95, 15.4.2010, pp. 1–24.
<i>Data Protection Directive (95/46/EC)</i>	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.95, pp. 31–50.
<i>Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector</i>	Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, pp. 37–47.

<i>Unfair Business-to-Consumer Commercial Practices Directive (2005/29/EC)</i>	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (Text with EEA relevance), OJ L 149, 11.6.2005, pp. 22–39.
<i>Clinical Trials Directive (2001/20/EC)</i>	Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use, OJ L 121, 1.5.2001, pp. 34–44.
<i>Regulation 536/2014 on clinical trials on medicinal products for human use</i>	Regulation (EU) No. 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC (Text with EEA relevance), OJ L 158, 27.5.2014, pp. 1–76.
<b>Criminal justice and alternative proceedings</b>	
<i>Right to Interpretation and Translation Directive (2010/64/EU)</i>	Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, pp. 1–7.
<i>Right to Information Directive (2012/13/EU)</i>	Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1–10.
<i>Access to a Lawyer Directive (2013/48/EU)</i>	Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.
<i>Charter of Fundamental Rights</i>	Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
<b>Children with disabilities</b>	
<i>Council Decision 2010/48/EC</i>	Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, OJ L 23, 27.1.2010, pp. 35–61.







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