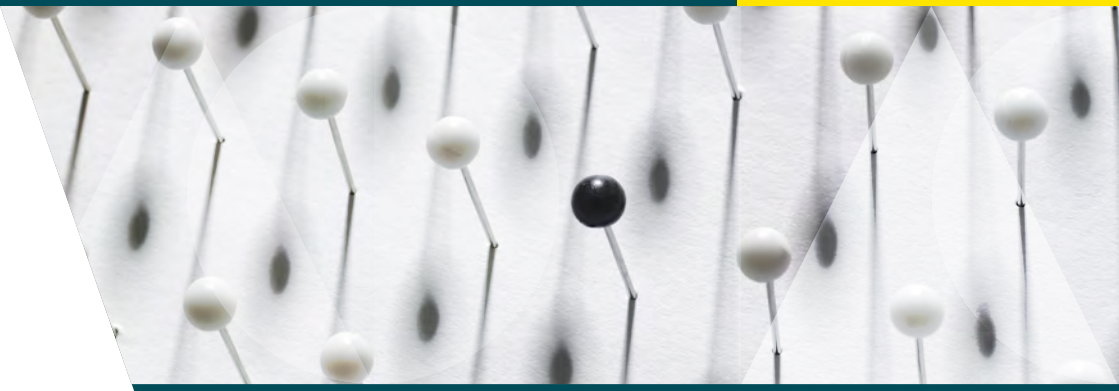
HANDBOOK



Handbook on European law relating to the rights of the child

2022 edition

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

The manuscript was completed in February 2022.

Luxembourg: Publications Office of the European Union, 2022

CoE:	ISBN 978-92-871-9750-4		
FRA – print:	ISBN 978-92-9461-460-5	doi:10.2811/079581	TK-09-21-398-EN-C
FRA – PDF:	ISBN 978-92-9461-457-5	doi:10.2811/610564	TK-09-21-398-EN-N

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Foreword

This second edition of the *Handbook on European law relating to the rights of the child* has been jointly prepared by the European Union Agency for Fundamental Rights and the Council of Europe (the Children's Rights Division, the European Social Charter Department and the Registry of the European Court of Human Rights). It is the fifth in a series of handbooks on European law jointly prepared by our organisations. Previous handbooks were dedicated to European law relating to non-discrimination, asylum, borders and immigration, data protection and access to justice.

Since we published the first edition in 2015, there have been a number of legislative changes, as well as important case law relevant to the rights of the child. For example, the European Union (EU) has for the first time legislated on procedural safeguards for children who are suspects or accused persons in criminal proceedings. The Court of Justice of the EU (CJEU) has clarified legal questions regarding issues such as return of third-country national children. The European Court of Human Rights (ECtHR) has delivered a number of important judgments, notably in the areas of violence against children and detention of migrant children.

Children are full-fledged human rightsholders and this handbook aims to increase knowledge on the legal standards that protect and promote these rights in Europe. The Treaty on European Union sets forth the Union's obligation to promote the protection of the rights of the child. Its Charter of Fundamental Rights, regulations and directives, as well as the jurisprudence of the CJEU, have contributed to further determining the protection of these rights.

In the Council of Europe, a large number of conventions and their respective treaty bodies focus on specific aspects of the protection of the rights of the child, including protection from sexual abuse and exploitation, cybercrime, trafficking, gender-based violence and violation of data protection rights. These conventions contribute to enhancing the protection granted to children under the European Convention on Human Rights and the European Social Charter, including by the jurisprudence of the ECtHR and the decisions of the European Committee of Social Rights.

This handbook is designed for 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 trust that this handbook will provide them with the knowledge needed to integrate a child's rights perspective into all their decisions in all situations.

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Director General of Democracy
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Director of the European Union
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Contents

Abbreviations

CJEU	Court of Justice of the European Union (prior to December 2009, European Court of Justice (ECJ))
CoE	Council of Europe
CRC	United Nations Convention on the Rights of the Child
CRD	Consumer Rights Directive
CRPD	United Nations Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as European Convention on Human Rights)
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
EDPB	European Data Protection Board
EEA	European Economic Area
ESC	European Social Charter
EU	European Union
FCNM	Council of Europe Framework Convention for the Protection of National Minorities
FRA	European Union Agency for Fundamental Rights
GC	Grand Chamber (of the European Court of Human Rights)
GDPR	General Data Protection Regulation
GRETA	Group of Experts on Action against Trafficking in Human Beings
ILO	International Labour Organization
LGBTIQ	lesbian, gay, bisexual, transgender, intersex and queer
NGO	non-governmental organisation

TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

How to use this handbook

This handbook provides an overview of the fundamental rights of children in the European Union (EU) and in the Council of Europe (CoE) member States. It is broad in scope and updates the first edition, published in 2015. Children's rights are a cross-sectorial field of law. The handbook acknowledges children as holders of all human/fundamental rights, as well as subjects of special regulations given their specific characteristics. It focuses on the areas of law which are of specific importance to children.

The handbook is designed to assist legal practitioners who may not be specialised in the field of children's rights, including 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 related legal questions. It is a point of reference on both EU and CoE law related to its 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 starts with a table of the applicable law under the two separate European legal systems, which is then outlined in relation to each topic covered, to allow 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.

The application of 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. This body of case law is complemented by references to other relevant CoE instruments and standards.

EU law is presented 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)).

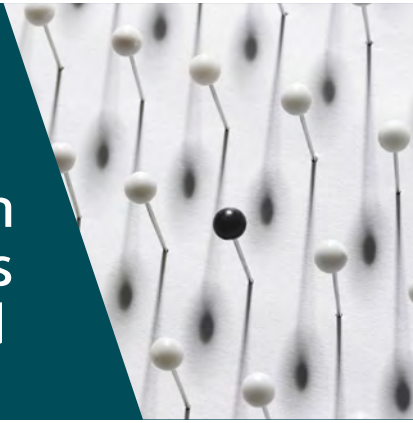
The case law described or cited in this handbook provides examples of an important body of both ECtHR and CJEU case law. The handbook includes, as far as possible given its limited scope and introductory nature, legal developments until September 2021.

The handbook starts with 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 and non-discrimination;
- personal identity issues;
- family life;
- alternative care and adoption;
- child protection against violence and exploitation;
- economic, social and cultural rights;
- migration and asylum;
- personal data and consumer protection;
- children's rights within criminal justice and alternative proceedings.

Each chapter cross-references other topics and chapters, providing a fuller understanding of the applicable legal framework. Key points are presented at the beginning of each section.

1 Introduction to European law relating to the rights of the child: context and key principles



EU	Issues covered	CoE
Charter of Fundamental Rights, Articles 24 and 32 Treaty on European Union (TEU), Article 3 (3)	**The child as a holder of rights**	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)
Charter of Fundamental Rights, Article 24 (2) CJEU, C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 2008 CJEU, C-112/20, *M. A. v. État belge*, 2021	**Best interests of the child**	Lanzarote Convention, Article 30 (1) ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, 2021
Charter of Fundamental Rights, Article 24 (1)	**Children's rights to participation and to be heard**	Lanzarote Convention, Article 9 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 (Oviedo Convention), Article 6
Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU)	**Protection from violence and/or sexual violence**	ECHR, Articles 2 (right to life), 3 (torture, inhuman or degrading treatment) and 8 (physical integrity) Lanzarote Convention
Charter of Fundamental Rights, Article 14 (2) (right to education)	**Right to receive free compulsory education**	ESC (revised), Article 17 (2) (right to appropriate social, legal and economic protection) Protocol 1 to the ECHR, Article 2

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 21 (non-discrimination)	Prohibition of discrimination on grounds of age	ECHR, Article 14 (prohibition of discrimination) Protocol 12 to the ECHR, Article 1
Charter of Fundamental Rights, Article 7 (respect for private and family life) and Article 24 (3) (contact with parents)	Right to respect for private and family life	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, *Maslov v. Austria* [GC], No. 1638/03, 2008 (deportation of the applicant, convicted of criminal offences as a child)

This introductory chapter explains how children's rights law has developed at 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.

The CoE was formed after the Second World War, bringing together the European states to uphold human rights, democracy and the rule of law in Europe. Today, the CoE is composed of 47 member States, including all EU Member States. In 1950, the CoE adopted the ECHR.[1] The ECHR was the first instrument to crystallise and give binding effect to the rights set out in the Universal Declaration of Human Rights. The ECHR applies equally to adults and children. It lays down absolute rights, which the States can never breach, such as the right to life or the prohibition of torture, and it protects certain rights and freedoms that can be restricted by law only when necessary in a democratic society, for example the right to liberty and security or the right to respect for private and family life.

Article 19 of the ECHR established the ECtHR as a judicial mechanism to ensure that states observe their obligations under the ECHR.

1 Council of Europe (1995), European Convention on Human Rights, adopted on 4 November 1950 and entered into force on 3 September 1953.

The ECtHR examines complaints from individuals, groups of individuals or legal persons alleging violations of the ECHR. It can also examine interstate cases brought by one or more CoE member States against another member State. Further to this, since the entry into force of Protocol 16 to the ECHR on 1 August 2018, the highest courts and tribunals of a State Party may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto.

States have an international obligation to ensure that their officials comply with the ECHR. All CoE member States have now incorporated or given effect to the ECHR in their national law, which requires their judges and officials to act in accordance with the provisions of the ECHR.

The ESC[2] (revised in 1996[3]) is another major human rights treaty of the CoE for the protection of social rights, with specific provisions for children's rights. The honouring of commitments under the charter by the States Parties is subject to the supervision of the European Committee of Social Rights (ECSR), elected by the CoE Committee of Ministers to monitor compliance with the charter through two complementary mechanisms: collective complaints lodged by social partners and NGOs, and national reports drawn up by Contracting States. ECSR decisions and conclusions must be respected by States even if they are not directly enforceable in the domestic legal systems.

The EU has evolved from three European organisations established in the 1950s. The original treaties of the European Communities did not contain any reference to human rights or their protection. However, as cases began to appear before the ECJ (now the CJEU) alleging human rights breaches caused by Community law, in the late 1960s and early 1970s, the Court developed a body of judge-made law known as the 'general principles' of Community law. According to the CJEU, these general principles would reflect the content of human rights protection found in national constitutions and human rights treaties, in particular the ECHR, and the CJEU would ensure the compliance of Community law with these principles.

The EU system of human rights protection has developed from the jurisprudence of the CJEU through to amendments to the treaties in order to affirm the protection of fundamental rights in the EU. The Treaty of Maastricht included

2 Council of Europe (1961), European Social Charter, CETS No. 35, 18 October 1961.

3 Council of Europe (1996), European Social Charter (revised), CETS No. 163, 3 May 1996.

reference to the ECHR and the common constitutional traditions of Member States as general principles of EU law, while the Treaty of Amsterdam confirmed that the EU is founded on those principles (the Treaty of Lisbon lists them as 'values' in Article 2 of the TEU).

The Charter of Fundamental Rights of the European Union, adopted in 2000, enshrines a range of civic, political, economic, social and cultural rights. When the Lisbon Treaty came into force in 2009, the charter acquired the same legal value as the treaties, meaning that the institutions of the EU are bound to comply with it. EU Member States must comply with the charter when implementing EU law. Comparing these references with the wording of corresponding provisions in national constitutions, the charter emerges as offering a remarkably detailed set of children's rights.[4]

All EU Member States and CoE member States are parties to the UN CRC.[5] The guiding principles of the CRC, such as the principle of the best interests of the child, the prohibition of discrimination, the right to survival, life and development, and the right of the child to be heard, have been incorporated to EU and CoE legal instruments.

1.1. Core concepts

Key points

- A child is defined as any person under the age of 18.
- Children are rightsholders, not merely beneficiaries of protection.

1.1.1. Scope of European law relating to the rights of the child

This section focuses on the legally binding instruments adopted by the CoE and the EU, as well as the case law of the ECtHR, the CJEU and other relevant

4 See Toggenburg, G. N. (2019), 'Die Rechte der Kinder und der Mehrwert der EU-Grundrechtecharta', *Interdisziplinäre Zeitschrift für Familenrecht*, August 2019, pp. 263–265.

5 United Nations, Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with Art. 49.

monitoring bodies. Where relevant, reference is made to other European sources that influence the development of European children's rights law, including key policy documents, guidelines and other non-binding/soft-law instruments.

Children as rightsholders are beneficiaries of all human/fundamental rights and subjects of special regulations, given their specific characteristics and needs. A considerable amount of 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 rights of children, it also considers the importance of parents/guardians or other legal representatives and makes reference, where appropriate, to situations in which rights and responsibilities are most prominently vested in children's carers. In such instances, the CRC approach is adopted, namely that parental responsibilities need to be exercised with the best interests of the child as the primary concern and in a manner consistent with the evolving capacities of the child.

1.1.2. The child as a holder of rights

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, including in Europe, to define who is a child.

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 majority of EU legal instruments use the definition of a child as a person below 18 years old. Nevertheless, some others use a broader one. For example, the 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",[6] 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),[7] for example, which regulates children's access to and conditions of formal employment across the EU Member States, distinguishes between

6 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).

7 Directive 94/33/EC of 22 June 1994 on the protection of young people at work, OJ 1994 L 216/12, Art. 3.

'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 CoE Convention on Action against Trafficking in Human Beings[8] and Article 3 (a) of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).[9]

The ECHR does not contain a definition of a child, but its Article 1 obliges states to secure rights under the convention 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.[10] The ECtHR has accepted applications by and on behalf of children irrespective of their age.[11] In its jurisprudence, it has accepted the CRC definition of a child,[12] endorsing the "below the age of 18 years" notion.

The same definition applies to the ESC and its interpretation by the ECSR.[13]

8 Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005.

9 Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007.

10 ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010. See also European Union Agency for Fundamental Rights (FRA) and ECtHR (2018), *Handbook on European non-discrimination law*, Luxembourg, Publications Office of the European Union (Publications Office), 21 March 2018, p. 103.

11 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. See also ECtHR, *C v. Croatia*, No. 80117/17, 8 October 2020.

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

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

1.2. Background to the rights of the child in Europe

Key points

- EU law protects the rights of the child through primary and secondary law in diverse areas, such as consumer protection, asylum and migration, cooperation in civil and criminal matters, and data protection.
- CoE law is based on several conventions focusing on the rights of children, as well as soft-law instruments, such as Committee of Ministers recommendations.

The EU and the CoE have both legislated in several areas relevant to the rights of the child. Interinstitutional cooperation is particularly strong between the CoE and the EU. The development of European law is also informed by important instruments adopted by international institutions, such as the Hague Conference on Private International Law.[14]

1.2.1. European Union: development of the rights of the child and the scope of protection

Historically, reference to the rights of the child in EU law was largely aimed at addressing specific child-related aspects of broader economic and political initiatives, for example in the field of consumer protection[15] and the free movement of persons.[16] The introduction of the Charter of Fundamental Rights of the European Union in 2000, the entry into force of the Treaty of Lisbon

14 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); Under its Terms of Reference (2020–2021), the Steering Committee for the Rights of the Child is tasked with ensuring co-operation and synergies with the EU.

15 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.

16 For example, 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.

in 2009[17] and strategic policy developments, such as the adoption of the EU Strategy on the Rights of the Child 2021–2024, provided new momentum for child rights in the EU.

Following 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 TEU). It obliges EU institutions in all their actions and the Member States when implementing EU law to protect the rights enshrined in it. The charter contains the first detailed references to children's rights at 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 any child work and exploitative labour of young people (Article 32). Significantly, the charter contains a specific provision on the rights of the child (Article 24), which articulates key children's rights principles: the right to such protection and care as is necessary for their well-being (Article 24 (1)); the right to express their views freely and to have their views taken into consideration in accordance with their age and maturity (Article 24 (1)); the right to have their best interests taken as a primary consideration in all actions relating to them (Article 24 (2)); the right to maintain on a regular basis a personal relationship and direct contact with both parents, unless that is contrary to their interests (Article 24 (3)); and the right to private and family life (Article 7). Comparing these references with the wording of corresponding provisions in national constitutions, the charter emerges as offering a remarkably detailed set of children's rights.[18]

According to Article 51 (2) of the charter and Article 6 (1) of the TEU, the charter cannot extend EU competences or modify or establish a new power or task for the EU.

The Lisbon Treaty 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 the child are included in the Treaty on the Functioning of the

17 Art. 3, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007 C 306.

18 See Toggenburg, G. N. (2019), 'Die Rechte der Kinder und der Mehrwert der EU-Grundrechtecharta', *Interdisziplinäre Zeitschrift für Familenrecht*, August 2019, pp. 263–265.

European Union (TFEU),[19] enabling the EU to enact legislative measures aimed at combating sexual exploitation and human trafficking (Article 79 (2) (d) and Article 83 (1)).

This led to the adoption of the Directive on combating child sexual abuse, child sexual exploitation and child pornography,[20] and the Directive on preventing and combating trafficking in human beings and protecting its victims,[21] which also contain provisions addressing specific needs of child victims. Moreover, the Directive establishing minimum standards on the rights, support and protection of victims of crime devotes several provisions to children.[22] In addition, a recent directive establishes procedural safeguards for children who are suspects or accused persons in criminal proceedings.[23]

In parallel to legal developments, important policy instruments have emerged on the rights of the child, initially in the context of the EU's external cooperation agenda and then in relation to internal issues. In 2021, the EU Strategy on the Rights of the Child[24] was adopted, as well as specific measures to combat child poverty and social exclusion under the European Child Guarantee. In the EU Strategy on the Rights of the Child, the European Commission addresses persisting and emerging challenges and proposes concrete priority actions in six key areas:

- child participation in political and democratic life;
- socio-economic inclusion, health and education;
- combating violence against children and ensuring child protection;
- child-friendly justice;

19 See consolidated versions of the TFEU, OJ 2012 C 326.

20 EU, European Parliament and Council of the European Union (2011), Directive 2011/93/EU, OJ 2011 L 335.

21 EU, European Parliament and Council of the European Union (2011), Directive 2011/36/EU, OJ 2011 L 101.

22 EU, European Parliament and Council of the European Union (2012), Directive 2012/29/EU, OJ 2012 L 315.

23 EU, European Parliament and Council of the European Union (2016), Directive 2016/800/EU, OJ 2016 L 132/1.

24 EU, European Commission (2021), The EU Strategy on the Rights of the Child 2021–2024.

- digital and information society;
- the global dimension.

A safe, secure and trusted digital space is a cornerstone of the European digital society. Children especially should be able to benefit from the unprecedented opportunities of the digital age, to become confident, competent and active digital citizens. The update of the European Strategy for a Better Internet for Children[25] in 2022 will provide the digital rights component of the umbrella rights of the child strategy.

The Child Guarantee addresses child poverty and social exclusion through measures in early childhood education and care, education, healthcare, nutrition and housing.[26]

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

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

1.2.2. Council of Europe: development of the rights of the child and the scope of protection

The CoE has had, since its establishment, a clear mandate to protect and promote human rights. Its primary human rights treaty, ratified by all CoE member States, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the ECHR and its additional protocols, contain specific

25 https://digital-strategy.ec.europa.eu/en/policies/european-strategy-better-internet-children

26 Council of the European Union (2021), Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee, ST/9106/2021/INIT, OJ 2021 L 223.

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 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, for instance Article 8, which guarantees the right to respect for private and family life, and Article 3, which prohibits torture and inhuman or degrading treatment or 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 ESC (revised in 1996), provides for the protection of social rights, with specific provision for related 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, and 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 ECSR, which is composed of 15 independent experts elected by the CoE's Committee of Ministers. The ECSR monitors the conformity of national law and practice with the ESC.

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

- Lanzarote Convention;
- Convention on the Exercise of Children's Rights;[27]

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

- Convention on the Legal Status of Children Born out of Wedlock;[28]
- Convention on the Adoption of Children, revised in 2008;[29]
- Convention on Contact concerning Children;[30]
- Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).[31]

At policy level, the CoE has, since 2006, implemented the programme 'Building a Europe for and with children' – a transversal plan of action involving national governments, civil society, the EU, and other international organisations and stakeholders. The Steering Committee for the Rights of the Child, established in 2020 as the successor to the Ad Hoc Committee for the Rights of the Child (2016–2019), guides the intergovernmental work in this area. The programme promotes a holistic and integrated approach to children's rights, mainstreaming child rights across all relevant CoE policy areas.[32]

Under this programme, the CoE's Committee of Ministers has adopted several soft-law instruments offering practical guidance to complement binding European legal measures relevant to children, including:

- Recommendation on integrated national strategies for the protection of children from violence;[33]
- *Guidelines on child-friendly justice*;[34]

28 Council of Europe (1975), European Convention on the Legal Status of Children Born out of Wedlock, CETS No. 85, 15 October 1975.

29 Council of Europe (2008), Convention on the Adoption of Children (revised), CETS No. 202, 27 November 2008.

30 Council of Europe (2003), Convention on Contact concerning Children, CETS No. 192, 15 May 2003.

31 Council of Europe (2011), Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 11 May 2011.

32 Council of Europe, children's rights web page.

33 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.

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

- *Guidelines on child-friendly healthcare*;[35]
- Recommendation on children's rights and social services friendly to children and families;[36]
- Recommendation on the participation of children and young people under the age of 18;[37]
- Recommendation concerning children with imprisoned parents;[38]
- Recommendation on effective guardianship for unaccompanied and separated children in the context of migration;[39]
- Recommendation on guidelines to respect, protect and fulfil the rights of the child in the digital environment.[40]

The CoE's intergovernmental work in the area of the rights of the child is guided by consecutive strategies for the rights of the child. The CoE Strategy for the Rights of the Child is implemented in synergy with priorities and actions proposed by other CoE strategies and action plans, such as the Disability Strategy (2017–2023), the Counter-terrorism Strategy (2018–2022), the Gender Equality Strategy (2018–2023), the Strategic Action Plan for Roma and Traveller Inclusion (2020–2025), the Strategic Action Plan on Human Rights and Technologies in Biomedicine (2020–2025), the Youth Sector Strategy 2030 and the Action

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

36 Council of Europe, Committee of Ministers (2011), Recommendation CM/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 CM/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 (2018), Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, 4 April 2018.

39 Council of Europe, Committee of Ministers (2019), Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019.

40 Council of Europe, Committee of Ministers (2018), Recommendation CM/Rec(2018)7 on guidelines to respect, protect and fulfil the rights of the child in the digital environment, 4 July 2018.

Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021–2025).[41]

The new Strategy for the Rights of the Child (2022–2027) has six key priority areas: freedom from violence; equal opportunities and social inclusion; access to and safe use of technologies for all children; child-friendly justice; giving a voice to every child; and children's rights in crisis and emergency situations.

1.3. European law relating to the rights of the child 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 CRC enjoys an important standing at European level, as all CoE member States are parties to the convention. It establishes common legal obligations on member States and shapes 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 binding instruments and case law at European level opens up more effective channels of enforcement for those seeking to invoke children's rights in Europe. The UN Committee on the Rights of the Child, which monitors the

41 Council of Europe, Disability Strategy 2017–2023, 30 November 2016; Council of Europe, Counter-terrorism Strategy (2018–2022), 4 July 2018; Council of Europe, Gender Equality Strategy 2018–2023, 7 March 2018; Council of Europe, Committee on Bioethics, Strategic Action Plan on Human Rights and Technologies in Biomedicine (2020–2025), 18 December 2019; Council of Europe, Committee of Ministers, Youth Sector Strategy 2030, 22 January 2020; Council of Europe, Committee of Ministers (2020), Council of Europe Strategic Action Plan for Roma and Traveller Inclusion (2020–2025), 22 January 2020; Council of Europe, Committee of Ministers (2021), Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021–2025), 5 May 2021.

implementation of the convention and its optional protocols and provides guidance on the interpretation of the CRC through its general comments, is of great importance for the EU and the CoE. Specific references to the UN committee's most relevant documents are included throughout this handbook.

The EU cannot become a party to the CRC, because the treaty does not provide for 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) as sources of EU law alongside the EU treaties. The CJEU has 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.[42] Consequently, and as all EU Member States have ratified the CRC, the EU is bound to adhere to its principles and provisions, at least in relation to matters that fall within the scope of the EU's competence.

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 two of the 'CRC general principles',[43] notably the best interests of the child principle (Article 3 of the CRC) and the child participation principle (Article 12 of the CRC).[44] At EU level, child-related legislative instruments, almost without exception, include either explicit reference to CRC articles or its 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. The CJEU has also often referred to the connection between the EU treaties and the CRC.[45]

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

43 United Nations, Committee on the Rights of the Child (2003), *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, CRC/GC/2003/5, 27 November 2003, para. 12.

44 EU, European Parliament, Council of the European Union, European Commission (2007), Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17.

45 See, for example, CJEU, C-112/20, *M. A. v État belge*, 11 March 2021, para. 37.

The CoE, as an organisation, is not legally bound by the CRC or its optional protocols,[46] although all CoE member States are parties to this convention. Since the ECHR is to be interpreted in harmony with the general principles of international law, account should be taken of any relevant rules of international law applicable in the relations between the States Parties to the ECHR; more specifically, the obligations that the ECHR lays on its States Parties in the field of children's rights must be interpreted in the light of the CRC.[47] The ECSR has also explicitly referred to the CRC in its decisions.[48] 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* 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.[49]

46 United Nations (2000), Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, General Assembly Resolution A/RES/54/263 of 25 May 2000; United Nations (2011), Optional Protocol to the Convention on the Rights of the Child on a communications procedure, General Assembly Resolution A/RES/66/138 of 19 December 2011; United Nations (2000), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, General Assembly Resolution A/RES/54/263 of 25 May 2000.

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

48 ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, 21 January 2021, para. 158; 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; ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 8 November 2004.

49 See United Nations, 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; United Nations, 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; United Nations, 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; United Nations, Committee on the Rights of the Child (2021), *General Comment No. 25 (2021) on children's rights in relation to the digital environment,* CRC/C/GC/25, 24 March 2021; United Nations, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019): Children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019.

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

Key points

- The CJEU, often drawing from the CRC, has issued decisions related to children's rights in areas such as migration, free movement, habitual residency and non-discrimination.
- The ECtHR has a vast jurisprudence on children's rights. Most of these cases fall under Article 8 of the ECHR, which guarantees the right to respect for private and family life.

1.4.1. Court of Justice of the European Union

In children's rights cases, the CJEU has so far mainly reviewed what are called preliminary references (Article 267 of the TFEU). These are procedures where a national court or tribunal asks the CJEU for an interpretation of primary EU law (i.e. treaties) or secondary EU law (i.e. decisions and legislation) of relevance to a pending case.

The CJEU increasingly delivers judgments concerning children's rights in various areas, such as free movement, EU citizenship, migration, foster care, habitual residency, family life and non-discrimination.

The CJEU has referred to the CRC to determine how EU law should be interpreted in relation to children, for example in the *Dynamic Medien Vertriebs GmbH v. Avides Media AG* case,[50] in which the CJEU invoked 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.[51] The CJEU also referred to Article 3 (1) of the CRC on the best interests of the child, and its reflection in Article 24 of the Charter of Fundamental Rights in the *M. A. v État belge* case.[52]

50 CJEU, C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 14 February 2008.

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

52 CJEU, C-112/20, *M. A. v État belge*, 11 March 2021, para. 37.

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.[53]

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,[54] 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. 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). Protocol No. 16 to the ECHR, which entered into force in 2018, allows the highest courts and tribunals of member States that have ratified the text to ask the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or its protocols.

The ECtHR has a vast body of jurisprudence on children's rights, and has examined many cases under Article 8 of the ECHR (right to respect for private and family life), in particular. Other cases related to the rights of the child have been examined under a range of human rights guarantees protected by the ECHR, such as the prohibition of inhuman or degrading treatment (Article 3 of the ECHR) or the right to a fair trial (Article 6 of the ECHR).

The ECtHR regularly refers to the CRC when addressing claims pursued either by or on behalf of children. In some cases, 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).

53 CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010. See also Chapter 5.

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

Example: *Maslov v. Austria*[55] concerns the deportation of the applicant, who had been convicted of a number of criminal offences as a child. 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.[56] The CRC was 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

Key point

- The ECSR has issued opinions following collective complaints in several child rights areas, including on cases related to exploitation, migration and children in conflict with the law.

The ECSR rules on the conformity of national law and practice with the ESC, either through the collective complaints procedure or the national reporting procedure.[57] 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 looked into issues concerning the economic exploitation of children,[58] the physical integrity of children,[59] the health rights of migrant children,[60] access to education by children

55 ECtHR, *Maslov v. Austria* [GC], No. 1638/03, 23 June 2008.

56 *Ibid.*, para. 83.

57 ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, 26 January 2021

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

59 ESCR, *World Organisation against Torture (OMCT) v. Greece*, Complaint No. 17/2003, 7 December 2004; ECSR, *Association for the Protection of All Children (APPROACH) Ltd v. Ireland*, Complaint No. 93/2013, 4 February 2013.

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

with disabilities,[61] children in conflict with the law[62] and rights of unaccompanied children.[63]

Example: In *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*,[64] the ICJ and ECRE alleged that Greece had failed to ensure the protection of unaccompanied migrant children in Greece and accompanied migrant children on the northeastern Aegean islands because, *inter alia*, reception facilities were overcrowded. The ECSR found violations of the ESC, on the grounds of the failure to provide adequate and appropriate accommodation to refugee and asylum-seeking children on the islands, the lack of sufficient long-term accommodation and shelter for unaccompanied refugee and asylum-seeking children on the mainland, the lack of an effective guardianship system for unaccompanied and separated migrant children, the detention of unaccompanied migrant children under the 'protective custody' scheme, the lack of access to education and the failure to provide sufficient healthcare for accompanied and unaccompanied migrant children on the islands.

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

62 ECSR, *International Commission of Jurists (ICJ) v. Czech Republic*, Complaint No. 148/2017, 20 March 2017.

63 ECSR, *European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v. Czech Republic*, Complaint No. 157/2017, 17 June 2020.

64 ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, 21 January 2021.

2 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**	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) ECtHR, *Dogru v. France*, No. 27058/05, 2008 (wearing of Islamic headscarf at a state secondary school) ECtHR, *Kervanci v. France*, No. 31645/04, 2008 (wearing of Islamic headscarf at a state secondary school) ECtHR, *Grzelak v. Poland*, No. 7710/02, 2010 (alternatives to religious education in primary and secondary schools) ECtHR, *Lautsi and Others v. Italy* [GC], No. 30814/06, 2011 (display of crucifixes in state schools) ECtHR, *Osmanoğlu and Kocabaş v. Switzerland*, No. 29086/12, 2017 (exemption from compulsory mixed swimming lessons) ECtHR, *Stavropoulos and Others v. Greece*, No. 52484/18, 2020 (right not to be obliged to manifest one's beliefs)

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 11 (freedom of expression)	**Freedom of expression and information**	ECHR, Article 10 (freedom of expression) ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, 1976 (banning of a book for children) ECtHR, *Gaskin v. the United Kingdom*, No. 10454/83, 1989 (access to casefile kept during childhood)
Charter of Fundamental Rights, Article 24 (rights of the child) Brussels IIa Regulation (recast) (2019/1111/EU) Procedural Safeguards Directive (2016/800/EU) Child Sexual Abuse Directive (2011/93/EC) CJEU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 2010 (right to be heard, international child abduction)	**Right to be heard**	ECHR, Article 6 (fair trial) European Convention on the Exercise of Children's Rights, Articles 3, 4, 6 and 7 Lanzarote Convention, Articles 9 and 14 ECtHR, *M. and M. v. Croatia*, No. 10161/13, 2015 (right to be heard in custody cases) ECtHR, *Sahin v. Germany* [GC], No. 30943/96, 2003 (hearing a child in court in access proceedings)
Charter of Fundamental Rights, Article 12 (freedom of assembly and association)	**Right to freedom of assembly and of association**	ECHR, Article 11 (freedom of peaceful assembly and association) ECtHR, *Christian Democratic People's Party v. Moldova*, No. 28793/02, 2006 (attending gatherings in public space)

All persons, including children, enjoy the civil rights and freedoms laid down in various instruments, most notably the EU Charter of Fundamental Rights and the ECHR as interpreted by the ECtHR. This chapter presents an overview of rights and freedoms that have an impact on children's rights. It analyses the right of the child to freedom of thought, conscience and religion (Section 2.1), Parents' rights and the freedom of religion of their children (Section 2.2), to freedom of expression and information (Section 2.3), to be heard (Section 2.4), and to freedom of assembly and of association (Section 2.5).

2.1. Freedom of thought, conscience and religion

Key point

- The ECHR and the EU Charter of Fundamental Rights guarantee freedom of thought, conscience and religion, including the right to change religion or belief and the freedom to manifest religion or belief in worship, teaching, practice and observance.

Under EU law, Article 10 of the EU Charter of Fundamental Rights guarantees 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 also recognised in accordance with national law (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.[65] 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.

Example: The cases of *Dogru v. France* and *Kervanci v. France*[66] 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

65 ECtHR, *Darby v. Sweden*, No. 11581/85, 23 October 1990.

66 ECtHR, *Dogru v. France*, No. 27058/05, 4 December 2008; ECtHR, *Kervanci v. France*, No. 31645/04, 4 December 2008.

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*[67] 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 levels (between the ages of 7 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.

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

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

Key points

- Parents have the right to ensure that the education and teaching of their children is in conformity with their religious, philosophical and pedagogical convictions.
- Parents have the right and duty to provide direction to their children 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.

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

Under EU law, due respect must be given to the right of parents to ensure that the education and teaching of their children is in conformity with their religious, philosophical and pedagogical convictions (Article 14 (3) of the Charter of Fundamental Rights).

Under CoE law, in particular Article 2 of Protocol No. 1 to the ECHR, states must take into account the parents' (religious) convictions in 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.[68] This 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 indoctrination that may not respect parents' religious and philosophical convictions), as well as the organisation of the school environment, including the presence of religious symbols, such as crucifixes, in state schools. The ECtHR has also considered cases where the interests of the child could come into conflict with the religious interests of their parents in the context of education.

68 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.

Example: The case *Lautsi and Others v. Italy*[69] 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 (GC) 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 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 – symbols that undoubtedly refer 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 GC 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.

Example: The case of *Osmanoğlu and Kocabaş v. Switzerland*[70] concerns Muslim parents who were fined for their refusal to allow their daughters to participate in compulsory mixed swimming lessons at their primary school. The applicants complained that this had amounted to an infringement of their right to manifest their religion under Article 9 (Protocol No. 1 to the ECHR not having been ratified by Switzerland). The ECtHR took into account the fact that the authorities had offered very flexible arrangements so as to reduce the impact of the children's attendance upon their parents' religious convictions; among other things, the daughters had been allowed to wear a burkini, and they had been able to undress and shower with no boys present. The fines, which had been preceded by warnings, did not appear disproportionate and there had been an accessible procedure for

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

70 ECtHR, *Osmanoğlu and Kocabaş v. Switzerland*, No. 29086/12, 10 January 2017.

the applicants to have their exemption request examined. It followed that the authorities had not exceeded the considerable margin of appreciation afforded to them in the present case.[71]

Example: In *Stavropoulos and Others v. Greece*,[72] the applicant parents and their daughter argued that the child's birth registration constituted a violation of their right to freedom of religion. A handwritten note (with the word "naming") had been inserted next to the child's name in the document and the section concerning christening had been left blank. The Court agreed with the applicants that the note carried a particular connotation; namely, that the daughter had not been christened. Including such information on a birth certificate, a public and frequently used document, exposed the bearer to the risk of discriminatory situations in their dealings with administrative authorities. In the case in question, moreover, the insertion of the handwritten note had not been prescribed by law; it was therefore not necessary to examine whether the interference had pursued a legitimate aim and was "necessary in a democratic society", in order to find a breach of Article 9 of the ECHR.

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. 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). Article 14 (3) of the EU Charter of Fundamental Rights also recognises the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions.

71 See also ECtHR, *Papageorgiou and Others v. Greece*, Nos. 4762/18 and 6140/18, 31 October 2019; ECtHR, *Perovy v. Russia*, No. 47429/09, 20 October 2020.

72 ECtHR, *Stavropoulos and Others v. Greece*, No. 52484/18, 25 June 2020.

2.3. Freedom of expression and information

Key point

- 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.

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 when prescribed by law, in pursuit of one of the legitimate aims listed in Article 10 (2) and when necessary in a democratic society.

In its case law, the ECtHR has 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".[73]

Example: In *Handyside v. the United Kingdom*,[74] 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 with regard to sexuality

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

74 *Ibid.*

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".

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

Example: The case *Gaskin v. the United Kingdom*[75] 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".[76] 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 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

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

76 *Ibid.*, para. 49.

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.

The CRC under Article 13 (1) recognises the child's right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, orally, in writing or in print, in the form of art, or through any other medium of the child's choice.

2.4. Right to be heard

Key points

- The CRC recognises the child's right to express their own views freely in all matters affecting them as one of its general principles.
- According to the EU Charter of Fundamental Rights, children have the right to express their views freely and for their views to be taken into consideration on matters which concern them in accordance with their age and maturity.
- Under the ECHR, whether a national court has to hear the child has to be assessed in light of the specific circumstances of each case and is dependent on the child's age and maturity.

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 has often interpreted the meaning of this provision in conjunction with the Brussels IIa Regulation.

Example: *Joseba Andoni Aguirre Zarraga v. Simone Pelz*[77] 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

77 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 IIa Regulation (recast).

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 IIa) 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 the right of a child to be heard 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 IIa 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. If the child is resident in another Member State, the hearing of a child may, as indicated in recital 20 of the Brussels IIa Regulation, take place under the arrangements laid down in Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. According to the CJEU's ruling, however, the authorities of the country the child had been removed to (Germany) could not oppose the return of the child on the basis of a breach of the right to be heard in the country of origin (Spain).

The right to be heard is reflected in various legislative acts. Under Article 21 of the Brussels IIa Regulation (recast), children capable of forming their own views have the right to be provided with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body.[78] Their views are to be given due weight in accordance with their age and maturity. This right applies not only in matters of parental responsibility, but also to return proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[79]

According to the EU's Procedural Safeguards Directive, Member States must ensure that children have the right to be present at their trial, and must take

78 EU, Council of the European Union, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ 2019 L 178/1.

79 See also Art. 26 of Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ 2019 L 178/1.

all necessary measures to enable them to participate effectively in the trial, including by giving them the opportunity to be heard and express their views.[80] The EU's Child Sexual Abuse Directive also establishes a number of procedural safeguards to ensure the child victim is protected during interviews in the criminal proceedings.[81]

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.[82] 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.

Example: The case of *M. and M. v. Croatia*[83] concerns a custody dispute, including allegations of child abuse by the father. The ECtHR was particularly struck by the fact that the child, at the relevant time aged 13 and a half, had still not been heard in custody proceedings, which had thus far lasted over four years, and had thus not been given the chance to express her views before the courts about which parent she wanted to live with. It could not be said that children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views. The circumscribed autonomy of children, which gradually increases with their evolving maturity, is exercised through their right to be consulted and

80 EU, European Parliament and Council of the European Union (2016), Directive (EU) 2016/800/EU of 11 May 2016 on procedural safeguards for children suspected or accused in criminal proceedings, OJ 2016 L 132/1, Art. 16.

81 EU, European Parliament and Council of the European Union (2011), Directive (EU) 2011/93/EU 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 2011 L 335/1, Art. 20.

82 See also ECtHR, *N.Ts. v. Georgia*, No. 71776/12, 2 February 2016; ECtHR, *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, No. 23298/12, 11 October 2016; ECtHR, *C v. Croatia*, No. 80117/17, 8 October 2020; ECtHR, *M.N. and Others v. Belgium*, No. 3599/18, 5 March 2020; ECtHR, *Petrov and X v. Russia*, No. 23608/16, 23 October 2018.

83 ECtHR, *M. and M. v. Croatia*, No. 10161/13, 3 September 2015.

heard. In the specific circumstances of the case, not respecting the first applicant's wishes as regards which parent she wished to live with had breached her right to respect for private and family life under Article 8.

Example: In the case of *Sahin v. Germany*,[84] 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 on 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.

A number of binding and soft-law CoE instruments contain provisions relating to the right of the child to be heard in different contexts. The European Convention on the Exercise of Children's Rights deals with the right of children to express their views freely.[85] The convention grants children 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 information, consult her or him in person, if appropriate, and allow the child to express her or his views. Equally, the *CoE Guidelines on child-friendly*

84 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.

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

justice emphasise the importance of children's right to be heard in all proceedings involving or affecting them.[86]

The Lanzarote Convention, in Article 9, addresses the participation of children in the development and the implementation of state policies, programmes or other initiatives concerning the fight against sexual exploitation and sexual abuse of children. Article 14 (1) of the same convention provides that assistance to victims must take due account of the child's views, needs and concerns.[87]

The Council of Europe Recommendation on the participation of children and young people under the age of 18 refers to their right to be heard in all settings, including in schools, in communities and in the family as well as at national and European levels.[88] It also contains guidelines for member States when implementing the recommendation, such as protecting children's and young people's right to participate, promoting participation and informing children and young people about it, and creating spaces for participation. The Council of Europe *Child participation assessment tool* provides specific and measurable indicators to measure progress in implementing this recommendation.[89]

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.

86 See also Council of Europe, Committee of Ministers of the Council of Europe (2010), *Guidelines on child-friendly justice*, 17 November 2010.

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

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

89 Council of Europe, Children's Rights Division and Youth Department (2016), *Child participation assessment tool*, March 2016.

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.
- The ECtHR has explicitly asserted the right of children to attend public gatherings.

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 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*[90] it would be contrary to the parents' 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. Based on this provision, various associations in which children are engaged have been granted international protection.

90 ECtHR, *Christian Democratic People's Party v. Moldova,* No. 28793/02, 14 February 2006.

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) TFEU, Article 19 Employment Equality Directive (2000/78/EC) Racial Equality Directive (2000/43/EC) Directive 2006/54/EC (recast) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services	**Equality and non-discrimination**	ECHR, Article 14 Protocol No. 12 to the ECHR, Article 1 (non-discrimination) ESC (revised), Article E (non-discrimination) Framework Convention for the Protection of National Minorities (FCNM), Article 4 Lanzarote Convention, Article 2
Racial Equality Directive (2000/43/EC)	**Non-discrimination based on race and ethnic origin**	ECHR, Article 14 taken together with Article 2 of Protocol No. 1 to the ECHR FCNM, Articles 4 and 12 ECtHR, *D.H. and Others v. the Czech Republic* [GC], No. 57325/00, 2006 (placement of Roma children in special schools)

EU	Issues covered	CoE
		ECtHR, *Oršuš and Others v. Croatia*, No. 15766/03, 2010 (Roma-only classes in primary schools) ECtHR, *Catan and Others v. Moldova and Russia*, Nos. 43370/04 et al., 2012 (separatist authorities policy) ECtHR, *Ádám and Others v. Romania*, Nos. 81114/17 et al., 2020 (additional exams for ethnic group) ECSR, *European Roma Rights Centre (ERRC) v. Ireland*, Complaint No. 100/2013, 2015
Charter of Fundamental Rights, Article 21 *TFEU*, Article 45 Citizenship Directive (2004/38/EC) Long-term Residence Directive (2003/109/EC) Family Reunification Directive (2003/86/EC) Single Permit Directive (2011/98/EU) CJEU, C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 2004 (residence rights of third-country national parents)	**Non-discrimination based on nationality and immigration status**	ECHR, Article 14 taken together with Article 2 of Protocol No. 1 to the ECHR FCNM, Articles 4 and 12 ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 2011 (school fees for temporary residents)
Charter of Fundamental Rights, Article 21 Employment Equality Directive (2000/78/EC) CJEU, C-303/06, *S. Coleman v. Attridge Law and Steve Law* [GC], 2008	**Non-discrimination based on disability**	ECHR, Article 14; Protocol No. 12 to the ECHR, Article 1 (non-discrimination) ESC, Article 17 (2) ECtHR, *Çam v. Turkey*, No. 51500/08, 2016 (refusal of admission to music school on the grounds of visual impairment) ECtHR, *G.L. v. Italy*, No. 59751/15, 2020 (failure to provide specialised learning support for autistic pupil)

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 21 Victims' Rights Directive (2012/29/EU) Employment Equality Directive (2000/78/EC) CJEU, C-303/06, *S. Coleman v. Attridge Law and Steve Law* [GC], 2008	Non-discrimination based on other protected grounds	Lanzarote Convention, Article 2 ECHR, Article 14 Protocol No. 12 to the ECHR, Article 1 (non-discrimination) ECtHR, *Bayev and Others v. Russia*, No. 67667/09, 2017 (arbitrary anti-homosexuality legislation) ECtHR, *P.V. v Spain*, No. 35159/09, 2010 (restriction of contact due to emotional instability resulting from gender reassignment) ECtHR, *D.G. v. Ireland*, No. 39474/98, 2002 (failure to provide age-appropriate detention facility for young offender) ECtHR, *Bouamar v. Belgium*, No. 9106/80, 1988 (failure to provide age-appropriate detention facility for young offender) ECtHR, *Fabris v. France* [GC], No. 16574/08, 2013 (inheritance rights for children born out of wedlock) ECtHR, *Mazurek v. France*, No. 34406/97, 2000 (inheritance rights for children born out of wedlock)

The prohibition of discrimination is a basic principle of any democratic society. EU institutions have adopted a series of directives to combat discrimination, which are also relevant to children. The ECtHR has developed a substantial body of case law on the prohibition of discrimination under Article 14 of the ECHR, in conjunction with other ECHR articles and, to a more limited extent, under Article 1 of Protocol No. 12.

The ECSR considers the function of Article E of the ESC on non-discrimination to be similar to that of Article 14 of the ECHR: it has no independent existence and must be combined with one of the ESC's substantive provisions.[91]

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

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 starts with general information on European non-discrimination law (Section 3.1), and then focuses on equality of and non-discrimination against children based on ethnic origin (Section 3.2), nationality and immigration status (Section 3.3), disability (Section 3.4), and other protected grounds, including gender, gender identity and sexual orientation, language and personal identity (Section 3.5).

3.1. European non-discrimination law

Key points

- 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 or sexual orientation is generally prohibited in Europe.[92]
- In the EU, the Charter of Fundamental Rights prohibits any discrimination based on any ground such as 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 or sexual orientation. Within the scope of application of the treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality is also prohibited.
- Secondary EU law prohibits discrimination on grounds of sex (gender equality directives); on grounds of ethnic or racial origin in several domains of life (Racial Equality Directive); and in employment and occupation on grounds of age, disability, sexual orientation, religion or belief (Employment Equality Directive).
- Article 14 of the ECHR prohibits discrimination in relation to the exercise of another right guaranteed by the convention. Under Protocol No. 12, the prohibition of discrimination became a free-standing right.
- A number of CoE instruments highlight the need to secure non-discrimination in reference to particular circumstances or groups.

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

92 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 (2018), *Handbook on European non-discrimination law*, February 2018.

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. Article 2 of the TEU refers to non-discrimination, equality, human dignity justice and tolerance between men and women as common to all Member States' values. Article 19 of the TFEU covers the grounds of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Non-discrimination 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. Article 19 of the TFEU 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 access to 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),[93] 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.[94] Further directives implement the principle of equal treatment between men and women in matters of employment and occupation or self-employment (Directives 2006/54/EC[95] and

93 EU, Council of the European Union (2000), Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303.

94 EU, Council of the European Union (2000), 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.

95 EU, European Parliament and Council of the European Union (2006), Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204.

2010/41/EU[96]) and in the access to and supply of goods and services (Gender Goods and Services Directive).[97] Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women applies in the area of social security.[98] The Equal Treatment Directive proposed by the Commission in 2008 aims at filling the gaps in the equality legislation.[99]

Under the ECHR, Article 14 guarantees equality in "the enjoyment of [...] [the] rights and freedoms" set out in the ECHR. The ECtHR is therefore only competent to examine complaints of discrimination that fall within the ambit of one of the rights protected by the ECHR. Protocol No. 12 (ratified so far by 20 Member States) prohibits discrimination in relation to the "enjoyment of any right set forth by law" and "by any public authority" and has thus a wider scope than Article 14, which relates only to the rights guaranteed by the ECHR.

The provisions set forth in both instruments include a non-exhaustive list of grounds on which discrimination is prohibited: sex, race, colour, language, 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 similar positions are treated differently, it will investigate whether this can be objectively and reasonably justified.[100]

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 the ESC, relevant to this article, clarifies that differential treatment based on an objective and reasonable

96 EU, European Parliament and Council of the European Union (2010), Directive 2010/41/EU of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ 2010 L 180.

97 EU, Council of the European Union (2004), 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 2004 L 373.

98 EU, Council of the European Union (1978), Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ 1979 L 6.

99 EU, Council of the European Union (2008), *Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation* {SEC(2008) 2180} {SEC(2008) 2181}, COM(2008) 426, 2 July 2008.

100 For an overview of the ECtHR case law, see FRA and ECtHR (2018), *Handbook on European non-discrimination law*, February 2018.

justification includes requiring a certain age or capacity for access to some forms of education.[101]

Under Article 4 of the FCNM[102] 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 European Commission against Racism and Intolerance is a unique human rights-monitoring body, which specialises in questions relating to the fight against racism, discrimination, xenophobia, antisemitism and intolerance in Europe.[103] In the framework of its country-monitoring work, the commission examines the situation concerning manifestations of racism and intolerance in each of the CoE member States.

Article 2 of the Lanzarote Convention guarantees that implementation of its provisions, in particular the enjoyment of measures to protect the rights of victims of sexual exploitation and sexual abuse, will be secured without discrimination on any ground.

Refraining from discriminatory treatment is sometimes not sufficient to achieve equal treatment. In some situations, measures can be taken in order to make up for existing and persisting inequalities. In the UN context, these are called 'special measures', while EU law refers to 'specific measures' or 'positive action'. The ECtHR speaks about 'positive obligations'. By taking such special measures, governments are able to ensure 'substantive equality', that is, equal enjoyment of opportunities to access benefits available in society, rather than mere 'formal equality'. Where governments, employers and service providers fail to consider the appropriateness of taking special measures, they increase the risk that their rules and practices may amount to indirect discrimination.

101 Council of Europe (1996), European Social Charter (revised), explanatory report, para. 136.

102 Council of Europe (1995), Framework Convention for the Protection of National Minorities, CETS No. 157, 1 February 1995.

103 See more at the European Commission against Racism and Intolerance web page.

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

3.2. Non-discrimination based on race or ethnic origin

Key points

- Race and ethnic origin are prohibited grounds of discrimination in Europe.
- The EU has a specific legal instrument (the Racial Equality Directive) that prohibits direct and indirect discrimination, as well as harassment, in all areas of life.

Under EU law, the Racial Equality Directive prohibits discrimination on the basis of race or ethnicity not only in the context of employment but also in the provision of goods and services, the welfare system, education and social security. 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 against Roma was the adoption in 2011 of a specific EU Roma integration framework for national strategies.[104] It was followed in 2020 by a second EU Roma strategic framework for equality, inclusion and participation for 2020–2030.[105] Roma children are particularly affected by direct and indirect discrimination, as well as harassment, in education, access to employment and housing, healthcare, awareness and access to justice. Achieving full equality in practice may in certain circumstances warrant Roma-specific positive action, in particular in these four key areas.[106]

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

104 EU, European Commission (2011), *An EU framework for national Roma integration strategies up to 2020*, COM(2011) 173 final, 5 April 2011.

105 EU, European Commission (2020), *A Union of equality: EU Roma strategic framework for equality, inclusion and participation*, COM(2020) 620 final, 10 October 2020.

106 EU, 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, 17 January 2014.

analysed under Article 14 taken together with Article 2 of Protocol 1 to the 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 into 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 programme could thus not be justified.[107] In addition, the Committee of Ministers of the CoE recommends that the history of Roma and/or Travellers be included in school curricula and teaching materials.[108]

Example: In *D.H. and Others v. the Czech Republic,*[109] 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,*[110] 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

107 ECtHR, *Lavida and Others v. Greece*, No. 7973/10, 30 May 2013.

108 Council of Europe, Committee of Ministers (2020), Recommendation CM/Rec(2020)2 to member States on the inclusion of the history of Roma and/or Travellers in school curricula and teaching materials, 1 July 2020.

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

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

soon as this placement disproportionally 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 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 ECtHR has also adjudicated other cases concerning discrimination against children in school settings.

Example: In *Catan and Others v. Moldova and Russia*,[111] the ECtHR looked into the language policy introduced in schools by the separatist authorities in Transdniestria, which was aimed at Russification. Following the forced closure and relocation of Moldovan-language schools (using the Latin alphabet), parents had to choose either to send their children to schools where they were taught in an artificial combination of the Moldovan language and the Cyrillic alphabet, with teaching materials produced in Soviet times, or to send 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 were 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.[112]

Example: In *Ádám and Others v. Romania*,[113] ethnic Hungarian students, who attended school in their mother tongue in Romania, complained that they had had to sit two additional exams in their mother tongue during

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

112 *Ibid.*, paras. 141–144.

113 ECtHR, *Ádám and Others v. Romania*, No. 81114/17, 13 October 2020.

the same, rather short, period set for the baccalaureate exams throughout the country. At the outset, the ECtHR stressed that the relevant CoE instruments expressly recognise that the protection and encouragement of minority languages should not be to the detriment of official languages and the need to learn them. Furthermore, the two additional exams the applicants had to sit had been the direct and inevitable consequence of their conscious and voluntary choice to study in a different language and the state's offering them such an opportunity. The ECtHR was satisfied that the applicants had not been placed in a different situation that was sufficiently significant for the purposes of Article 1 of Protocol No. 12. No breach of the ECHR was found.

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.[114]

Example: The case of *European Roma Rights Centre (ERRC) v. Ireland*[115] concerns Ireland's compliance with the ESC regarding the accommodation of Travellers, particularly with respect to housing conditions and evictions of Travellers and, as regards child Travellers, also with respect to social, legal and economic protection. The ERRC alleged that the government had violated Article 17 by denying Traveller children the right to social, legal and economic protection, particularly regarding schooling.

Under Article 4 (2) and (3) of the 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.[116]

114 ECSR, Conclusions 2003 – Bulgaria – Art. 17 (2), 2003/def/BGR/17/2/EN, 30 June 2003.

115 ECSR, *European Roma Rights Centre (ERRC) v. Ireland*, Complaint No. 100/2013, 1 December 2015.

116 See Council of Europe, Advisory Committee on the FCNM (2006), *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 or immigration status

Key points

- European law prohibits discrimination based on nationality.
- Under EU law, discrimination on the ground of nationality is prohibited in the context of the free movement of persons under Article 45 of the TFEU (freedom of movement and of residence). Within the scope of application of EU law any discrimination on grounds of nationality is prohibited under Article 21 (2) 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, discrimination on the ground of nationality is prohibited within the scope of the application of the treaties (Article 18 of the TFEU; Article 21 (2) of the Charter of Fundamental Rights). These articles are relevant to all EU citizens in connection with the provision on European citizenship, and to long-term residents with non-EU nationality. Furthermore, EU law prohibits discrimination on the ground of nationality, in particular in the context of the free movement of persons (Citizenship Directive[117]; Article 45 of the TFEU).[118] 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 long-term residents, the Third-country Nationals Directive requires, among other conditions, a period of five years of lawful residence.[119] In addition, Directive 2003/86/EC on the right to family reunification (Family Reunification Directive)[120] allows for third-country nationals lawfully residing in a Member State to be joined by family members,

117 EU, European Parliament and Council of the European Union (2004), Directive 2004/38/EC 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, OJ 2004 L 158.

118 Fundamental Rights Agency (2018), *Making EU citizens' rights a reality: National courts enforcing freedom of movement and related rights*, Luxembourg, Publications Office.

119 EU, Council of the European Union (2003), Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16.

120 EU, Council of the European Union (2003), Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251.

under certain conditions (see also Section 9.5).[121] Moreover, the Single Permit Directive secures the right to equal treatment to third-country nationals under certain conditions.[122]

Example: The *Chen* case[123] 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 requirements 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 holds that differential treatment on grounds of nationality and immigration status could amount to discrimination.

Example: *Ponomaryovi v. Bulgaria*[124] 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: (a) the right to education enjoys direct protection under the ECHR, and (b) education is a very particular type of public service, which serves broad

121 EU, European Parliament and Council of the European Union (2011), Directive 2011/98/EU (Single Permit Directive) of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343/1.

122 *Ibid.*, Art. 12.

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

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

societal functions. According to the ECtHR, the margin of appreciation increases with the level of education. So, while primary schooling (higher) fees for foreigners are hard to justify, they may be fully justified at university level. Given the importance of secondary education for personal development, and social and professional integration, stricter scrutiny of the proportionality of the differential treatment applies to 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 of educational benefits it provides to nationals and certain limited categories of foreigners. In assessing the particular circumstances of the applicants' 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 the Bulgarian educational system, as they had come to live in Bulgaria at a very young age following their mother's marriage to 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 disability

Key points

- Any discrimination based on disability is prohibited under European law (Article 21 of the Charter of Fundamental Rights; Article 14 of the ECHR; Article 1 of Protocol No. 12 of the ECHR).
- Discrimination based on disability under EU and CoE law also includes cases of 'discrimination by association' (for example, if a child is discriminated against because their parents have disabilities)

Disability is one of the discrimination grounds explicitly prohibited by Article 21 of the EU Charter of Fundamental Rights. The EU has ratified the UN Convention on the Rights of Persons with Disabilities (CRPD)[125] and has developed a

125 This is the first time in history that the EU has become a party to an international human rights treaty. United Nations, Convention on the Rights of Persons with Disabilities, 13 December 2006.

strategy for the rights of persons with disabilities for 2021–2030.[126] The CRPD is now a reference point for interpreting EU law relating to discrimination on the grounds of disability.[127] Under EU law, it is recognised that states have obligations to ensure reasonable accommodation to allow persons with disabilities the opportunity to fully realise their rights.[128]

At least for disability, but not limited to it, the CJEU has accepted that EU law also protects against '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, or discrimination against a person due to their child's disability.[129]

Example: In *S. Coleman v. Attridge Law and Steve Law*,[130] 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

126 EU, European Commission (2021), *Union of equality: Strategy for the rights of persons with disabilities 2021–2030*, COM(2021) 101 final.

127 CJEU, C-312/11, *European Commission v. Italian Republic*, 4 July 2013; CJEU, C-363/12, *Z. v. A Government Department and The Board of Management of a Community School* [GC], 18 March 2014; CJEU, C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, 22 May 2014; CJEU, C-395/15, *Mohamed Daouidi v. Bootes Plus SL and Others*, 1 December 2016; CJEU, C-406/15, *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, 9 March 2017.

128 See, for example, EU, European Parliament and Council of the European Union (2012), Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (Victim's Rights Directive), OJ 2012 L 315/57, Arts. 3 and 22.

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

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

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 the ECHR, there is an increasing body of case law dealing with cases of discrimination in access to education against children with disabilities.[131] In their earlier case law on the matter, the ECHR organs stressed the need to educate disabled children, whenever possible, with other children of their own age.[132] In more recent cases, the ECtHR has stressed the importance of reasonable accommodation in education.

Example: In *Çam v. Turkey*,[133] a music academy had refused to enrol a student qualified for admission on the grounds of her visual impairment. The ECtHR noted that discrimination based on disability also covered the refusal to provide reasonable accommodation to facilitate access by persons with disabilities to education (for example, adaptation of teaching methods to make them accessible to blind students).[134] In the present case, the competent national authorities made no effort to identify the applicant's needs and failed to explain how or why her blindness could impede her access to musical education. Therefore, the applicant had been denied, without objective and reasonable justification, the benefit of education in the music academy solely on account of her visual disability, in breach of Article 14 read in conjunction with Article 2 of Protocol No. 1.

In *G.L. v. Italy*[135] an autistic pupil had been deprived of statutory specialised learning support for the first two years of primary school. The authorities had not sought to determine her real needs or provide tailored support in order to allow her to continue her primary education in conditions that would, as far as possible, be equivalent to those in which other children attended the same school. The ECtHR further noted that the discrimination suffered by the applicant was all the more serious as it had taken place in

131 Council of Europe, ECtHR (2021), *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights – Right to education*, 31 August 2021.

132 ECtHR, *Klerks v. the Netherlands*, No. 25212/94, 4 July 1995; ECtHR, *McIntyre v. United Kingdom*, No. 29046/95, 21 October 1998.

133 ECtHR, *Çam v. Turkey*, No. 51500/08, 23 February 2016.

134 For the right of autistic children to education, see ECtHR, *Dupin v. France*, No. 2282/17, 18 December 2018.

135 ECtHR, *G.L. v. Italy*, No. 59751/15, 10 September 2020.

the context of primary education, which formed the foundation of child education and social integration, giving children their first experience of living together in a community. The ECtHR held that there had been a violation of Article 14 in conjunction with Article 2 of Protocol No. 1.

The ECtHR has also examined cases in which a parent's disability had had an influence on their parental rights or contacts with their children,[136] and where a parent had been discriminated against by association, on account of the disability of their child.[137]

According to the ECSR it is acceptable in the application of Article 17 (2) of the ESC 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.[138] 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.[139] States have to make sufficient efforts to promote the inclusion of children with mental disabilities in mainstream primary and secondary education.[140]

The CRPD restates some of the CRC principles, such as the best interests of the child as a primary consideration and the right to be heard (Article 7 (2) and (3)). It obliges States Parties "to take all necessary measures to ensure the full enjoyment by children of all human rights and fundamental freedoms on an equal basis with other children" (Article 7 (1)). The CRC Committee considers that the enjoyment of a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate active participation in the community is the

136 See ECtHR, *Cinta v. Romania*, No. 3891/19, 18 February 2020; ECtHR, *Kocherov and Sergeyeva v. Russia*, No. 16899/13, 29 March 2016.

137 ECtHR, *Guberina v. Croatia*, No. 23682/13, 22 March 2016.

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

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

140 ECSR, *International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium*, Complaint No. 141/2017, 9 October 2020; see also ECSR, *MDAC v. Belgium*, Complaint No. 109/2014, 4 July 2018.

leading principle for the implementation of the CRC with respect to children with disabilities.[141]

3.5. Non-discrimination based on other protected grounds

Key points

- Under European law, discrimination on grounds of sexual orientation, gender identity and sex characteristics is prohibited. Discrimination on the ground of sexual orientation is also explicitly prohibited in all recent CoE conventions and standards protecting children's rights.
- Under EU legislation on non-discrimination, protection from discrimination on the basis of age is limited.
- The ECtHR has considered age as a basis for discrimination and has also dealt with other grounds of discrimination such as language, affiliation or discrimination against children born out of wedlock.

Article 21 of the EU Charter of Fundamental Rights prohibits discrimination based on other grounds particularly relevant to children, such as age, sex, genetic features, language, or sexual orientation.

Under EU law, protection against discrimination for lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) persons falls under different legal frameworks depending on whether discrimination is on the ground of sexual orientation, to which the anti-discrimination legal framework is relevant, or of sex, including gender reassignment, to which the gender equality legal framework is relevant. Sexual orientation, gender identity/expression and sex characteristics belong to the prohibited grounds of discrimination. The ECJ has ruled that the prohibition of discrimination on grounds of sex may also include cases of gender reassignment.[142]

141 United Nations, Committee on the Rights of the Child (2006), *General Comment No. 9: The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, para. 11.

142 See, for example, CJEU, C-13/94, *P. v. S. and Cornwall County Council*, 30 April 1996; CJEU, C-117/01, *K.B. v. National Health Service Pensions Agency*, 7 January 2004.

Children may identify as lesbian, gay, bisexual, transgender, non-binary, intersex or queer[143] or belong to 'rainbow families', which include LGBTIQ parents. The EU has adopted the LGBTIQ Equality Strategy, which acknowledges the discrimination faced by LGBTIQ children or children in rainbow families.[144] Owing to differences in national legislation between Member States, family status may not always be recognised in another Member State.[145] From an early age, LGBTIQ children, youth and rainbow families may be exposed to stigmatisation and discrimination. This affects their educational performance and employment prospects, as well as their daily lives, well-being and mental health.[146]

The EU's Victims' Rights Directive requires that victims of hate crime, including LGBTIQ children, receive appropriate information, support and protection, and be able to participate in criminal proceedings.[147] It provides that victims of crime should be recognised and treated in a respectful, sensitive and professional manner without discrimination on the grounds of, among others, sexual orientation, gender identity and gender expression.

Discrimination on the ground of sexual orientation is prohibited in CoE conventions and standards protecting children's rights. Article 2 of the Lanzarote Convention, for instance, explicitly states that all victims of sexual violence are to enjoy the protection of the convention without discrimination on any ground, including sexual orientation. The *Guidelines on child-friendly justice* also note, as a fundamental principle, that the rights of children are to be secured without discrimination on any ground such as, among others, sex, sexual orientation and gender identity.

Although not explicitly mentioned in the ECHR, sexual orientation and gender identity are protected characteristics included among 'other status' under the

143 EU, European Commission (2020), *Union of equality: LGBTIQ equality strategy 2020–2025*, COM(2020) 698 final, 12 November 2020.

144 *Ibid*.

145 EU, European Parliament (2021), *Obstacles to the free movement of rainbow families in the EU*, PE 671.505, March 2021.

146 See also EU, Fundamental Rights Agency (2020), *A long way to go for LGBTI equality*, 14 May 2020.

147 EU, European Parliament and Council of the European Union (2012), Directive 2012/29/EU 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 2012 L 315/57, Art. 22.

relevant ECHR provisions.[148] The ECtHR has also recognised the role that schools and education authorities can play in protecting children from homophobia.[149]

Example: In *Bayev and Others v. Russia*,[150] a complaint was brought by three gay rights activists about Russian legislation banning the "promotion of homosexuality among minors", also known as the 'gay propaganda law'. In a series of legislative acts, "promoting non-traditional sexual relationships" among children was made an offence punishable by a fine. The Court found that, although the laws in question aimed primarily at protecting children, the limits of those laws had not been clearly defined and their application had been arbitrary. Moreover, the very purpose of the laws and the way they were formulated and applied in the applicants' case had been discriminatory and, overall, served no legitimate public interest. Indeed, by adopting such laws the authorities had reinforced stigma and prejudice and encouraged homophobia, which was incompatible with the values of a democratic society.[151]

Example: The case *A.M. and Others v. Russia*[152] concerned the restriction of the applicant's parental rights and deprivation of contact with her children without the required scrutiny because she had been undergoing gender transition at that time. The Court found no evidence of any potential damage to the children from the transition and held that that the domestic courts had not sufficiently examined the particular circumstances of the family. Furthermore, the decision had been clearly based on the applicant's gender identity and had thus been discriminatory, in breach of Article 8 of the ECHR taken alone and in conjunction with Article 14 of the ECHR.

Discrimination based on age is another type of discrimination that children could face. Under current EU legislation on non-discrimination, protection from discrimination on the basis of age is limited. Age is currently only protected in the context of access to employment and occupation.

148 See, for example, ECtHR, *X and Others v. Austria* [GC], No. 19010/07, 19 February 2013.

149 ECtHR, *Bayev and Others v. Russia*, No. 67667/09, 20 June 2017, para. 82; See also ECtHR, *Vejdeland and Others v. Sweden*, No. 1813/07, 9 February 2012.

150 ECtHR, *Bayev and Others v. Russia*, No. 67667/09, 20 June 2017.

151 See also Council of Europe, Committee of Ministers (2010), Recommendation to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, CM/Rec(2010)5.

152 ECtHR, *A.M. and Others v. Russia*, No. 47220/19, 6 June 2021.

The Employment Equality Directive is applicable to children who are legally entitled to work. While the International Labour Organization (ILO) Convention concerning Minimum Age for Admission to Employment,[153] ratified by all EU Member States, establishes a minimum age of 15 years, differences regarding minimum age persist among EU Member States.[154] Article 6 of the Employment Equality Directive, allows Member States to justify 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 treatment may, for instance, include the setting of special conditions on access to vocational training, employment and occupation, to promote their vocational integration or ensure their protection.

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 recognised age as being included among 'other status'. In *D.G. v. Ireland*[155] *and Bouamar v. Belgium*,[156] 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 ECHR. 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 an objective and reasonable justification for any difference of treatment.

The ECtHR has dealt with discrimination against children in a variety of situations other than those already mentioned, such as discrimination based on language,[157] or discrimination against children born out of wedlock.[158]

153 ILO (1973), Convention concerning Minimum Age for Admission to Employment, No. 138.

154 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.

155 ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002.

156 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

157 ECtHR, *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.

158 ECtHR, *Fabris v. France* [GC], No. 16574/08, 7 February 2013; ECtHR, *Wolter and Sarfert v. Germany*, Nos. 59752/13 and 66277/13, 14 December 2017; ECtHR, *Mazurek v. France*, No. 34406/97, 1 February 2000.

Example: In *Fabris v. France*,[159] 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*[160] 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 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.[161]

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.*

159 ECtHR, *Mazurek v. France*, No. 34406/97, 1 February 2000; ECtHR, *Fabris v. France* [GC], No. 16574/08, 7 February 2013.

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

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

4 Personal identity issues

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 7 (right to respect for family life)	Birth registration and right to a name	ECHR, Article 8 (right to respect for private and family life) FCNM, Article 11 (right to use the surname in original language) European Convention on the Adoption of Children (revised), Article 11 (3) (retaining the original name of an adopted child) ECtHR, *Johansson v. Finland*, No. 10163/02, 2007 (refusal to register a name previously granted to other persons)
Charter of Fundamental Rights, Article 7 (right to respect for family life)	Right to personal identity	ECHR, Articles 6 (fair trial) and 8 (right to respect for private and family life) European Convention on the Adoption of Children (revised), Article 22 (3) ECtHR, *Mikulić v. Croatia*, No. 53176/99, 2002 ECtHR, *Mizzi v. Malta*, No. 26111/02, 2006 (inability to challenge paternity) ECtHR, *Mennesson v. France*, No. 65192/11, 2014 (surrogacy with biological father as intended father) ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, No. 71552/17, 2021

EU	Issues covered	CoE
TEU, Article 9 TFEU, Article 20 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEm),* 2011 (residence rights of third-country nationals with minor EU citizen children) CJEU, C-221/17, *Tjebbes and Others v. Minister van Buitenlandse Zaken,* 2019 CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado*, 2016 Free Movement Directive (2004/38/EC)	**Citizenship**	ECHR, Article 8 European Convention on Nationality Convention on the Avoidance of Statelessness in relation to State Succession European Convention on the Adoption of Children (revised), Article 12 ECtHR, *Genovese v. Malta*, No. 53124/09, 2011 (arbitrary denial of citizenship to child born out of wedlock)

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 ruled on 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, 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. The focus of the following sections is therefore on 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 know one's origins (Section 4.2); and the right to citizenship (Section 4.3). Several related issues are dealt with in other chapters, in particular concerning sexual abuse (Chapter 7.1.3) and 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 as unsuitable for a child although it is accepted by the family may raise an issue under 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,[162] Article 7 (1) of the CRC and Article 18 of the CRPD), European human rights instruments do not explicitly provide for the right to birth registration immediately after birth or the right to a name from birth.

Under EU law, Article 7 of the Charter of Fundamental Rights stipulates the right to private and family life. According to the explanatory memorandum to the charter, "the rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR". The right to a name has been addressed by the CJEU from the perspective of the freedom of movement. The CJEU holds that the right to freedom of movement does not allow an EU Member State to refuse to recognise a child's surname that was registered in another Member State of which the child is a national or where the child was born and had resided.[163]

Under CoE law, refusal of birth registration of children may raise an issue under Article 8 of the ECHR. The ECtHR has 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.[164] The parents' choice of their child's first name[165] and family name[166] is

162 United Nations (1996), International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Art. 49.

163 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.

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

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

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

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 child does not violate Article 8 of the ECHR.[167] However, refusal to register a first name 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*,[168] 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.[169]

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 (Adoption Convention) provides for the possibility for States Parties to keep the original surname of an adopted child.[170] This is an exception to the general

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

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

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

170 Council of Europe (2008), European Convention on the Adoption of Children (revised), CETS No. 202, 27 November 2008.

principle that the legal relationship between the adopted child and his or her original family is severed.

4.2. Right to know one's origins

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 origins with the interest of the presumed or alleged father, and with the general interest.
- 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"[171] 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",[172] 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.

171 ECtHR, *Odièvre v. France* [GC], No. 42326/98, 13 February 2003, para. 29.

172 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). Who one's parents are is a fundamental aspect of one's identity.[173] 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 *Mikulić v. Croatia*,[174] 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.

If the putative father refuses to undergo genetic testing, national courts, within their discretion, may establish paternity based on other evidence and factors, giving priority to the child's right to respect for their private life and their right to know their origins.[175] In a case where an adolescent child refused to undergo genetic testing because he wanted to keep the surname of his mother's husband, domestic courts nevertheless recognised paternity in favour of the biological father, finding that the child's best interests lay primarily in knowing the truth about his origins. The ECtHR consequently found that the domestic courts had not exceeded their margin of appreciation in recognising the biological father and setting aside the legitimisation of the child as the son of his mother's husband. There had therefore been no violation of Article 8.[176]

173 ECtHR, *Mennesson v. France*, No. 65192/11, 26 June 2014, para. 96.

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

175 ECtHR, *Canonne v. France*, No. 22037/13, 25 June 2015.

176 ECtHR, *Mandet v. France*, No. 30955/12, 14 January 2016.

Example: In *Mizzi v. Malta*,[177] 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 the ECHR. It had also disproportionately interfered with his rights under Article 8 of the ECHR.[178]

The interests of the 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 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.[179]

Authorities may have a positive obligation to intervene in proceedings to establish paternity in the best interests of the child if 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.[180]

With regard to the specific case of recognition of affiliation between intended parents and children born through 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.

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

178 *Ibid.*, paras. 112–114.

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

180 ECtHR, *A.M.M. v. Romania*, No. 2151/10, 14 February 2012, paras. 58–65.

Example: *Mennesson v. France*[181] 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 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.[182]

After the *Mennesson* judgment, the French law was amended, making it possible for children born through a surrogacy arrangement abroad to obtain a birth certificate indicating the name of the intended father if he was also the biological father.[183] In February 2018, the French Civil Judgments Review Court granted the request for re-examination of Mr and Mrs Mennesson's appeal, which led to a new set of proceedings before the Court of Cassation.[184] In the course of those proceedings, the Court of Cassation made the first-ever request to the ECtHR for an advisory opinion under Protocol 16 to the ECHR. In its advisory opinion, the ECtHR held that the right to respect for private life of a child born through surrogacy did not require recognition of a legal parent–child relationship with the intended mother to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad. Another means, such as adoption of the child by the intended mother, might be used provided that the procedure laid down by domestic law

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

182 ECtHR, *Mennesson v. France*, No. 65192/11, 26 June 2014, para. 100; see also ECtHR, *Labassee v. France*, No. 65941/11, 26 June 2014, para. 79; ECtHR, *C and E v. France*, Nos. 1462/18 and 17348/18, 12 December 2019.

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

184 ECtHR (2019), Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother requested by the French Court of Cassation, No. P16-2018-001, 10 April 2019.

ensured that it could be implemented promptly and effectively, in accordance with the child's best interests.[185]

> Example: In *Valdís Fjölnisdóttir and Others v. Iceland*,[186] the first and second applicants, a same-sex married couple, were the intended parents of the third applicant, a child born by means of gestational surrogacy in the United States who had no biological link to them. The Icelandic authorities initially refused to register the child in the national register and took legal custody of him, before placing him in the foster care of the first two applicants. After the entry into force of new legislation, the third applicant was added to the national register, but the first two applicants were not registered as his parents. Acknowledging that, thanks to their uninterrupted care for the child, there had been family life among the applicants, the ECtHR concluded that the state had acted within its margin of appreciation. In particular, the three applicants' actual enjoyment of family life had not been interrupted; on the contrary, the state had taken steps to ensure that they continued to lead a family life through the foster care arrangement and by granting the third applicant citizenship. Moreover, it had been open to one of the first two applicants to apply for adoption of the third applicant. The non-recognition of a formal parental link had thus struck a fair balance between the applicants' right to respect for family life and the general interests that the state had sought to protect by the ban on surrogacy.

The ECtHR also held that states could not be obliged to authorise children born to a surrogate mother to enter their territory without the national authorities having a prior opportunity to conduct certain legal checks.[187]

4.2.2. Establishing one's origins: adoption

A child's right to know his or her origins has gained 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.

185 *Ibid*.

186 ECtHR, *Valdís Fjölnisdóttir and Others v. Iceland*, No. 71552/17, 18 May 2021.

187 ECtHR, *D v. France*, No. 11288/18, 16 July 2020; ECtHR, *Paradiso and Campanelli v. Italy*, No. 25358/12, 27 January 2015.

Under CoE law, Article 22 (3) of the European Convention on the Adoption of Children (revised) gives an adopted child the right to access information held by the authorities concerning the child's origins. It also allows 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 their birth.[188]

Under international law, the Hague Convention on Intercountry 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.[189]

4.3. 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 9 of the TEU and Article 20 of the TFEU confer the status of Union citizenship on every person having the nationality of a Member State. 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 primary caregiver of a child deprives the child's right of residence of any useful effect. Hence, the parent who is the

188 Council of Europe (2008), European Convention on the Adoption of Children (revised), CETS No. 202, 27 November 2008, Art. 22.

189 Hague Conference on Private International Law (1993), Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 29 May 1993, Art. 30 (2).

primary caregiver has the right to reside with the child in the host state.[190] The status of EU citizenship entails certain rights that are also included in secondary legislation, such as the EU Free Movement Directive[191] in connection with the execution of basic rights of free movement of EU citizens and their families, rights of secondary beneficiaries such as dependent minor children and the right to family reunification. These aspects are addressed in more detail in Section 9.5.

Example: The *Zambrano* case[192] concerns two children born during the asylum process (before their asylum request was denied) of parents in Belgium who became Belgian citizens. The parents requested a residence permit based on the EU Free Movement Directive as the ascendant relatives upon whom the children are dependent. Their application was denied. The CJEU ruled that, if a third-country national's dependent minor children are EU citizens, Member States are precluded from refusing that third-country national a work permit and a right of residence in those children's Member State of residence and nationality, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen.

Example: In *Tjebbes and Others*,[193] the CJEU stipulated that EU law does not preclude the loss of the nationality of a Member State and, consequently, the loss of citizenship of the EU, where the genuine link between the person concerned and that Member State is durably interrupted. The case concerned a Dutch law providing for the automatic loss of nationality for Dutch nationals who resided outside the Netherlands for more than 10 years. Children of denaturalised individuals would also lose Dutch nationality under the 10-year rule. Following the *Rottmann* case,[194] the CJEU determined that the decision to withdraw nationality must comply with

190 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.

191 EU, European Parliament and Council of the European Union (2004), Directive 2004/38/EC 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.

192 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, 8 March 2011.

193 CJEU, C-221/17, *Tjebbes and Others v. Minister van Buitenlandse Zaken*, 12 March 2019.

194 CJEU, C-135/08, *Janko Rottmann v. Freistaat Bayern*, 2 March 2010.

the principle of proportionality. The CJEU held that national authorities need to conduct an individual examination to determine whether or not the consequence of losing the nationality of an EU Member State, which entails the loss of EU citizenship, might disproportionately affect the normal family development and the professional life of the person concerned. In addition, a remedy must be available to reinstate nationality if the measure is deemed to be disproportionate.

Example: The *Alfredo Rendón Marín v. Administración del Estado* case[195] concerns two nationals of non-EU countries who were refused a residence permit and served with a deportation order, based on their criminal records, by the authorities of the host Member State. That was the state of nationality of minor children of whom they had sole care and who possessed citizenship of the Union. The CJEU ruled that Article 20 of the TFEU must be interpreted as precluding the national legislation that requires a third-country national who is a parent of minor children who are Union citizens in that person's sole care to be automatically refused the grant of a residence permit on the sole ground that the third-country national has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the EU.[196]

Under CoE law, the ECHR does not guarantee the right to citizenship.[197] 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[198].

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

195 CJEU, C-165/14, *Alfredo Rendón Marín v. Administración del Estado*, 13 September 2016.

196 See also CJEU, C-304/14, *Secretary of State for the Home Department v. CS*, 13 September 2016; CJEU, C-133/15, *H. C. Chavez-Vilchez u. a. gegen Raad van bestuur van de Sociale verzekeringsbank u. a. Vorabentscheidungsersuchen des Centrale Raad van Beroep*, 10 May 2017; CJEU, C-82/16, *K.A. and Others v. Belgische Staat*, 8 May 2018.

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

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

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.[199]

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 their citizenship.[200] 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).[201] 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 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 International Covenant on Civil and Political Rights.

199 *Ibid.*, paras. 43–49.

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

201 Council of Europe, Convention on the Avoidance of Statelessness in relation to State Succession, CETS No. 200, 19 May 2006.

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) ECtHR, *V.D. and Others v. Russia*, No. 72931/10, 2019
Charter of Fundamental Rights, Article 24 (rights of the child) Maintenance Regulation (4/2009) Work–Life Balance Directive (2019/1158) CJEU, C-129/18, *SM v. Entry Clearance Officer, UK Visa Section,* 2019 (child placed under Algerian *kafala*)	**Right to be cared for by parents**	ECHR, Article 8 (right to respect for family life) ECtHR, *Petrov and X. v. Russia*, No. 23608/16, 2018 ECtHR, *Wunderlich v. Germany*, No. 18925/15, 2019
Charter of Fundamental Rights, Article 24 (3) (right to maintain contact with both parents) Procedural Safeguards Directive (2016/800) Brussels IIa Regulation (recast) (2019/1111) Mediation Directive (2008/52/EC) CJEU, C-436/13, *E. v. B.*, 2014 (access of the father to child) CJEU, C-497/10 PPU, *Barbara Mercredi v. Richard Chaffe*, 2010 (infant and habitual residency)	**Right to maintain contact**	ECHR, Article 8 (right to respect for family life) Convention on Contact concerning Children, Article 1 European Convention on the Exercise of Children's Rights, Article 6 ECtHR, *Schneider v. Germany*, No. 17080/07, 2011 (contact between a child and non-legally recognised biological father) ECtHR, *Levin v. Sweden*, No. 35141/06, 2012 (restriction of contact rights) ECtHR, *A.I. v. Italy*, No. 70896/17, 2021

EU	Issues covered	CoE
CJEU, C-335/17, *Neli Valcheva v. Georgios Babanarakis*, 2018 (right to maintain contact with grandparents) Access to Justice Directive (2003/8/EC) (access to justice in cross-border disputes)		ECtHR, *Mustafa and Armağan Akin v. Turkey*, No. 4694/03, 2010 (contact between siblings after custody award) ECtHR, *Vojnity v. Hungary*, No. 29617/07, 2013 (restriction on access on the ground of religious convictions) ECtHR, *A.M. and Others v. Russia*, No. 47220/19, 2021 ECtHR, *Terna v. Italy*, No. 21052/18, 2021 ECtHR, *Bogonosovy v. Russia*, No. 38201/16, 2019 ECtHR, *M.S. v. Ukraine*, No. 2091/13, 2017 ECtHR, *Khoroshenko v. Russia*, No. 41418/04, 30 June 2015 ECtHR, *Horych v. Poland*, No. 13621/08, 2012 ECtHR, *Hadzhieva v. Bulgaria*, No. 45285/12, 2018
Charter of Fundamental Rights, Article 24 (rights of the child) Brussels IIa Regulation (recast) (2019/1111) CJEU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 2010 (right to be heard, international child abduction) CJEU, C-111/17 PPU, *OL v. PQ*, 8 June 2017 CJEU, C-262/21 PPU, *A v. B*, 2 August 2021 CJEU, C-211/10 PPU, *Doris Povse v. Mauro Alpago*, 2010 (enforcement certificate)	**Child abduction**	European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children Convention on Contact concerning Children ECHR, Article 8 (right to respect for family life) ECtHR, *Neulinger and Shuruk v. Switzerland* [GC], No. 41615/07, 2010 (taking of child by mother) ECtHR, *R.S. v. Poland*, No. 63777/09, 2015 ECtHR, *Y.S. and O.S. v. Russia*, No. 17665/17, 2021

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

defined in the Brussels IIa Regulation (recast). 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 in order to secure their best interests. Furthermore, 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 (Section 5.1), the right of the child to be cared for by his/her parents (Section 5.2), the right to maintain contact (Section 5.3) and child abduction (Section 5.4).

5.1. Right to respect for family life

Key points

- Under both EU and CoE law, states have a positive obligation to ensure children's effective enjoyment of their right to respect for family life.
- Judicial and administrative authorities should take into account the child's best interests in any decision related to respect for family life.

A child's right to enjoy respect for their family life includes a number of composite rights, such as: the right to be cared for by their 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 subject to a number of limitations. These limitations, as the explanatory note to the EU Charter of Fundamental Rights[202] clarifies, are the same as for the corre-

202 EU, European Parliament, Council of the European Union, European Commission (2007), Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, see explanation relating to Art. 7.

sponding 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.[203]

The EU Charter of Fundamental Rights requires that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration (Article 24 (2)).[204] 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.[205]

The ECtHR has ruled that Article 8 of the ECHR also protects family life when it concerns children and their foster family.[206] *V.D. and Others v. Russia*[207] a severely disabled boy who had been in the care of his foster mother for nine years was ultimately returned to live with his biological family, while his foster mother and siblings were denied all contact. In a situation where the person who had taken care of the child for a long period of time, and had formed a close personal bond with him, was entirely and automatically excluded from the child's life and could not obtain contact rights in any circumstances, irrespective of the child's best interests, the Court found a violation of Article 8 of the ECHR.

203 Council of Europe (1950), Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 5, 4 November 1950, Art. 8.

204 See, for example, CJEU, C-400/10 PPU, *J. McB. v. L.E.*, 5 October 2010.

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

206 ECtHR, *Strand Lobben and Others v. Norway* [GC], No. 37283/13, 10 September 2019.

207 ECtHR, *V.D. and Others v. Russia*, No. 72931/10, 9 April 2019.

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, and EU legal instruments deal with cross-border aspects, such as recognition and enforcement of judgments across Member States. Council Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation), for instance, covers cross-border maintenance applications arising from family relationships.[208] It establishes common rules for the EU, aiming to ensure the recovery of maintenance claims even where the debtor or creditor is in another Member State.

The right to be cared for by one's parents was strengthened in 2019 by the Work–Life Balance Directive,[209] which provides minimum standards for individ-

208 EU, 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 obligations, OJ 2008 L 7 (Maintenance Regulation).

209 EU, European Parliament and Council of the European Union (2019), Directive (EU) 2019/ 1158 of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ 2019 L 188/79.

ual rights related to paternity leave, parental leave and carers' leave, and flexible working arrangements for workers who are parents or carers.

Under CoE law, the ECtHR has held in numerous cases that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Domestic measures hindering this amount to interference with a right that Article 8 of the ECHR protects.[210] In cases of this type, the ECtHR examines whether or not, in the light of a case as a whole, the reasons for any measure limiting the enjoyment by parent and child of each other's company are relevant and sufficient. Consideration of what lies in the best interests of the child is crucial in every case of this kind.

The relevant national authorities, which have the benefit of direct contact with all the persons concerned in such disputes, enjoy a margin of appreciation depending on the specific case and the weight of the different interests at stake. That margin will be rather wide in custody cases and narrower as regards further limitations, such as restrictions that these authorities place on parental contact rights.

The ECtHR has also stressed that in this type of case the decision-making process must be fair and such as to ensure due respect for the interests that Article 8 safeguards.

Example: In *Petrov and X. v. Russia*,[211] the child's mother moved away from the father (the first applicant), taking the child (the second applicant) with her. She ultimately obtained a residence order in respect of the child. The ECtHR noted that no expert opinion had ever been sought on important questions such as the child's relationship with each of his parents, each parent's parenting abilities or whether or not it was possible to interview the child in court, given the child's age and maturity. The domestic courts had refused to examine the father's application for a residence order in his favour and to admit in evidence certain documents he had submitted, and the childcare authorities had issued conflicting recommendations. On the whole, the ECtHR found that the domestic courts' examination of the case had not been sufficiently thorough; the decision-making process had been

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

211 ECtHR, *Petrov and X. v. Russia*, No. 23608/16, 23 October 2018.

deficient and had not therefore allowed the best interests of the child to be established, in breach of Article 8 of the ECHR.

Example: In *Wunderlich v. Germany*,[212] a married couple wished to home-school their four children, although that had not been permitted under domestic law. The family court subsequently withdrew their right to determine the children's place of residence and their right to take decisions on school matters. The children were removed from the applicants' home and placed in a children's home, where their learning was assessed. They were returned to the applicants after three weeks, when the latter had agreed to allow the children to attend school.

The German system of compulsory school attendance was based on considerations that were in line with the ECtHR's own case law and that fell within the respondent state's margin of appreciation. The enforcement of compulsory school attendance, to prevent social isolation of the applicants' children and ensure their integration into society, was thus a relevant reason for justifying the partial withdrawal of the applicants' parental authority. While it is true that the assessment of the children's learning showed that they had sufficient knowledge, social skills and a loving relationship with their parents, this information had not been available to the youth welfare office or the courts when they took their decisions, precisely because the applicants refused those tests before the children were taken into care. The Court stressed in this context that even mistaken judgments or assessments by professionals did not per se render childcare measures incompatible with the requirements of Article 8. The actual removal of the children had not lasted any longer than necessary, had been in their best interests and had not been implemented in a way that was particularly harsh or exceptional. The decision-making process, seen as a whole, provided the applicants with the requisite protection of their interests. No violation of Article 8 of the ECHR was found.

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

212 ECtHR, *Wunderlich v. Germany*, No. 18925/15, 10 January 2019.

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 for the alternative care of children* further substantiate the rights of children in these circumstances and the corresponding duties of states.[213]

5.3. Right to maintain contact

Key points

- The right of the child to maintain contact with both parents has to be respected in all forms of parental separation. This may include the right to maintain contact with grandparents and siblings.
- 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. The scope of the right to maintain contact must now also be seen as extending, in certain circumstances, to grandparents and siblings.

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

213 United Nations, Human Rights Council (2009), *Guidelines for the alternative care of children*, UN Doc. A/HRC/11/L.13, 15 June 2009.

limited by the best interests of the child. This provision, as the explanatory note to the charter clarifies, is informed by Article 9 of the CRC.

The Procedural Safeguards Directive stipulates the right of detained children to maintain contact with their parents, family and friends through visits and correspondence, unless exceptional restrictions are required in the child's best interests.[214]

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 relevance: Brussels IIa Regulation (recast),[215] and the Mediation Directive.[216] From a rights perspective, the Brussels IIa Regulation (recast) 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.[217]

CJEU jurisprudence[218] has primarily aimed, in cases of wrongful removal of a child following a decision taken unilaterally by one of the parents, 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 of Fundamental Rights), as the Court asserts that this right is fundamentally linked to the best interests of any child. In the CJEU's view, a measure that prevents the child from maintaining on a regular basis a personal relationship and direct contact with both parents can only be justified by another interest of the child of such importance that it takes priority over the interest underlying

214 EU, European Parliament and Council of the European Union (2016), Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132/1.

215 EU, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ 2019 L 178/1 (Brussels IIa Regulation (recast)).

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

217 See, for example, Council Regulation (EC) 2019/1111, Preamble (paras. 7, 19,20, 28 and 57) and Arts. 7, 21, 26, 39 (2) and 47 (3)(a)(b).

218 See, for example, CJEU, C-497/10 PPU, *Barbara Mercredi v. Richard Chaffe*, 22 December 2010.

that fundamental right.[219] This includes provisional, including protective, measures under Article 15 of the Brussels IIa Regulation (recast). The Court has ruled that a balanced and reasonable 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 IIa Regulation (recast).

Example: The case of *E. v. B.*[220] 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 IIa Regulation.

The CJEU held that, where a court is seized of proceedings in accordance with Article 12 (3) of the Brussels IIa 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 IIa Regulation.

With regard to parental responsibility, the Brussels IIa Regulation (recast) co-exists with the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility

219 CJEU, C-403/09 PPU, *Jasna Detiček v. Maurizio Sgueglia*, 23 December 2009, para. 59, 60.

220 CJEU, C-436/13, *E. v. B.*, 1 October 2014.

and Measures for the Protection of Children.[221] Pursuant to Article 97 of the Brussels IIa Regulation (recast), this regulation shall take precedence over 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 IIa Regulation (recast) is the determination of the habitual residence of the child.

Example: In *Mercredi v. Chaffe,*[222] 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 IIa Regulation corresponds to the place which reflects some degree of integration by the child into 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 20023/8/EC (Access to Justice Directive), which establishes minimum common rules relating to legal aid "to improve access to justice in cross-border disputes".[223]

221 World Organization for Cross-border Cooperation in Civil and Commercial Matters, Hague Conference on Private International Law (1996), 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.

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

223 EU, Council of the European Union (2003), Council Directive 2003/8/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), 31 January 2003.

The Court has also ruled on grandparents' rights of access to their grandchildren.

> Example: In *Neli Valcheva v. Georgios Babanarakis*,[224] the grandmother (on the mother's side) demanded access to her grandchild after the dissolution of his parents' marriage by a Greek court, which awarded custody of the child to his father. The CJEU ruled that the right of children to maintain contact with both parents must be interpreted extensively and the 'rights of access' must be interpreted as including rights of access of grandparents to their grandchildren.

Under CoE law, the right of each child to maintain contact with both parents is implicit in Article 8 of the ECHR. The ECtHR has affirmed in a number of cases that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life".[225] It has also emphasised, 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 contacts between parents and children.

> Example: In *Schneider v. Germany*,[226] 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 interests.[227] As regards the applicant's re-

224 CJEU, C-335/17, *Neli Valcheva v. Georgios Babanarakis*, 31 May 2018.

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

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

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

quest 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) and that, therefore, the interference had not been "necessary in a democratic society".

Example: In *Levin v. Sweden*[228] 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 *A.I. v. Italy*,[229] the applicant, who was of Nigerian origin and a victim of trafficking, complained about her inability to exercise her contact rights in respect of her two children owing to a prohibition on contact imposed by the domestic court in its decision declaring the children eligible for adoption. The domestic courts had assessed the applicant's parental skills without taking into account her vulnerability as a victim of trafficking or the origin or the different model of parent–child attachment in her culture, although that factor had been clearly highlighted in the available expert report. The Court found that, in the course of the proceedings that had led to the interruption of contact between the applicant and her children, insufficient weight had been attached to enabling the applicant and the children to have a family life. Thus, the proceedings had not been accompanied by safeguards proportionate to the seriousness of the interference and the interests at stake and were therefore in breach of Article 8 of the ECHR.

Example: In *Mustafa and Armağan Akin v. Turkey*,[230] the applicants – a father and a son – argued that the terms of a custody order by the

228 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.

229 ECtHR, *A.I. v. Italy*, No. 70896/17, 1 April 2021.

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

domestic court had violated their rights under Article 8 of the ECHR because they 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.[231]

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*,[232] the applicant argued that he had been denied access to his son due to his religious convictions. 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.[233] 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. 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 interests of the child.

Example: The case *A.M. and Others v. Russia*[234] concerned the restriction of the applicant's parental rights and deprivation of contact with her children without the required scrutiny because she had been undergoing gender transition at that time. The Court found no evidence of any potential damage to the children from the transition and held that that the domestic

231 See also ECtHR, *Vujica v. Croatia*, No. 56163/12, 8 October 2015.

232 ECtHR, *Vojnity v. Hungary*, No. 29617/07, 12 February 2013; see also ECtHR, *P.V. v. Spain*, No. 35159/09, 30 November 2010.

233 ECtHR, *Vojnity v. Hungary*, No. 29617/07, 12 February 2013, para. 38.

234 ECtHR, *A.M. and Others v. Russia*, No. 47220/19, 6 June 2021.

courts had not sufficiently examined the particular circumstances of the family. Furthermore, the decision had been clearly based on the applicant's gender identity and had thus been discriminatory, in breach of Article 8 of the ECHR taken alone and in conjunction with Article 14 of the ECHR.

Example: In *Terna v. Italy*,[235] the applicant complained about the removal and placement in care of her granddaughter (who had resided with her since birth), and about her inability to exercise her right of access as granted by the domestic courts. She considered that the situation had resulted from the stigmatisation of the child's family connected to their Roma ethnic origin. The ECtHR found a violation of Article 8 of the ECHR on account of the lack of adequate and sufficient efforts by the domestic authorities to ensure respect for the applicant's visiting rights. On the other hand, to justify taking her into care, the domestic courts had used arguments concerning the best interests of the child, not the child's and her family's ethnic origin. There had thus been no breach of Article 14 read in conjunction with Article 8 of the ECHR.

Furthermore, the right of the child to maintain contact with both parents is expressly cited within the CoE Convention on Contact concerning Children.[236] 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[237] 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.

235 ECtHR, *Terna v. Italy*, No. 21052/18, 14 January 2021.

236 Council of Europe (2003), Convention on Contact concerning Children, CETS No. 192, 15 May 2003. See also World Organization for Cross-border Cooperation in Civil and Commercial Matters, Hague Conference on Private International Law (1996), 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.

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

The respect for family life as regards grandparents and their grandchildren primarily entails the right to maintain a normal grandparent–grandchild relationship through contact between them, even though those contacts normally take place with the agreement of the person who has parental responsibility.[238] In *Bogonosovy v. Russia*,[239] in which a grandfather wanted to maintain ties with his granddaughter after her adoption by another family, and in *M.S. v. Ukraine*,[240] the ECtHR emphasised the relevance of contact with the grandparents, especially when the child had continuously lived not only with both parents but also with the grandparents.

Situations may arise in which children are separated from a parent, for example as a result of the parent's imprisonment.[241] The ECtHR found in *Khoroshenko v. Russia*[242] that the interference with the applicant's private and family life resulting from the infrequency of authorised visits had been disproportionate to the aims of his sentence. Moreover, in *Horych v. Poland*,[243] the ECtHR 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". 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".

Example: In *Hadzhieva v. Bulgaria*,[244] the 14-year-old applicant was left on her own when her parents were both arrested. Under the relevant domestic legal provisions, the authorities had the responsibility, seemingly from the moment the applicant's parents were taken into custody, either to enable them to arrange for her care or to enquire into her situation of their own motion; they were also required to provide the applicant with assistance, support and services as needed, in her own home, a foster family or

238 ECtHR, *Mitovi v. The Former Yugoslav Republic of Macedonia*, No. 53565/13, 16 April 2015.

239 ECtHR, *Bogonosovy v. Russia*, No. 38201/16, 5 March 2019.

240 ECtHR, *M.S. v. Ukraine*, No. 2091/13, 11 July 2017.

241 See also Council of Europe, Committee of Ministers (2018), Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, 4 April 2018.

242 ECtHR, *Khoroshenko v. Russia*, No. 41418/04, 30 June 2015.

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

244 ECtHR, *Hadzhieva v. Bulgaria*, No. 45285/12, 1 February 2018.

a specialised institution. The relevant authorities did none of this. For the initial two-day period, therefore, the authorities had failed to comply with their positive obligation under Article 8 to ensure that the applicant was protected and provided for in her parents' absence.

The right of children to maintain contact with their parents is reinforced by selected provisions of the CoE *Guidelines on child-friendly justice*.[245] 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). Moreover, the CoE Recommendation CM/Rec(2018)5 concerning children with imprisoned parents[246] provides guidance on how to address the need to preserve and help develop positive child–parent relations when a parent is in detention.

Under international law, the CRC refers to the child's right to maintain contact with both parents in its Article 9 (3): "States 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

- EU law requires specifically that the child be heard during the proceedings relating to his/her return following wrongful removal or retention.
- The Brussels IIa Regulation (recast) supplements certain provisions of the Hague Convention, while the regulation prevails over the rules of the convention in relations between Member States.
- 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.

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

246 Council of Europe, Committee of Ministers (2018), Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, 4 April 2018.

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[247] (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, in cases of unlawful removal of a child, 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 domestic level and at 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 legal instrument regulating child abduction between EU Member States is the Brussels IIa Regulation (recast),[248] which is based on the provisions of the Hague Convention. It complements and takes precedence over the Hague Convention in intra-EU abduction cases (Article 96). Although the Hague Convention remains the main international child-abduction instrument, in certain respects Brussels IIa 'tightens' the jurisdictional rules in favour of the courts of origin/habitual residence. Similarly to the Hague Convention, the courts of the state where the child was habitually resident immediately prior to their improper removal or retention retain jurisdiction in cases of child abduction. The regulation maintains the same exceptions to the return as

247 World Organisation for Cross-border Cooperation in Civil and Commercial Matters (1980), Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980.

248 Council of the European Union (2019), Council Regulation (EC) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ 2019 L 178/1.

those included in the Child Abduction Convention. The recast regulation, introduced in 2019, abolished the need for exequatur,[249] which involved delays in enforcing orders. It also includes specific rules and clear deadlines governing the need for "expeditious court proceedings", an important tool to expedite child abduction cases.[250]

The recast Brussels IIa Regulation, in contrast to the Hague Convention, keeps jurisdiction to adjudicate the merits of the custody dispute with the state of habitual residence, even when a non-return order is issued in application of Article 13 (b) of the Hague Convention (Article 29 of the Brussels IIa Regulation (recast)). The change of jurisdiction to the state to which the child has been removed may only occur in two situations, under Article 10 of the Brussels IIa Regulation (recast). The first situation stipulates that the courts of the state of refuge shall have jurisdiction if the child has acquired habitual residence in that state and each person having right of custody has acquiesced in the removal or retention.[251] 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 five further conditions listed in Article 9 (b) of the Brussels IIa Regulation (recast) are met.[252]

As with all other EU legal instruments, Brussels IIa must be interpreted in accordance with the provisions of the 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 under the Brussels IIa Regulation (before the recast). As discussed in Section 2.4, 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.[253] According to the CJEU however, it is only for

249 The procedure known as exequatur concerns a process of enforcement of civil judgments, frequently involving costly, laborious and technically demanding reviews on the merits by domestic courts.

250 Art. 24 of the Brussels IIa Regulation (recast).

251 Art. 9 (a) of the Brussels IIa Regulation (recast).

252 Art. 9 (b) of the Brussels IIa Regulation (recast).

253 CJEU, C-491/10 PPU, *Joseba Adoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010. On aspects concerning child participation in this case, see also the analysis in Section 2.4.

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 IIa 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.

Example: The case of *Povse v. Alpago*[254] 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 IIa. 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 a judgment thus certified 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.[255]

The recast of Brussels IIa broadened and clarified the obligation of Member States to give children the opportunity to be heard. The recast introduces an obligation to give the child a genuine and effective opportunity to express

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

255 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.

their views and for the authorities to assess the child's best interests while giving due weight to their views in accordance with their age and maturity.[256] In addition, it specifies that the child has the right to express their views in return proceedings.[257]

The risk of serious, possibly irremediable, damage to the relationship between the child and a parent is one of the grounds for applying to the ECJ for an urgent preliminary ruling.[258] The Court has applied the preliminary ruling procedure on this ground in numerous cases, sometimes *ex officio*.[259]

Example: The case of *OL v. PQ*[260] relates to the request for the return of a child from Greece, the Member State where the child was born and lived with her mother, to Italy, where the couple were habitually resident before the birth of the child. The Court ruled that if a child has been born and has lived continuously with her mother for several months, in accordance with the joint wishes of her parents, in a Member State other than that where those parents were habitually resident before her birth, the initial intention of the parents that the mother, together with the child, should return to the latter Member State cannot lead to the conclusion that that child was habitually resident there. Thus, the refusal of the mother to return with the child to Italy cannot be considered a "wrongful removal or retention" of the child.

Example: The case of *A and B*[261] concerns a dispute between two Iranian nationals living in Sweden and the consequent removal to Finland of their child by the mother as part of a voluntary return in application of the Dublin Procedure (Regulation No. 604/2014). The Court ruled that a situation in which one parent, without the consent of the other parent, is led to take

256 EU, Council of the European Union (2019), Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ 2019 L 178/1, Art. 21.

257 *Ibid*., Art. 26.

258 EU, Rules of Procedure of the Court of Justice, OJ 2012 L 265, Art. 107; EU, Protocol (No. 3) on the Statute of the Court of Justice of the European Union, OJ 2016 C 115, Art. 23a.

259 CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010; CJEU, C-85/18 PPU, *CV v. DU*, 10 April 2018.

260 CJEU, C-111/17 PPU, *OL v. PQ*, 8 June 2017.

261 CJEU, C-262/21 PPU, *A v. B*, 2 August 2021.

her child to another Member State, in application of the Dublin Procedure, and then decides to remain in that Member State after the first Member State has annulled the transfer decision, but without the authorities deciding to take the mother and the child back or to grant them residence, cannot be considered a wrongful removal or retention.

Under CoE law, the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody[262] and the Convention on Contact concerning Children[263] include safeguards to prevent the improper removal of children and ensure the return of children.[264]

The ECtHR often deals with child abduction cases and is in such instances generally guided by the 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.

Example: The case *Neulinger and Shuruk v. Switzerland*[265] 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, it was also necessary to take into account any developments since the Federal Court's judgment ordering the child's return in order to assess compliance with Article 8 of the ECHR. 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

262 Council of Europe (1980), European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, CETS No. 105, 20 May 1980.

263 Council of Europe (2003), Convention on Contact concerning Children, CETS No. 192, 15 May 2003.

264 *Ibid.*, Arts. 10 (b) and 16, respectively; Council of Europe (1980), European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, CETS No. 105, 20 May 1980, Art. 8.

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

consequences for him and had to be weighed against any benefit he was likely to gain from it. Restrictions had been imposed on the father's right of access before the child's removal. 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, the court considered that 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 departed 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.

The jurisdiction in custody cases remains with the courts of habitual residence of the child unless specific conditions are met that allow for a change of jurisdiction.

Example: The case of *R.S. v. Poland*[266] concerned a Polish family living in Switzerland. The mother had taken the children on holiday to Poland but then petitioned for divorce there and successfully applied for temporary custody. The applicant – the father, living in Switzerland – was neither informed nor summoned to the court hearing concerning the decision on temporary custody, and the Polish courts denied his application to return the children to Switzerland, on the grounds that he had agreed to the mother's taking the children to Poland. Under the terms of the Hague Convention, the wrongfulness of the removal and retention derived from actions interfering with the normal exercise of parental rights under the law of the state where the children previously had their habitual residence, in this case Switzerland. Consequently, the Court found that Poland had failed to secure to the applicant the right to respect for his family life, in breach of Article 8 of the ECHR.

266 ECtHR, *R.S. v. Poland*, No. 63777/09, 21 July 2015.

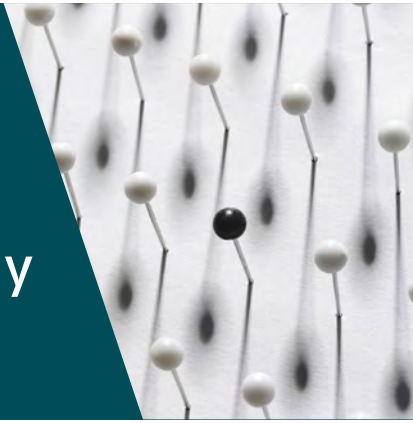
Example: In *Y.S. and O.S. v. Russia*,[267] a Russian woman had married a Ukrainian man and settled in Ukraine. After the birth of their daughter, the mother left her husband and their daughter. Several years later, after the military conflict in Ukraine, the mother took the child to Russia without the father's consent. The father then successfully applied for the child's return despite the mother's argument that the child's return would constitute a a "grave risk" within the meaning of Article 13 (b) of the Hague Convention in view of the ongoing military conflict in the place of her habitual residence. The ECtHR considered that the "grave risk" allegation, capable of constituting an exception to the child's return, was not genuinely taken into account by the Russian courts and that their decisions dismissing the mother's objections were not sufficiently reasoned, in breach of Article 8 of the ECHR.

Article 11 of the Hague Convention stipulates a period of six weeks for the court dealing with the abduction case to finish the case. As the ECtHR has emphasised in a number of cases,[268] in matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation, such cases requiring urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them.

267 ECtHR, *Y.S. and O.S. v. Russia*, No. 17665/17, 15 June 2021.

268 See ECtHR, *Simões Balbino v. Portugal*, No. 26956/14, 29 January 2019; ECtHR, *Mansour v. Slovakia*, No. 60399/15, 21 November 2017; ECtHR, *Hoholm v. Slovakia*, No. 35632/13, 13 January 2015; ECtHR, *M.A. v. Austria*, No. 4097/13, 15 January 2015; ECtHR, *Adžić v. Croatia*, No. 22643/14, 15 March 2015; ECtHR, *K.J. v. Poland*, No. 30813/14, 1 March 2016.

6 Alternative care to family care and adoption



EU	Issues covered	CoE
Charter of Fundamental Rights, Articles 7 (family life) and 24 (rights of the child) Brussels IIa Regulation (recast) (2019/1111/EU)	Alternative care to family care	ECHR, Article 8 (right to respect for private and family life) ESC (revised), Article 17 (right of children and young persons to social, legal and economic protection) ECtHR, *Y.I. v. Russia*, No. 68868/14, 2020 ECtHR, *Wallová and Walla v. the Czech Republic*, No. 23848/04, 2006 (placement in care due to inadequate housing) ECtHR, *Paradiso and Campanelli v. Italy*, No. 25358/12, 2017 (removal of a child born through gestational surrogacy) ECtHR, *B. v. Romania (No. 2)*, No. 1285/03, 2013 (parents' involvement in decision-making) ECtHR, *B.B. and F.B. v. Germany*, Nos. 18734/09 and 9424/11, 2013 (procedural flaws in decision-making process) ECtHR, *T. v. the Czech Republic*, No. 19315/11, 2014 (importance of contact) ECtHR, *Jansen v. Norway*, No. 2822/16, 2018

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 24 (rights of the child)	Adoption	ECHR, Article 8 (right to respect for private and family life) European Convention on the Adoption of Children (revised) ECtHR, *Strand Lobben and Others v. Norway* [GC], No. 37283/13, 2019 ECtHR, *S.S. v. Slovenia*, No. 40938/16, 30 October 2018 ECtHR, *Kearns v. France*, No. 35991/04, 2008 (parental consent to adoption) ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010 ECtHR, *E.B. v. France* [GC], No. 43546/02, 2008 (LGBTIQ woman's eligibility to adopt) ECtHR, *Gas and Dubois v. France*, No. 25951/07, 2012 (LGBT couple's eligibility to adopt) ECtHR, *X and Others v. Austria* [GC], No. 19010/07, 2013 ECtHR, *A.H. and Others v. Russia*, Nos. 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 and 42403/13, 2017 ECtHR, *Harroudj v. France*, No. 43631/09, 2012 (*kafala* and adoption)

Every child has the right to respect for family life, recognised under Article 7 of the EU Charter of Fundamental Rights and Article 8 of the ECHR (see Chapter 5). Both EU and CoE 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.[269] Finding a balance between ensuring that the child remains with their family – in order to respect 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

269 EU (2012), Charter of Fundamental Rights of the European Union, OJ 2012 C 326, Art. 24 (3).

and requires that contact continues to support family reunification if it is in the child's best interests. In certain circumstances, permanent removal from the family, through adoption, will take place. However, the legal finality of adoption requires stringent requirements to be followed.

This chapter examines European law on alternative care. EU law, mainly through the Brussels IIa Regulation (recast), 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. The chapter also includes issues connected with same-sex parents and surrogacy agreements.

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 generally 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 their placement in alternative care.

EU, CoE and international law provide guidance on the rights of the child with regard to alternative care.[270]

270 See also Council of Europe, Committee of Ministers (2011), Recommendation CM/Rec(2011)12 on children's rights and social services friendly to children and families, 16 November 2011; Council of Europe, Committee of Ministers (2005), Recommendation Rec(2005)5 on the rights of children living in residential institutions, 16 March 2005; Council of Europe, Committee of Ministers (2010), Recommendation CM/Rec(2010)2 on deinstitutionalisation and community living of children with disabilities, 3 February 2010; Council of Europe (2009), *Children and young people in care*, 2009.

As the CRC establishes, children have the right to be cared for by their parents (Article 7) and to be placed in alternative care as a temporary or permanent measure when this would be in their best interests (Article 20). Alternative care is a protective measure that ensures a child's interim safety and facilitates their return to their families where possible.[271] 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.[272] 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. A child placed in alternative care has the right to be informed of their rights and options, as well as the right "to be consulted and to have his/her views duly taken into account in accordance with his/her evolving capacities".[273]

International law, including the CRPD, 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 also highlighted in the *UN Guidelines for the alternative care of children*.[274] In regard to children with disabilities, the CRPD 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".[275] 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".[276]

271 United Nations, General Assembly (2010), *Guidelines for the alternative care of children, A/RES/64/142, 24 February 2010*, paras. 48–51; United Nations, 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*, CRC/C/GC/14, 29 May 2013, paras. 58–70.

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

273 United Nations, General Assembly (2010), *Guidelines for the alternative care of children*, 4 February 2010, A/RES/64/142, para. 6.

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

275 United Nations (2006), Convention on the Rights of Persons with Disabilities, 13 December 2006, Art. 23 (5).

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

In line with this approach, CoE Recommendation CM/Rec(2010)2 on deinstitutionalisation and community living of children with disabilities calls on member States to take appropriate legislative, administrative and other measures to replace institutional care with community-based services within a reasonable time frame and through a comprehensive approach.

The child's right to a guardian or representative is key to securing his or her broader rights.[277] Most often the mandate of a legal guardian is to safeguard the child's best interests, ensure their overall well-being and exercise legal representation, complementing their limited legal capacity.[278] Seven EU legal instruments require Member States to appoint a guardian for children within different contexts, some directly related to children without parental care.[279] At CoE level, the Convention on Action against Trafficking in Human Beings[280] and Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in migration on effective guardianship for

277 FRA (2014), *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, 30 June 2014, p. 31.

278 *Ibid.*, p. 15.

279 EU, European Parliament and the Council of the European Union (2011), Directive 2011/36/EU 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 2011 L 101 (Human Trafficking Directive); EU, European Parliament and the Council of the European Union (2011), Directive 2011/93/EU of 13 December 2011 combating the sexual abuse and exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ 2011 L 335; EU, European Parliament and the Council of the European Union (2012), Directive 2012/29/EU 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 2012 L 315 (Victims' Rights Directive); EU, European Parliament and the Council of the European Union (2011) Directive 2011/95/EU 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), OJ 2011 L 337 (Qualification Directive (recast)); EU, European Parliament and the Council of the European Union (2013), Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180 (Reception Conditions Directive (recast)); EU, European Parliament and the Council of the European Union (2013), Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180 (Asylum Procedures Directive (recast)); EU, European Parliament and the Council of the European Union (2013), Regulation (EU) No 604/2013 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 2013 L 180.

280 Council of Europe (2005), Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005, Art. 10 (4); see also Council of Europe, Committee of Ministers (2019), Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019.

unaccompanied and separated children in migration provide guidance on aspects of guardianship and legal representation.

Under EU law, the CJEU has ruled that the Brussels IIa Regulation (recast) applies to decisions to place a child in alternative care. The regulation, as noted in Chapter 5, incorporates children's rights principles in its approach. Here the "grounds of non-recognition for judgments relating to parental responsibility", as expressed in Article 39 of the Brussels IIa Regulation (recast), are instructive. Article 39 states that the recognition of a decision shall be refused if the decision was given without hearing a child who is capable of forming their own opinion. This will not apply if the proceedings concerned only the property of the child or there were serious grounds taking into account, in particular, the urgency of the case.

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 and possibly the choice of court (Article 10 of the Brussels IIa Regulation (recast)).

Under CoE law, the ECtHR finds that, where the family cannot provide the child with the necessary care and protection, removal to an alternative care setting may be required. 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.[281]

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".[282] The ECSR ruled that routinely placing young children in child centres, especially those who are most vulnerable, such as Roma and children with disabilities, and failing to put in place non-institutional and family-like alternative forms of care is in violation of Article 17 of the ESC.[283]

281 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.

282 Council of Europe (1996), European Social Charter (revised), CETS No. 163, 3 May 1996, Art. 17 (1) (c).

283 ESCR, *European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v. Czech Republic*, Complaint No. 157/2017, 17 June 2020.

6.2. Placing children in alternative care

Key points

- Under CoE and EU law, the decision-making process must contain procedural safeguards.
- Under CoE law, placing a child in alternative care is allowed only if it is provided for by law, pursues a legitimate aim and is necessary in a democratic society. Relevant and sufficient reasons must be put forward by the competent authority.

Under EU law, the Brussels IIa Regulation (recast) establishes that, when a court or competent authority of a Member State is considering placing a child in another Member State, it should obtain the consent of the competent authority of the Member State in which the child would be placed before ordering or arranging the placement.[284] Moreover, in line with the case law of the CJEU, Member States should establish clear rules and procedures for obtaining consent pursuant to this regulation, in order to ensure legal certainty and expedition. The fact that the institution where the child is to be placed gives its consent is not sufficient.[285]

Under CoE law,[286] 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 *Y.I. v. Russia*,[287] the applicant was deprived of parental authority and her two youngest children were placed in public care, because she was a drug addict and unemployed. The ECtHR considered that the children's

284 EU, Council of the European Union (2019), Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, recital 83 and Art. 82.

285 CJEU, C-92/12 PPU, *Health Service Executive v. S.C. and A.C.*, 26 April 2012.

286 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 1977.

287 ECtHR, *Y.I. v. Russia*, No. 68868/14, 25 February 2020.

removal and initial placement in public care at the beginning of the criminal proceedings against the applicant were justified, but not the far-reaching measure of deprivation of parental authority. The domestic courts had failed to provide any concrete evidence that the applicant had left her children unattended, had not provided care for them or had neglected them in any other way, let alone endangered their health or life. The domestic authorities had not considered a less drastic measure, such as restriction rather than deprivation of parental authority, nor had they warned her about the possible consequences of her allegedly negligent behaviour. The ECtHR concluded that the domestic authorities had failed to demonstrate convincingly that, despite the availability of less radical solutions, the impugned measure had constituted the most appropriate option corresponding to the children's best interests, in breach of Article 8 of the ECHR.

Example: In *Wallová and Walla v. the Czech Republic*[288] the applicants complained about the placement of their five children in two separate children's homes due to their poor housing situation. The care orders were ultimately lifted when the parents' economic and housing situation improved. The ECtHR found that the underlying reason for the decision to place the children in care had been the 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 ECtHR 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 or policies affecting children.[289]

Example: In *Paradiso and Campanelli v. Italy*,[290] a couple requested registration of the birth certificate of a child born through a surrogacy arrangement

288 ECtHR, *Wallová and Walla v. the Czech Republic*, No. 23848/04, 26 October 2006.

289 See also ECtHR, *Saviny v. Ukraine*, No. 39948/06, 18 December 2008.

290 ECtHR, *Paradiso and Campanelli v. Italy*, No. 25358/12, 24 January 2017.

in Russia. Since neither of the applicants had had biological links with the child, and they were considered to have brought the child to Italy illegally, the child was placed in a foster home with a view to adoption. For the authorities, the primary concern had been to put an end to an illegal situation. Although the child was not an applicant in the case, his best interests and the way in which the domestic courts had addressed them were relevant. The ECtHR accepted that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them, and found no 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 has stated 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".[291] This includes keeping them informed about developments, ensuring that they can participate in decisions made about them[292] and, in certain circumstances, hearing from the children concerned.[293]

Example: In *B. v. Romania (No. 2)*,[294] 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

291 ECtHR, *W. v. the United Kingdom*, No. 9749/82, 9 June 1988, para. 64.

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

293 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.

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

mental disorder, had not been assigned either a lawyer or 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 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*,[295] 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 Office 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

295 ECtHR, *B.B. and F.B. v. Germany*, Nos. 18734/09 and 9424/11, 14 March 2013.

sufficient reasons for their decision to withdraw the applicants' parental authority, in breach of Article 8 of the ECHR.

Even when placed in alternative care, children retain the right to maintain contact with their parents. This right has been recognised under the ECHR,[296] 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.[297] Under the ECHR, positive duties flow from these principles, as illustrated by the following cases.

Example: In *T. v. the Czech Republic*,[298] 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 interests. 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

296 ECtHR, *Olsson v. Sweden (No. 1)*, No. 10465/83, 24 March 1988.

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

298 ECtHR, *T. v. the Czech Republic*, No. 19315/11, 17 July 2014.

institution to deny contact, given that these decisions ultimately reduced the chances of family reunification.

Example: In *Jansen v. Norway*,[299] the applicant was a Roma. Her daughter had been taken into emergency foster care at a secret address when she was about a year old and the applicant was allowed one hour of supervised contact per week because of the risk that the child might be abducted. The contacts were then reduced to four visits per year before being suspended altogether, because the High Court considered that there was a risk of abduction during contact sessions and a risk that the foster family's address and identity could become known to the applicant's family. The ECtHR considered that the potential negative long-term consequences for the daughter of losing her Roma identity and contact with her mother, and the positive duty to take measures to facilitate family reunification as soon as reasonably feasible, had not been sufficiently weighed in the balancing exercise, resulting in 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.
- Under EU and CoE law an adoption process must adhere to certain criteria to ensure that it is in the best interests of the child.

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. Moreover, adoption is

299 ECtHR, *Jansen v. Norway*, No. 2822/16, 6 September 2018.

governed by the European Convention on the Adoption of Children (revised),[300] which calls for a child rights-based approach to adoption. The convention states, for instance, 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".[301] The convention 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".[302] A child not deemed to understand this shall, "as far as possible, be consulted and his or her views and wishes shall be taken into account having regard to his or her degree of maturity".[303] The ECtHR has emphasised that the best interests of the child may override those of the parent,in adoption. Accordingly, a balancing exercise has to be carried out between the interests of the child and those of their biological family, taking into account any possibility that the child could be reunified with their biological family. The Court requires procedures relating to adoption to be accompanied by safeguards commensurate with the gravity of the interference and the seriousness of the interests at stake.[304] According to the ECtHR, any radical measure such as annulling an adoption must be supported by relevant and sufficient reasons, and should not be envisaged if it would be against the interests of an adopted child.[305]

Example: In *Strand Lobben and Others v. Norway*,[306] after giving birth to her son, the first applicant accepted the child welfare authorities' recommendation to stay at a family centre for evaluation. Three weeks later, when she decided to leave the centre, the authorities took the child into immediate compulsory care and placed him in a foster home on an emergency basis, as they were concerned about the child's nutrition. The child remained in foster care for three years until the social welfare authorities authorised the foster parents to adopt him. The ECtHR confirmed that protecting biological family ties was fundamental, except when a family has

300 Council of Europe (2008), European Convention on the Adoption of Children (revised), CETS No. 202, 27 November 2008.

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

302 *Ibid.*, Art. 5 (1) b.

303 *Ibid.*, Art. 6.

304 ECtHR, *Strand Lobben and Others v. Norway* [GC], No. 37283/13, 10 September 2019; ECtHR, *Uzbyakov v. Russia*, No. 71160/13, 5 May 2020.

305 ECtHR, *Zaieţ v. Romania*, No. 44958/05, 24 March 2015.

306 ECtHR, *Strand Lobben and Others v. Norway* [GC], No. 37283/13, 10 September 2019.

proved particularly unfit.[307] In this case the domestic authorities had not attempted to perform a genuine balancing exercise between the interests of the child and those of his biological family. The Court found that the decision-making process that had led to the impugned decision authorising his adoption had not been conducted in such a way as to ensure that all the views and interests of the applicants had duly been taken into account. Thus, the procedure in question had not been accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake, in breach of Article 8 of the ECHR.[308]

Example: In *Abdi Ibrahim v. Norway,*[309] the applicant, a young Somali woman of Muslim faith, requested that her son be put in a Somali or Muslim foster family, which proved impossible, so he was put in a Christian one. When the authorities subsequently allowed for his adoption by the foster family, the applicant did not ask for the child's return but sought continuation of their contact so that her son could maintain his cultural and religious roots. The domestic courts had relied on Article 20 (3) of the CRC, according to which, when assessing possible solutions for a child temporarily or permanently deprived of his or her family environment, due regard has to be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. The Court accepted that this standard corresponded to and was in compliance with the requirements of the convention. However, the arrangements made after the child's initial placement into foster care as regards the applicant's ability to have regular contact with him, culminating in the decision to allow for his adoption, had failed to take due account of the applicant's interest in allowing the child to retain at least *some* ties to his cultural and religious origins. The reasons advanced in support of the impugned decision had not been sufficient to demonstrate that the circumstances of the case had been so exceptional as to justify a complete and definite severance of the ties between the applicant and her son, or that the decision to that effect had been motivated by an overriding requirement pertaining to the child's best interests. A violation of Article 8, in light of Article 9, of the ECHR, was found.

307 *Ibid.*, para. 207.

308 See also ECtHR, *Suur v. Estonia*, No. 41736/18, 20 October 2020; ECtHR, *Y.I. v. Russia*, No. 68868/14, 25 February 2020; ECtHR, *Pedersen and Others v. Norway*, No. 39710/15, 10 March 2020.

309 ECtHR, *Abdi Ibrahim v. Norway* [GC], No. 15379/16, 10 December 2021.

Example: In *S.S. v. Slovenia*,[310] the applicant, suffering from paranoid schizophrenia, was divested of her parental rights based on her inability to take care of her child. She had abandoned the child about a month after birth. The child was put into foster care and ultimately adopted. Finding no realistic possibility of her resuming care of the child, and having taken into account the negative impact the contact sessions had had on her and the lack of any emotional connection between them, the domestic courts had considered it to be in the child's best interests to withdraw the applicant's parental rights. Furthermore, the child had lived with her adoptive family since infancy and had established strong bonds. Since there was little or no prospect of the biological family's reunification, the child's interest in fully integrating into her de facto family weighed particularly heavily in the balance when assessed against the applicant's wish to retain legal ties with her. Moreover, the disputed measure had not prevented the applicant from having a personal relationship with the child, as she could have, in principle and despite the adoption, maintained contact with the child. The Court found no violation of Article 8 of the ECHR.

Example: In *Kearns v. France*,[311] 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 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 had to be paramount. 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.

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 discriminatory grounds such as sexual orientation, nationality or age was compatible with Article 14, in conjunction with Article 8. In doing so, it reaffirmed that the duty to take proportionate action with a view to protecting the best interests of the child is of central importance.

310 ECtHR, *S.S. v. Slovenia*, No. 40938/16, 30 October 2018.

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

Example: In *Schwizgebel v. Switzerland*,[312] 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. 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. 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.

Example: The case of *E.B. v. France*[313] 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. The ECtHR 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. 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. 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 in comparison to other single individuals who were entitled to adopt under national law.

Example: The case of *Gas and Dubois v. France*[314] concerned the question of whether same-sex couples should have an equal right to second-parent

312 ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010.

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

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

adoption as heterosexual couples. The applicants were a same-sex couple who had entered into a civil partnership. The applicants alleged that they had been discriminated against compared with both married and unmarried heterosexual couples. Concerning the comparison with unmarried couples of opposite sex, the ECtHR considered 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 thus concluded that there had been no difference in treatment based on sexual orientation and thus no violation of the applicants' ECHR rights.

Example: The case of *X and Others v. Austria*[315] concerns a similar situation, but under Austrian law second-parent adoption for unmarried heterosexual couples had been permissible. The ECtHR 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.

Example: The case of *A.H. and Others v. Russia*[316] *concerned a Russian law* banning the adoption of Russian children by nationals of the United States of America. The blanket ban, which applied retroactively and indiscriminately to all prospective adoptive parents from the United States, irrespective of the stage of the adoption proceedings and their individual circumstances, was found to violate Article 14 in conjunction with Article 8 of the ECHR.

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

Example: In *Harroudj v. France*,[317] 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

315 ECtHR, *X and Others v. Austria* [GC], No. 19010/07, 19 February 2013.

316 ECtHR, *A.H. and Others v. Russia*, Nos. 6033/13, 8927/13, 10549/13, 12275/13, 23890/13, 26309/13, 27161/13, 29197/13, 32224/13, 32331/13, 32351/13, 32368/13, 37173/13, 38490/13, 42340/13 and 42403/13, 17 January 2017.

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

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 into the family, as well as the need to interpret the ECHR in a manner consistent with the general principles of international law. *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.

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.[318] Of particular relevance is General Comment No. 14 the UN Committee on the Rights of the Child, on the right of the child to have his or her best interests taken as a primary consideration.[319]

318 UN Convention on the Rights of the Child, Arts. 2, 3, 6 and 12. See also United Nations, 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 Art. 44, para. 1 (b), of the Convention on the Rights of the Child*, UN Doc. CRC/C/58/Rev.2, 23 November 2010, paras. 23–27.

319 United Nations, 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 (art. 3, para. 1)*, CRC/C/GC/14, 29 May 2013.

Similarly, one of the objectives of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption is "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".[320]

320 Hague Conference on Private International Law (1993), The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, Art. 1 (a).

7 Child protection against violence and exploitation

EU	Issues covered	CoE
Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU) TFEU, Articles 82 and 83 Directive on electronic commerce (2000/31/EC) Directive on privacy and electronic communications (2002/58/EC) Audiovisual Media Services Directive (2018/1808) Regulation on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse (2021/1232/EU)	**Violence in schools, online, at home and in other settings**	ECHR, Articles 2 (right to life), 3 (inhuman or degrading treatment) and 8 (physical integrity) Protocol No. 1 to the ECHR, Article 2 (right to education) ESC (revised), Articles 7 (right to special protection against physical and moral hazards) and 17 (right to protection) Lanzarote Convention Istanbul Convention ECtHR, *Kayak v. Turkey*, No. 60444/08, 2012 (stabbing in the vicinity of a school) ECtHR, *O'Keeffe v. Ireland* [GC], No. 35810/09, 2014 (sexual abuse in school) ECtHR, *X and Others v. Bulgaria*, No. 22457/16, 2021 (investigation into allegations of sexual abuse in an orphanage) ECtHR, *Campbell and Cosans v. the United Kingdom*, Nos. 7511/76 and 7743/76, 25 February 1982

EU	Issues covered	CoE
		ECtHR, *F.O. v. Croatia*, No. 29555/13, 2021 (verbal abuse in school) ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 2003 ECtHR, *R.B. v. Estonia*, No. 22597/16, 2021 ECtHR, *A.Ş. v. Turkey*, No. 58271/10, 2016 ECtHR, *A.R. and L.R. v. Switzerland*, No. 22338/15, 2017 (sex education in state school) ECtHR, *Kurt v. Austria* [GC], No. 62903/15, 2021 ECtHR, *Kontrová v. Slovakia*, No. 7510/04, 2007 ECtHR, *Talpis v. Italy*, No. 41237/14, 2017 ECtHR, *Costello-Roberts v. the United Kingdom*, No. 13134/87, 1993
Charter of Fundamental Rights, Articles 5 (2) (forced or compulsory labour) and 5 (3) (prohibition of trafficking) Young Workers Directive (94/33/EC) Anti-Trafficking Directive (2011/36/EU) Third-country Nationals Directive (2004/81/EC) Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU)	**Sexual exploitation**	ECHR, Articles 4 (freedom from servitude, forced and compulsory labour), 8 (right to respect for private life) ESC (revised), Article 7 (10) (protection of children against physical and moral dangers) Convention on Action against Trafficking in Human Beings Convention on Cybercrime Lanzarote Convention ECtHR, *C.N. and V. v. France*, No. 67724/09, 2012 (servitude) ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, 2010 (failure to investigate alleged trafficking) ECtHR, *V.C.L. and A.N. v. the United Kingdom*, Nos. 77587/12 and 74603/12, 2021

EU	Issues covered	CoE
		ECtHR, *Söderman v. Sweden* [GC], No. 5786/08, 2013 (secret filming of a child) ECtHR, *N.C. v. Turkey*, No. 40591/11, 2021 ECtHR, *K.U. v. Finland*, No. 2871/02, 2008
	High-risk groups	ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], No. 47848/08, 2014 (death of a severely disabled young man in a state institution) ECtHR, *Nencheva and Others v. Bulgaria*, No. 48609/06, 2013 (death of children in a state institution) ECtHR, *I.C. v. Romania*, No. 36934/08, 2016 ECtHR, *V.C. v. Italy*, No. 54227/14, 2018 (addicted children)
Commission Decision as regards the introduction of additional reserved numbers beginning with 116 (2007/698/EC)	Missing children	ECHR, Article 8 (right to respect for private life) ECtHR, *Zorica Jovanović v. Serbia*, No. 21794/08, 2013 (right to information) ECtHR, *Ljubinka Mik and Svetlana Jovanović v. Serbia*, Nos. 9291/14 and 63798/14, 2021

Violence against children includes all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.[321] It can happen in different settings such as in school, at home or on the streets, but also online through the use of mobile phones or other electronic devices connected to the internet. Online violence covers not only the ownership, production and sharing of child sexual abuse material, but also grooming, online harassment, victimisation and cyberbullying. 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

321 See full definition in Art. 19 (1) of the CRC.

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. The state's duty to protect may prove more difficult in cases where children are exposed to violence by private actors, including their family members. However, states' duties also include preventive measures and not only protection or assistance measures after violence has taken place. Crisis and emergency situations, such as the coronavirus disease 2019 (COVID-19) pandemic, may increase children's vulnerability to violence, including sexual abuse and exploitation, which need to be addressed.[322]

One of the EU's competences in the area relates to cross-border crimes including trafficking in human beings and the sexual exploitation of women and children (Article 83 of the TFEU). Particular legislative measures have therefore been enacted with respect to child sexual abuse material and human trafficking. The EU has also passed legislation requiring Member States to criminalise several forms of sexual abuse, sexual exploitation and actions that solicit children for sexual purposes, including grooming. At CoE level, the ECtHR, through its case law 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 complaints mechanism. Furthermore, specific CoE conventions, most notably the CoE Lanzarote Convention,[323] are in place, with monitoring bodies in charge of supervising their implementation. The Lanzarote Convention is the most comprehensive international legal instrument on the protection of children against sexual exploitation and sexual abuse with far reach (ratified by all 47 CoE member States and Tunisia).

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, online or in other settings and focuses on issues such as abuse in school, sexual abuse, domestic violence and child neglect. Section 7.2 looks at

322 World Health Organization (2020), 'COVID-19: Protecting children from violence, abuse and neglect in the home'; EU, European Commission (2021), 'The EU Strategy on the Rights of the Child and the European Child Guarantee'; EU Fundamental Rights Agency (2021), *The coronavirus pandemic and fundamental rights: A year in review,* 10 June 2021; Council of Europe (2021), 'The COVID-19 pandemic and children: Challenges, responses and policy implications', 12 March 2021.

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

cases of child exploitation that have a marked cross-border dimension, including human trafficking (for the purposes of forced labour or sexual exploitation), and offences related to child sexual abuse material. Section 7.3 deals with high-risk groups. Finally, Section 7.4 addresses the issue of missing children.

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

Key points

- States have the duty to ensure that children are effectively protected against all forms of violence and harm in all settings, including violence that occurs online.
- 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,[324] 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.[325]

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 violence against children under various provisions of the ECHR, most notably Articles 2, 3 and 8. The Court has identified clear duties incumbent on states whenever children are placed in

324 EU, European Parliament and Council of the European Union (2011), Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1.

325 *Ibid.*

institutions under their authority.[326] 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,[327] repeated sexual abuse by school teachers,[328] rape,[329] or corporal punishments[330] have all been found to fall within the scope of Article 3 of the ECHR.

In the case of 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.[331] States must also adopt special measures and safeguards for protecting children.[332]

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 run by non-state actors, where it was questionable whether state responsibility could arise. In such cases, 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.[333] In cases concerning the determination of state responsibility, the ECtHR generally distinguished between the state's general obligation to protect, when the risk was not clearly identifiable, and a specific obligation

326 ECtHR, *Nencheva and Others v. Bulgaria*, No. 48609/06, 18 June 2013.

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

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

329 ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003; ECtHR, M.G.C. *v. Romania*, No. 61495/11, 15 March 2016, para. 58.

330 ECtHR, *Tyrer v. the United Kingdom*, No. 5856/72, 25 April 1978; ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003, para. 150; ECtHR, *O'Keeffe v. Ireland* [GC], No. 35810/09, 28 January 2014, para. 146.

331 ECtHR, *Tyrer v. the United Kingdom*, No. 5856/72, 25 April 1978; ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003, para. 150; ECtHR, *O'Keeffe v. Ireland* [GC], No. 35810/09, 28 January 2014, para. 146.

332 ECtHR, *O'Keeffe v. Ireland* [GC], No. 35810/09, 28 January 2014, para. 148; see also ECtHR, *M.C. v. Bulgaria*, no. 39272/98, ECHR 2003-XII, para. 153.

333 ECtHR, *M.C. v. Bulgaria*, No. 39272/98, 4 December 2003, para. 150; ECtHR, *Costello-Roberts v. the United Kingdom*, No. 13134/87, 25 March 1993, para. 27.

to protect, in cases where the risk 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*[334] 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 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 of the school, which he used to stab the victim.

Example: The case of *O'Keeffe v. Ireland*[335] concerns acts of abuse committed in the 1970s in an Irish National School. At the time, national schools in Ireland were recognised and funded by the state, whereas the management and administration were 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 children 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[336] or by private per-

334 ECtHR, *Kayak v. Turkey*, No. 60444/08, 10 July 2012.

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

336 ECtHR, *Assenov and Others v. Bulgaria*, No. 24760/94, 28 October 1998.

sons. 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, which require states to protect children from all forms of ill-treatment. The ESCR has interpreted Article 17 as requiring a legal prohibition against any form of violence against children in all settings (home, schools and institutions). The ECSR in its case law found a violation of Article 17 of the ESC[337] where 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".[338]

Under the Lanzarote Convention, states are required to criminalise various forms of sexual abuse and sexual exploitation against children.[339] This convention also requires states to take legislative and 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. The Lanzarote Committee monitors the convention's implementation and issues report, opinions and declarations.[340] In the case of *X and Others v. Bulgaria*, the ECtHR stressed that Article 3 of the ECHR has to be interpreted in the light of other applicable international instruments and in particular the Lanzarote Convention with regards to investigation and procedural requirements.[341] Further-

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

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

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

340 See, for example, Council of Europe, Lanzarote Committee (2019), Declaration of the Lanzarote Committee on protecting children in out-of-home care from sexual exploitation and sexual abuse, 21 October 2019; Lanzarote Committee (2018), *2nd implementation report: Protection of children against sexual abuse in the circle of trust: The strategies*, 31 January 2018; Lanzarote Committee (2017), Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs), 12 May 2017; Lanzarote Committee (2015), *1st implementation report: Protection of children against sexual abuse in the circle of trust: The framework*, 4 December 2015.

341 ECtHR, *X and Others v. Bulgaria*, No. 22457/16, 2 February 2021.

more, Articles 4 and 5 of the CoE Istanbul Convention[342] require states to enact special legislative measures and to investigate acts of violence against women and girls. Under Article 22, states are obliged to ensure specialist support services to women and children who are victims of domestic violence. The Group of Experts on Action against Women and Domestic Violence monitors the implementation of the convention.[343]

Example: The case *X and Others v. Bulgaria*[344] concerns allegations by three Bulgarian children that they were sexually abused in an orphanage in Bulgaria prior to their adoption in Italy. Given the satisfactory legislative and regulatory framework for preventing child sexual abuse and the lack of proof that any of the authorities had been aware of the alleged abuse, the ECtHR found no violation of the substantive limb of Article 3. However, the Court considered that Bulgaria had failed to use all reasonable investigative and international cooperation measures while examining the alleged abuse. In particular, the authorities never attempted to examine the applicants medically or interview them or other children named by them. Moreover, the Bulgarian authorities never considered investigative measures of a more covert nature, such as surveillance of the orphanage perimeter, telephone tapping or the interception of telephone and electronic messages, or the use of undercover agents, which are expressly mentioned in the Lanzarote Convention and widely used across Europe in such cases. The ECtHR concluded that they had not taken all reasonable measures to shed light on the facts and had not undertaken a full and careful analysis of the evidence before them, in breach of their procedural obligation under Article 3 of the ECHR.

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, including corporal punishment. The UN Committee on the Rights of the Child has issued an important number of general comments and recommendations interpreting states' obligations under

342 Council of Europe (2011), Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 11 May 2011.

343 Council of Europe, Group of Experts on Action against Women and Domestic Violence (2020), *1st general report on GREVIO's activities*, April 2020.

344 See also ECtHR, *X and Others v. Bulgaria*, No. 22457/16, 2 February 2021.

the CRC. For instance, General Comment No. 13 describes measures to protect children against all forms of violence[345] and No. 8 calls on states to take appropriate measures against all forms of corporal punishment.[346]

7.1.2. Abuse in school

Under CoE law, the ECtHR has analysed complaints about abuse in school as a form of disciplinary measure mainly under Article 3 of the ECHR.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.

The case of *Campbell and Cosans v. the UK* concerned corporal punishment of children in state-supported education[347] and was followed by *Costello-Roberts v. UK*[348] regarding corporal punishment of children in private schools. In neither case did the ECtHR find a violation of Article 3 of the ECHR. However, since *Costello-Roberts*, there had been a change in social attitudes and legal standards concerning the application of measures of discipline towards children, emphasising the need to protect children from any form of violence and abuse.[349]

Example: The case of *F.O. v. Croatia*[350] concerns the alleged harassment of a pupil by a teacher in a public school and the failure on the part of the state authorities to effectively respond to his allegation. The teacher had called the applicant "a moron, an idiot, a fool, hillbilly" The ECtHR found that, while the teacher's initial insults against the applicant intended to discipline him and his classmates, the two later occasions could not be seen as anything but verbal abuse amounting to humiliation, belittling and ridicule. The ECtHR emphasised that teachers are expected to understand

345 United Nations, Committee on the Rights of the Child (2011), *General Comment No. 13 (2011): The right of the child to freedom of all forms of violence*, CRC/C/GC/13, 18 April 2011.

346 United Nations, 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.

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

348 ECtHR, *Costello-Roberts v. the United Kingdom*, No. 13134/87, 25 March 1993.

349 ECtHR, *F.O. v. Croatia*, No. 29555/13, 22 April 2021. See also ECtHR, *V.K. v. Russia*, No. 68059/13, 7 March 2017.

350 ECtHR, *F.O. v. Croatia*, No. 29555/13, 22 April 2021.

that verbal provocation and abuse might deeply affect students, particularly those who are sensitive. Moreover, a teacher should be aware that any form of violence, including verbal abuse, towards students, however mild, is not acceptable in an educational setting and that they should interact with students with due respect for their dignity and moral integrity. The Court further stressed that the domestic authorities had to put in place appropriate legislative, administrative, social and educational measures to unequivocally prohibit any form of violence or abuse against children at all times and in all circumstances, and thus to ensure zero tolerance of any violence or abuse in educational institutions. This includes the need to ensure accountability through appropriate criminal, civil, administrative and professional avenues. In the specific case, the Court found that the only measure taken by the domestic authorities involved a verbal reprimand from the school psychologist, which failed to address the problem that the teacher's conduct posed. The ECtHR accordingly found that there had been a violation of Article 8 of the ECHR.

7.1.3. Sexual abuse

Child sexual abuse may take many forms, including harassment, grooming, touching, incest or rape. It can take place in various settings, including at home, schools, care institutions and churches, as well as online through the use of internet and digital technologies. 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. Human trafficking and offences related to child sexual exploitation material are dealt with in Sections 7.2.2 and 7.2.3 respectively.[351]

Under EU law, Directive 2011/93/EU seeks to harmonise minimum criminal sanctions for various child sexual abuse offences between Member States, largely reflecting the approach of the Lanzarote Convention.[352] Under Article 3, Member States must punish various forms of sexual abuse through criminal law, offences including causing children to witness sexual activities or sexual abuse, engaging in sexual activities with children, and recruitment and/or

351 Please see Interagency Working Group (2016), *Terminology guidelines for the protection of children from sexual exploitation and sexual abuse*, 28 January 2016.

352 EU, European Parliament and Council of the European Union (2011), Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1.

coercion of children to participate in pornographic performances. The directive provides for increased penalties if the acts are committed by persons in a position of trust, and 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.

Article 10 of this directive requires Member States to ensure that anyone convicted of offences such as child sexual abuse, exploitation and pornography is disqualified from exercising activities involving direct and regular contact with children. Framework Decision 2009/315/JHA[353] regulating the exchange of criminal record information between Member States facilitates the implementation of the directive by allowing the sharing of information on the criminal records of individuals convicted of child sexual abuse offences.[354]

In relation to online content, special consideration must be given to child sexual abuse material that proliferates online. The Directive on combating child sexual abuse obliges Member States' authorities to remove web pages containing or disseminating child sexual abuse material, both when hosted within their territory and outside it.[355] The e-Commerce Directive[356] determines the existing liability rules for online intermediaries. Under Article 3 it allows for the notice and takedown mechanisms for illegal content, if this action is necessary for "public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons".

353 EU, Council of the European Union (2009), 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.

354 EU, European Commission (2020), *EU strategy for a more effective fight against child sexual abuse*, COM(2020) 607 final, 24 July 2020.

355 EU, European Parliament and Council of the European Union (2011), Directive 2011/93/EU 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 2011 L 335, Arti. 25.

356 EU, European Parliament and Council of the European Union (2000), Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ 2000 L 178.

An interim regulation[357] adopted in 2021 on the processing of personal and other data for the purpose of combating child sexual abuse provides for a temporary derogation from certain provisions of Directive 2002/58/EC on privacy and electronic communications.[358] This ensures that certain online service providers can continue their voluntary actions to detect and report child sexual abuse online. This derogation will last for three years.[359]

The revised Audiovisual Media Services Directive has introduced new rules, under Article 6a, requiring Member States to ensure that audiovisual media provided by media services under their jurisdiction that may impair the physical, mental or moral development of children are provided in a way that does not allow children normally to hear or see them, through measures proportional to the potential harm of the programme. The most harmful content, such as gratuitous violence and pornography, must be subject to the strictest measures. Moreover, this article requires Member States to ensure that media service providers provide sufficient information to viewers about content that may impair the physical, mental or moral development of children, through a system that describes the potentially harmful nature of the content of an audiovisual media service.[360]

Furthermore, in December 2020 the Commission proposed a Digital Services Act, which is a comprehensive reform of the obligations in the online space and includes the protection of children and other vulnerable groups.[361]

357 EU, European Parliament and Council of the European Union (2021), Regulation (EU) 2021/1232 of 14 July 2021 on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse, PE/38/2021/REV/1, 30 July 2021.

358 EU, European Parliament and Council of the European Union (2002), Directive 2002/58/EC 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 2002 L 201.

359 EU, European Commission (2020), *EU strategy for a more effective fight against child sexual abuse*, COM(2020) 607 final, 24 July 2020.

360 EU, European Parliament and Council of the European Union (2018), Directive (EU) 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ 2018 L 303/69.

361 EU, European Parliament and Council of the European Union (2020), Proposal for a regulation on a single market for digital services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020.

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 or psychological 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.[362] These situations are analysed in Chapter 5.

Example: In *M.C. v. Bulgaria*[363] the applicant, a 14-year-old girl 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.

Example: In *R.B. v. Estonia*,[364] a four-year-old girl, who had accused her father of sexual abuse, was recorded in two video interviews. In neither of them was she advised of her right not to testify against a family member or of the duty to tell the truth, although the rules of domestic criminal procedure required such instructions. In subsequent court proceedings, the Supreme Court considered that the failure to properly advise the applicant

362 Council of Europe (2021), *Respecting human rights and the rule of law when using automated technology to detect online child sexual exploitation and abuse*, Independent experts' report, June 2021.

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

364 ECtHR, *R.B. v. Estonia*, No. 22597/16, 22 June 2021.

before her interviews was of such importance as to render her testimony, which was decisive evidence in the case, inadmissible. The father was consequently acquitted. The ECtHR stressed that investigations and criminal proceedings had to be carried out in a manner that protected the best interests and rights of children, such protection requiring the adoption of child-friendly and protective measures for child victims in criminal proceedings. In particular, it was essential to safeguard children's testimony during both the pre-trial investigation and the trial. According to the CoE Committee of Ministers' *Guidelines on child-friendly justice*, where less strict rules on giving evidence or other child-friendly measures are applied, such measures should not in themselves diminish the value given to a child's testimony or evidence, without prejudice to the rights of the defence. However, the applicant's testimony had been found to be inadmissible precisely because of the strict application of procedural rules, which had made no distinction between adults and children, and thus did not provide for exceptions or adaptions for child witnesses. Consequently, the ECtHR concluded that there had been significant flaws in the domestic authorities' procedural response to the applicant's allegation of sexual abuse by her father, which had not sufficiently taken into account her particular vulnerability and corresponding needs as a young child, in breach of the respondent state's positive obligations under Articles 3 and 8 of the ECHR.[365]

Example: The case of *A.Ş. v. Turkey*[366] concerned a sexual assault and physical violence to which the applicant was subjected while in pre-trial detention as a child. The ECtHR concluded that, although Turkish criminal law criminalised attacks on persons' physical integrity of the kind complained of, in the present case, by requiring the applicant to lodge a formal complaint as a prerequisite for instituting criminal proceedings, without taking account of his particular vulnerability, it had rendered ineffective the legal enforcement measures designed to protect individuals against treatment contrary to Article 3 of the ECHR.

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 also open to ratification by states outside Europe. This binding instrument

365 See also ECtHR, *A and B v. Croatia*, No. 7144/15, 20 July 2019.

366 ECtHR, *A.Ş. v. Turkey*, No. 58271/10, 13 September 2016.

is backed by a plethora of non-legally binding instruments aimed at further ensuring that states enact effective measures against child sexual abuse.[367] As the Lanzarote Committee clarifies, the Lanzarote Convention also requires states to protect children against sexual abuse in the digital environment.[368] In 2019, the Lanzarote Committee adopted an opinion on Article 20 of the Lanzarote Convention with respect to child self-generated sexually suggestive or explicit images and/or videos. The opinion identifies situations that do not constitute criminal offences and those that call for criminal prosecution as a last resort.[369] Sexually suggestive or explicit images and/or videos generated by children in a particularly vulnerable situation should be considered the result of abusive/exploitative conduct.[370] See Section 7.2.3 for more information on child sexual exploitation material.

The Lanzarote Convention also addresses the prevention of sexual abuse against children through, *inter alia*, education for children: each Party should take the necessary legislative or other measures to ensure that children, during primary and secondary education, receive information on the risks of sexual exploitation and sexual abuse, as well as on the means to protect themselves, adapted to their developing capacity.

Example: *A.R. and L.R. v. Switzerland*[371] concerns the refusal by a primary school to grant the first applicant's request that her daughter, then aged seven and about to move up to the second year of primary school, be exempted from sex education lessons, which were mandatory for children between the ages of four and eight. The ECtHR noted that sex education

367 Examples include 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.

368 Council of Europe, Lanzarote Committee (2017), Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs), 12 May 2017.

369 Council of Europe, Lanzarote Committee (2019), Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children, 6 June 2019.

370 Council of Europe, Lanzarote Committee (2019), Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children, 6 June 2019; Council of Europe, Lanzarote Committee (2017), Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs), 12 May 2017.

371 ECtHR, *A.R. and L.R. v. Switzerland*, No. 22338/15, 19 December 2017.

at kindergarten and in the first years of primary school was not systematic; the teachers merely had to react to the children's questions and actions. The refusal to exempt a primary school pupil from sex education fell within the state's margin of appreciation and therefore did not constitute a breach of Article 8 of the ECHR. The complaint was accordingly declared inadmissible.

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 .

Under CoE law, domestic violence cases are usually brought either by women alone or together with their children, complaining that the state has failed to adequately discharge its obligation under Articles 2, 3 and 8 of the ECHR to protect them against harm. 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: *Kurt v. Austria*[372] concerned the murder of the applicant's son at school by her husband. She complained that the authorities had failed to protect her family from her violent husband, who had already been convicted of domestic violence against her and barred from their home. The ECtHR recalled that, in the context of domestic violence, the obligations incumbent on the state authorities firstly required an immediate response to allegations of domestic violence. Secondly, the authorities had to establish whether or not there existed a real and immediate risk to the life of one or more identified victims of domestic violence, by taking due account of the particular context of domestic violence cases and bearing in mind that violence against children belonging to the common household could be used by perpetrators as the ultimate form of punishment against their partner. The risk assessment had to be autonomous, proactive and comprehensive; the authorities should not rely solely on the victim's perception of the risk, but complement it by their own assessment, collecting and assessing information on all relevant risk factors and elements of the case. Thirdly, if the outcome of that assessment was the existence of such a risk, the

372 ECtHR, *Kurt v. Austria* [GC], No. 62903/15, 15 June 2021.

authorities' obligation to take adequate preventive operational measures proportionate to the level of the risk assessed was triggered.

In the applicant's case the authorities had responded immediately to her domestic violence allegations, had taken evidence and had issued barring and protection orders, without any delays or inactivity. Their risk assessment, while not following any standardised procedure, fulfilled the requirements of being autonomous, proactive and comprehensive and did not identify any real and immediate risk of an attack on the children's lives under the *Osman* test[373] as applied in the context of domestic violence. Consequently, there had been no obligation incumbent on the authorities to take further preventive operational measures specifically with regard to the applicant's children, in either private or public spaces, such as issuing a barring order for the children's school. The ECtHR accordingly found no violation of Article 2 of the ECHR.

Example: In the case of *Kontrová v. Slovakia*,[374] 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

373 In *Osman v. the United Kingdom* (1998), the Court laid down a two-pronged test to determine when a positive obligation arises to take operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The *Osman* test has been subsequently applied in a variety of circumstances. For a more comprehensive overview of the different situations, see ECtHR, *Bljakaj and Others v. Croatia*, No. 74448/12, 18 September 2014 , paras. 107–111.

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

direct consequence of those failures was the death of the applicant's children, in breach of Article 2 of the ECHR.

Example: The case of *Talpis v. Italy*[375] concerned several episodes of violence against the applicant and her children by her husband. Following the first two episodes, the applicant filed a complaint against him and requested protection measures. The police questioned her for the first time seven months after her complaint. Meanwhile, the third episode of violence resulted in the death of the couple's son and in injuries to the applicant. The ECtHR took note of the following failures of the authorities: (a) they did not conduct any investigation for seven months following the applicant's complaint, nor did they take any measures to protect her during that time; (b) the husband was convicted of serious bodily harm three years after the applicant had filed her complaint and only after he had killed their son and attempted to kill the applicant; and (c) the police remained inactive for six months after the prosecutor's request to take immediate action on the applicant's request for protection. The Court found an Article 2 violation for failing to protect the lives of the applicant and her son, an Article 3 violation for failing to protect the applicant against domestic violence and a violation of Article 14, read in conjunction with Articles 2 and 3.[376]

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.[377] 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 that the staff is trained to deal with the needs of children.[378]

375 ECtHR, *Talpis v. Italy*, No. 41237/14, 18 September 2017.

376 See also ECtHR, *Association Innocence en Danger and Association Enfance et Partage v. France*, Nos. 15343/15 and 16806/15, 4 June 2020.

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

378 ECtHR, *Nencheva and Others v. Bulgaria*, No. 48609/06, 18 June 2013.

The Istanbul Convention is the first legally binding international instrument on preventing and combating violence against women and girls at international level, signed by all EU Member States, and the EU,[379] and includes several references to children.[380] 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.[381] 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.

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.[382]

7.2. Child exploitation

Key point

- State authorities have a duty to cooperate effectively to protect children against forced labour, trafficking and child sexual exploitation material, including in the conduct of investigations.

379 Council of Europe, Treaty Office, Chart of signatures and ratifications of Treaty No. 210, status as of 15 October 2021.

380 Council of Europe (2011), Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 11 May 2011.

381 FRA (2014), Violence against women: An EU-wide survey, Main Results, Luxembourg, Publications Office, 5 March 2014, pp. 134–135. See also UNICEF (2006), Behind closed doors: The impact of domestic violence on children, 2006.

382 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.

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 generally prohibited by Article 32 of the charter, which specifies that the minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. The minimum school-leaving age varies across the EU, mostly between 15 and 18 years of age.[383] Directive 94/33/EC is the main legal instrument prohibiting child labour.[384] Member States are allowed to set the minimum age for employment below the minimum school leaving age only in exceptional circumstances (Article 4 (2)), and they 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).

In many instances, forced child labour cases involve trafficked children.[385] Directive 2011/36/EU on preventing and combating trafficking in human beings recognises forced labour as a form of child exploitation (Article 2 (3)).[386] 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).[387]

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

383 EU, European Commission, Eurydice (2018), *Compulsory education in Europe – 2018/19*, Eurydice Facts and Figures, 2018.

384 EU, Council of the European Union (1994), Directive 94/33/EC of 22 June 1994 on the Protection of Young People at Work, OJ 1994 L 216.

385 EU, European Parliament and Council of the European Union (2011), Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101/1, recital 11.

386 EU, European Parliament and Council of the European Union (2011), Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101/1.

387 See FRA (2015c), *Severe labour exploitation: Workers moving within or into the European Union-States' obligations and victims' rights*, 2 June 2015, pp. 40–41.

for which the said person has not offered himself voluntarily".[388] Servitude includes, in addition, "the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition".[389] 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.[390] 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.[391] 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.[392]

Example: The case of *C.N. and V. v. France*[393] 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

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

389 *Ibid.*, para. 123.

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

391 *Ibid.*, para. 104f.

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

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

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.[394] 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.[395]

The ILO brings together governments, employers and workers of 187 member States, to set labour standards, develop policies and devise programmes promoting decent work. Two ILO conventions on child labour, Convention No. 138 on Minimum Age[396] and Convention No. 182 on the Worst Forms of Child Labour,[397] establish the minimum age for entering certain types of employment, protective safeguards that need to be in place, and measures to prohibit and eliminate the worst forms of child labour.

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

394 ECSR (2004), Conclusions 2004 – Bulgaria – Article 7 (10), 2004/def/BGR/7/10/EN, 31 May 2004.

395 ECSR (2006), Conclusions 2006 – Albania – Article 7 (10), 2006/def/ALB/7/10/EN, 30 June 2006; ECSR (2006), Conclusions 2006 – Bulgaria – Article 7 (10), 2006/def/BGR/7/10/EN, 30 June 2006; ECSR (2020), Conclusions 2019 – Ireland, March 2020.

396 ILO (1973), Minimum Age Convention, C138, 1973; ILO (1973), Minimum Age Recommendation, R146, 1973.

397 ILO (1999), Worst Forms of Child Labour Convention, C182, 1999; ILO (1999), Worst Forms of Child Labour Recommendation, R190, 1999.

European Parliament and the Council based on Article 83 of the TFEU.[398] 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).[399] 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 (3)). 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 15 (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 15 (5)).[400]

Directive 2004/81/EC is also relevant for trafficked children if, by way of derogation, Member States decide to apply this directive to children under the conditions laid down in national law.[401] Under this instrument, victims of trafficking may be issued residence permits by the host Member States, provided they cooperate in the criminal investigation.[402]

398 EU, European Parliament and Council of the European Union (2011), Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, OJ 2011 L 101/1.

399 Provisions detailed in FRA and ECtHR (2020), *Handbook on European law relating to asylum, borders and immigration*, 17 December 2020.

400 See FRA (2015b), *Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, 5 May 2015, p. 79.

401 EU, Council of the European Union (2004), Directive 2004/81/EC 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.

402 *Ibid.*, Art. 3.

At policy level, the European Commission adopted a new strategy in April 2021 with a number of measures to prevent trafficking, protect victims and promote prosecution.[403] The EU's law enforcement agency (Europol) and the European Agency for Criminal Justice Cooperation (Eurojust) play an important role 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 refer specifically to trafficking. Nevertheless, the ECtHR interprets Article 4 of the ECHR as including a prohibition of trafficking.[404] 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.[405] 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. The Court has also drawn on its case law under Articles 3 and 8 in respect of acts of violence, as children are particularly vulnerable, to ascertain whether or not the measures applied by the state to protect them against acts falling within the scope of Article 4 are effective, include reasonable steps to prevent acts of which the authorities had, or ought to have had, knowledge, and are effectively deterrent.[406]

403 EU, European Commission (2021), 'Fighting trafficking in human beings: A new strategy 2021–2025', 21 April 2021.

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

405 United Nations, General Assembly (2000), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, New York, 15 November 2000; Council of Europe (2005), Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005.

406 ECtHR, *V.C.L. and A.N. v. the United Kingdom*, Nos. 77587/12 and 74603/12, 16 February 2021; see also ECtHR, *S.M. v. Croatia*, No. 60561/14, 25 June 2020.

Example: The case of *Rantsev v. Russia and Cyprus*[407] 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.[408]

Example: The case of *V.C.L. and A.N. v. the United Kingdom*[409] concerned two Vietnamese children discovered by police officers to be working on cannabis farms, following which they were arrested and charged with drug-related offences. The applicants were not referred immediately for assessment as potential victims of trafficking, but later the competent authority determined that both had been trafficked. The prosecution service disagreed with that assessment and pursued their prosecution. Both applicants pleaded guilty to the charges and were convicted. This was the first time the Court had considered the relationship between Article 4 of the ECHR and the prosecution of victims and potential victims of trafficking. No general prohibition on the prosecution of victims of trafficking could be construed from international anti-trafficking standards, nor could prosecuting child trafficking victims be precluded in all circumstances. Nevertheless, the prosecution of (potential) victims of trafficking might, in certain circumstances, be at odds with the state's duty to take operational measures to protect them where the authorities were aware, or ought

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

408 See also ECtHR, *S.M. v. Croatia*, No. 60561/14, 25 June 2020.

409 ECtHR, *V.C.L. and A.N. v. the United Kingdom*, Nos. 77587/12 and 74603/12, 16 February 2021.

to have been aware, of circumstances giving rise to a credible suspicion that an individual had been trafficked. For the prosecution of a (potential) victim to demonstrate respect for the freedoms guaranteed by Article 4, early identification of victims was of paramount importance. As soon as the authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence might have been trafficked or exploited, the person should be assessed promptly by trained and qualified individuals, based on the criteria identified in international standards, having specific regard to the fact that threat of force and/or coercion was not required where the individual was a child. Moreover, the ECtHR stressed that any decision on whether or not to prosecute a potential victim should, as far as possible, be taken only once a qualified person had made a trafficking assessment, in particular if the potential victim is a child In the applicants' case, the ECtHR found the prosecution service's reasons when deciding to prosecute wholly inadequate and inconsistent with the definition of trafficking in international law. Coupled with that, the authorities' failure to conduct a timely assessment of whether or not the applicants had in fact been trafficked amounted to a breach of their positive obligations under Article 4 of the ECHR. The ECtHR also considered that the foregoing had violated the applicant's right to a fair trial, guaranteed under Article 6 of the ECHR.

The ECSR considers trafficking in human beings to constitute a grave violation of human rights and human dignity, amounting to a new form of slavery.[410] Under Article 7 (10), states must enact legislation to criminalise it.[411] This legislation must be backed by an adequate supervisory mechanism, sanctions, and an action plan to combat child trafficking and sexual exploitation.[412]

At treaty level, the CoE Convention on Action against Trafficking in Human Beings is the key instrument addressing human trafficking.[413] The convention

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

411 ECSR (2016), Conclusion 2015 – Cyprus, p. 15, January 2016 in: ECSR (2016), Conclusions 2015 – Articles 7, 8, 16, 17, 19, 27 and 31 of the Charter, January 2016, p. 260.

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

413 Council of Europe (2005), Convention on Action against Trafficking in Human Beings, CETS No. 197, 16 May 2005.

complements 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.[414] 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. Sexual exploitation

Under EU law, Directive 2011/93/EU[415] is the main legal instrument addressing the sexual exploitation of children and child pornography.[416]

Article 4 extensively addresses exploitation, including recruiting, coercing and forcing children to participate in pornographic performances or child prostitution and profiting from them, attending pornographic performances involving children and engaging in sexual activities with a child forced into prostitution. It defines child pornography 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."[417] Article 5 of the directive introduces an obligation for EU Member States to take all necessary measures to ensure that the intentional production, acquisition,

414 See Council of Europe, GRETA (2019), *9th general report on GRETA's activities*, 2019.

415 EU, European Parliament and Council of the European Union (2011), Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1.

416 This handbook uses the term 'child pornography' only when referring to legal texts. However, following the 2016 Luxembourg Guidelines the preferred term is 'child sexual exploitation material' or 'child sexual abuse material'; Interagency Working Group (2016), *Terminology guidelines for the protection of children from sexual exploitation and sexual abuse*, 28 January 2016.

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

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 offences related to child sexual exploitation under Articles 3 and 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.[418] She alleged that the Swedish legislative framework did not adequately protect 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 concerned only an attempt to film the applicant, the ECtHR held that such legislative framework did not necessarily have to include criminal sanctions. The remedies offered to a victim – either civil or criminal – had 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.

Example: The case of *N.C. v. Turkey*[419] concerned a 12-year-old girl who was forced to work as a prostitute. An investigation was opened rapidly after the applicant's complaint, and the majority of the perpetrators were sentenced to terms of imprisonment. Nonetheless, in such a serious case, concerning the sexual exploitation of a girl, the ECtHR could not limit itself to that general finding in assessing whether or not the respondent state had fulfilled its obligations under Articles 3 and 8. The Court found that the lack of assistance to the applicant, the failure to provide her with protection from the perpetrators, the unnecessary reconstruction of the rape incidents, the repeated medical examinations, the failure to ensure a calm and safe environment at the hearings, the assessment of the victim's consent, the excessive length of the proceedings and, lastly, the fact that two of the charges had become time barred amounted to a case of serious secondary victimisation. The national authorities' conduct had not been compatible with the obligation to protect a child who had been the victim of sexual exploitation and abuse. It had been first and foremost the responsibility of the assize court judges to ensure that respect for the

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

419 ECtHR, *N.C. v. Turkey*, No. 40591/11, 9 February 2021.

applicant's personal integrity was adequately protected at the trial. The intimate nature of the subject matter and the applicant's age had been points of particular sensitivity, which inevitably called for a correspondingly sensitive approach on the part of the authorities to the conduct of the criminal proceedings in issue. Consequently, the Court found a violation of Articles 3 and 8 of the ECHR.

Article 9 of the CoE Convention on Cybercrime[420] requires States Parties to criminalise the conduct of offering, making available, distributing, transmitting, procuring or possessing pornography or producing such child pornography or producing such material through a computer system. An important requirement is that this conduct must be intentional. The explanatory report on the convention states that the term 'pornographic material' is "governed by national standards pertaining to the classification of materials as obscene, inconsistent with public morals or similarly corrupt. Therefore, material having an artistic, medical, scientific or similar merit may be considered not to be pornographic."[421] The Committee of Ministers of the CoE has also adopted guidelines on the rights of the child in the digital environment, which include a number of measures aimed specifically at protecting children from sexual exploitation and abuse online.[422]

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 encouraged 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.[423] The Lanzarote Convention provides that states have a duty to

420 Council of Europe (2004), Convention on Cybercrime, CETS No. 185, 1 July 2004.

421 Council of Europe (2001), *Explanatory report to the Convention on Cybercrime*, para. 99.

422 Council of Europe, Committee of Ministers (2018), *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*, Recommendation CM/Rec(2018)7.

423 Council of Europe, Lanzarote Committee (2015), Opinion on Article 23 of the Lanzarote Convention and its explanatory note: solicitation of children for sexual purposes through information and communication technology (grooming), 17 June 2015.

ensure appropriate responses to technological developments and use all relevant tools, measures and strategies to effectively prevent and combat sexual offences against children, including in the online environment.[424]

Example: In *K.U. v. Finland*,[425] 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 and physical description and contained a link to a web page 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 internet provider could not divulge the identity of the person who placed the advertisement because of 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.

7.3. High-risk groups

Key point

- Some children are particularly vulnerable, for example children belonging to ethnic minorities, children with disabilities, LGBTIQ children or children suffering from addictions.

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.

424 Council of Europe, Lanzarote Committee (2008), Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs), 12 May 2017.

425 ECtHR, *K.U. v. Finland*, No. 2871/02, 2 December 2008.

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.[426] 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 Court 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.

With respect to children living in institutions, the CoE Recommendation Rec(2005)5 spells out that the placement of a child should not be based on discriminatory grounds.[427] ECtHR cases concerning children with disabilities have raised several issues, including the state's positive obligations to protect their lives and physical integrity.

Example: The case of *Nencheva and Others v. Bulgaria*[428] concerns the death of 15 children and young adults in a home for people with mental and psychical disabilities. The ECtHR held that the living conditions of the children in the institution under the sole control of the state 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 any measures to protect the lives of children

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

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

428 ECtHR, *Nencheva and Others v. Bulgaria*, No. 48609/06, 18 June 2013.

placed under their control. Furthermore, the Bulgarian authorities did not conduct an effective investigation into the deaths of the children. In the particular circumstances of the case, they should have launched an *ex officio* criminal investigation. Their investigation was 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. Consequently, the Court also found a breach of the procedural limb of Article 2 of the ECHR.[429]

Example: The case of *I.C. v. Romania*[430] concerned a complaint about the inadequacy of the investigation into a 14-year-old girl's allegation of rape. The Court considered that the Romanian authorities had put undue emphasis on the lack of proof that the applicant had shown resistance during the incident, basing their conclusions only on the statements given by the alleged perpetrators that the girl had consented to having sexual intercourse, taken together with the fact that her body had shown no signs of violence. Furthermore, neither the prosecutors nor the judges deciding the case had taken a context-sensitive approach, failing to take into account her young age and the fact that the alleged rape, involving three men, had taken place at night in cold weather – all factors that had heightened her vulnerability. Particular attention should have been focused on analysing the validity of the applicant's consent in the light of her slight intellectual disability. In that context, the nature of the alleged sexual abuse against her had been such that the existence of useful detection and reporting mechanisms had been fundamental to the effective implementation of the relevant criminal laws and to her access to appropriate remedies. The ECtHR found a violation of Article 3 of the ECHR.

Example: The case of *V.C. v. Italy*[431] *concerned a* 15-year-old girl apprehended at a party where alcohol and drugs were being consumed. Her parents stated that their daughter suffered from psychiatric disorders and had been approached to pose for pornographic photographs. Although the authorities promptly launched a criminal investigation and the public prosecutor applied to have the applicant admitted to a specialist institution, the

429 See also ECtHR, *L.R. v. North Macedonia*, No. 38067/15, 23 January 2020.

430 ECtHR, *I.C. v. Romania*, No. 36934/08, 24 August 2016.

431 ECtHR, *V.C. v. Italy*, No. 54227/14, 1 May 2018.

ECtHR criticised the fact that more than four months had elapsed before the youth court reached its decision and that thereafter it took the social services another four months to implement the order. In the meantime, the applicant was a victim of sexual exploitation and of gang rape. In the ECtHR's view, the youth court and the social services had in practice taken no protective measures in the immediate term, even though they had been aware that the applicant was physically and psychologically vulnerable, and that proceedings concerning her sexual exploitation and alleged gang rape were pending. By acting in this way, the authorities had not carried out any assessment of the risks faced by the applicant, in breach of both Articles 3 and 8 of the ECHR.

At international level, Article 16 of the CRPD requires States Parties to take specific measures to protect children with disabilities from abuse and exploitation.[432]

7.4. Missing children

Key point

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

Under EU law, the EU Commission has launched a hotline number free of charge (116000) for missing children.[433] 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.

432 See also Section 3.5.

433 EU, European Commission (2007), Decision 2007/698/EC amending Decision 2007/116/EC as regards the introduction of additional reserved numbers beginning with 116, OJ 2007, L 284/31; EU, European Parliament and Council of the European Union (2018), Directive 2018/1972 establishing the European Electronic Communication Code (recast), OJ 2018 L 321/36, Art. 96.

Example: In *Zorica Jovanović v. Serbia*,[434] a newborn 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.[435] Under Article 46 of the ECHR, the Court ordered Serbia to take all appropriate measures, preferably by means of a *lex specialis*, and within one year, to establish a mechanism aimed at providing individual redress to all parents in a situation such as, or sufficiently similar to, the applicant's. The Serbian parliament subsequently passed the Zorica Jovanović Implementation Act in February 2020.

Example: In the subsequent case of *Mik and Jovanović v. Serbia*,[436] the applicants complained that the Serbian authorities had been too slow and ultimately ineffective in complying with the *Zorica Jovanović* judgment. Although that legislation had been enacted in 2020 after a significant delay, the issues that had required regulation were in themselves of great sensitivity and considerable complexity. Furthermore, the act, as ultimately passed by parliament, provided for both judicial and extrajudicial procedures with respect to the situation faced by the applicants and other persons in the same situation, and was aimed at discovering the true status of newborn babies suspected to have disappeared from maternity wards in Serbia. In particular, the act provided, *inter alia*, for a system in which the domestic courts would have the power to investigate and obtain evidence not only at the request of the petitioner but also of their own motion in order to establish all the relevant facts, and would also have the power to award compensation where appropriate. It also provided for a commission with extensive powers, appointed with a majority of representatives of registered parents' associations dealing with the issue of missing babies. Accordingly, the ECtHR struck the case out of its list of cases.

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

435 *Ibid.*, para. 74.

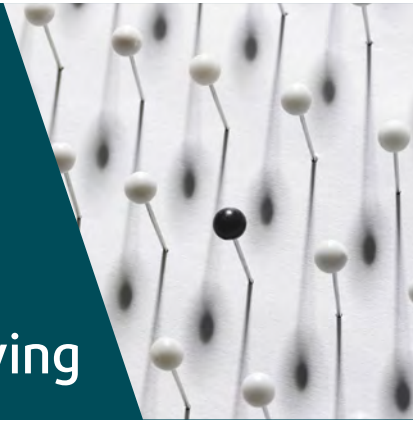
436 ECtHR, *Mik and Jovanović v. Serbia* (dec.), Nos. 9291/14 and 63798/14, 23 March 2021.

Article 25 (1) (b) of the International Convention for the Protection of All Persons from Enforced Disappearance[437] stipulates that states must prevent and punish the "falsification, concealment or destruction of documents attesting to the true identity" of children who 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, 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.[438]

437 United Nations (2006), International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

438 As of February 2022, 17 out of the 27 EU Member States had ratified this convention. In addition, the following CoE member States have ratified the convention: Albania, Armenia, Bosnia and Herzegovina, Montenegro, Serbia and Switzerland.

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



EU	Issues covered	CoE
Charter of Fundamental Rights, Article 14 (education) Single Permit Directive (2011/98/EU) Long-term Residence Directive (2003/109/EC) Students Directive (2004/114/EC) Free Movement Directive (2004/38/EC) Qualification Directive (2011/95/EU) Reception Conditions Directive (recast) (2013/33/EU) CJEU, C-9/74, *Donato Casagrande v. Landeshauptstadt München*, 1974 CJEU, C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 2002 (education of migrant children)	**Right to education**	ECHR, Protocol No. 1, Article 2 (right to education) ESC (revised), Article 17 (right to education) FCNM, Articles 12 (3) and 14 European Convention on the Legal Status of Migrant Workers ECtHR, *Ponomaryovi v. Bulgaria*, No. 5335/05, 2011 (discrimination on ground of immigration status)

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 35 (access to healthcare) Qualification Directive (2011/95/EU), Article 29 (core benefits for migrant children) Reception Conditions Directive (recast) (2013/33/EU), Article 21, Article 23 (4) and Article 25	**Right to health**	ECHR, Articles 2 (right to life) and 8 (right to physical integrity) Oviedo Convention, Articles 6 and 8 ESC (revised), Articles 11 (right to protection of health) and 13 (right to social and medical assistance) European Convention on the Legal Status of Migrant Workers ECtHR, *Oyal v. Turkey*, No. 4864/05, 2010 (HIV infection of a newborn) ECtHR, *Iliya Petrov v. Bulgaria*, No. 19202/03, 2012 (injury in an electricity substation) ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], No. 47848/08, 2014 (death in an institution) ECtHR, *Glass v. the United Kingdom*, No. 61827/00, 2004 (informed consent) ECtHR, *M.A.K. AND R.K. v. The United Kingdom*, Nos. 45901/05 and 40146/06, 2010 (test without parental consent) ECtHR, *Vavřička and Others v. the Czech Republic*, No. 47621/13, 2021 (obligatory vaccination measures) ECtHR, *Parfitt v. the United Kingdom,* No. 18533/21, 2021 (best interests of the child) ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 2004 (medical care for migrant children) ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 2012 (children in an irregular situation)

EU	Issues covered	CoE
Charter of Fundamental Rights, Article 34 (3) (right to social and housing assistance) Racial Equality Directive (2000/43/EC) Family Reunification Directive (2003/86/EC) Reception Conditions Directive (recast) (2013/33/EU) CJEU, C-233/18, *Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers*, 2019	**Right to housing**	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) ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 2011 ECtHR, *Winterstein and Others v. France*, No. 27013/07, 2013 (failure to provide housing) ECtHR, *Khan v. France*, No. 12267/16, 2019
Charter of Fundamental Rights, Articles 1, 24 and 34 (social security and social assistance) Work–Life Balance Directive (2019/1158) Long-term Residence Directive (2003/109/EC) Qualification Directive (2011/95/EU)	**Right to an adequate standard of living and right to social security**	ESC (revised), Articles 12–14 (rights to social security, to 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) Protocol No. 1 to the ECHR, Article 1 European Convention on the Legal Status of Migrant Workers European Convention on Social Security ECtHR, *Konstantin Markin v. Russia* [GC], No. 30078/06, 2012 (parental leave) ECtHR, *Yocheva and Ganeva v. Bulgaria*, Nos. 18592/15 and 43863/15, 2021 ECSR, *European Committee for Home-based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 82/2012, 2013 (suspension of family allowances for truancy)

Economic, social and cultural 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 academia and litigation. Aspects of them are addressed in Section 8.2 on the right to education.

Explicit standards on economic, social and cultural rights in the European context can mainly be found in the ESC 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"[439] and has read economic, social and cultural rights into the civil rights guaranteed by the ECHR. In that way, for example, access to healthcare has been dealt with under the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 of the ECHR).[440]

In the EU, the European Pillar of Social Rights (EPSR), proclaimed in 2017,[441] and the Commission's European Pillar of Social Rights Action Plan,[442] adopted in 2021, express a strong political commitment to a more social Europe. The EPSR consists of 20 principles essential for fair and well-functioning labour markets and welfare systems. Principle No. 11 of the EPSR focuses on childcare and support to children, and stresses that children have the right to affordable early childhood education and care of good quality and the right to protection from poverty. Children from disadvantaged backgrounds also have the right to specific measures to enhance equal opportunities. In 2021, the Council of the EU adopted the European Child Guarantee with a view to ensuring that every child in Europe at risk of poverty or social exclusion has access to the most basic of rights such as healthcare and education.[443]

This chapter analyses economic, social and cultural 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).

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

440 See, for example, ECtHR (2015), 'Factsheet – Prisoners' health-related rights', February 2015; ECtHR (2015), 'Factsheet – Health', April 2015.

441 EU (2017), 'The European Pillar of Social Rights in 20 principles', 16 November 2017.

442 EU, European Commission (2021), *The European Pillar of Social Rights Action Plan*, COM(2021) 102 final, 2021.

443 EU, Council of the European Union (2021), Council Recommendation (EU) 2021/1004 of 14 June 2021 establishing a European Child Guarantee, ST/9106/2021/INIT, OJ 2021 L 223.

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, economic, social and cultural rights have been included in the EU Charter of Fundamental Rights on a 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".[444] According to the CJEU, not all economic, social and cultural rights and principles enshrined in the charter are "judicially cognisable".[445]

Under CoE law, the ECSR notes that, when the realisation of a right is "exceptionally complex and particularly expensive to resolve", its progressive realisation is assessed against three criteria: first, that measures are taken within a reasonable time to achieve the objectives of the charter; second, that progress must be measurable; and, third, "consistent with the maximum use of available resources".[446] The ECSR has also reminded states of "the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected".[447]

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

444 See also EU, European Commission (2020), *Feasibility study for a child guarantee – Final report*, March 2020.

445 CJEU, C-596/16 and C-570/16, *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn*, 6 November 2018.

446 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.

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

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".[448] 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.[449]

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.[450] 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.

8.2. Right to education

Key points

- Limitations to the accessibility of education must be foreseeable, pursue a legitimate aim, and be justified and non-discriminatory.
- Respect for the religious and philosophical convictions of parents in a child's education does not exclude the possibility of religious or sexual education in schools.
- Education must be adaptable to the needs of all children, which 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

448 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. 65/2011, 23 May 2012, para. 47.

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

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

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. The EPSR includes the principle of education, training and lifelong learning.[451]

Under CoE law, Article 2 of Protocol No. 1 to the ECHR guarantees the right to education. The ECtHR has clarified 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".[452] 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".[453] 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 exclusion from an educational institution, are allowed, provided they meet the conditions for permissible limitations.[454] The ECtHR assesses whether these forms of exclusion from education result in a denial of the right to education by considering factors such as the procedural safeguards, duration of the exclusion, reintegration efforts and adequacy of alternative education provided.[455] Children may also be excluded from the grounds of an educational establishment for health and safety reasons, for example if they are suspected of carrying a contagious disease, provided that the decision to exclude them remains in place only as long as it is necessary.[456]

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.[457] The state can also integrate information or knowledge of a religious or

451 EU (2017), 'European Pillar of Social Rights', 16 November 2017.

452 ECtHR, *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.

453 *Ibid*.

454 ECtHR, *C.P. v. United Kingdom*, No. 300/11, 6 September 2016.

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

456 ECtHR, *Memlika v. Greece*, No. 37991/12, 6 October 2015.

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

philosophical kind into the school curriculum, on condition that it is "conveyed in an objective, critical and pluralistic manner".[458] To safeguard pluralism and 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 – such as the possibility not to attend certain classes or the religious course as a whole.[459] For the ECtHR's way of dealing with the issue from a non-discrimination angle, see Section 2.1 and Section 2.2.[460]

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".[461] Additionally, the ECSR ruled that under this provision, contracting states should ensure that children irregularly present in their territory also have access to education.[462]

Furthermore, educational institutions have to be accessible to everyone without discrimination.[463] The ECSR held that the "integration of children with disabilities into mainstream schools [...] should be the norm and teaching in specialised schools must be the exception".[464] 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.[465] Situations concerning differential treatment in education on grounds such as nationality, immigration status or ethnic origin are dealt with in Chapter 3.

Under ECSR case law, states enjoy a wide margin of appreciation in determining the cultural appropriateness of the educational material used in sexual and reproductive health education, but they must ensure non-discriminatory sexual

458 *Ibid.*, para. 84.

459 *Ibid.*, paras. 85–102 and dissenting opinion.

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

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

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

463 On the issue of children with disabilities, see Chapter 3 and Chapter 7.

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

465 ECSR, *European Action of the Disabled (AEH) v. France*, Complaint No. 81/2012, 11 September 2013, para. 78; ECSR, *International Federation for Human Rights (FIDH) and Inclusion Europe v. Belgium*, Complaint No. 141/2017, 9 September 2020.

and reproductive health education "which does not perpetuate or reinforce social exclusion and the denial of human dignity".[466] Educational materials must not "reinforce demeaning stereotypes", for instance concerning persons of non-heterosexual orientation.[467]

Finally, the adaptability of education to the needs of all children requires, for example, that for children with disabilities who are integrated into mainstream schools, "arrangements are made to cater for their special needs"[468] (see also Section 3.5).

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).[469] For children belonging to national minorities, Article 14 of the FCNM contains the right to learn and be taught one's own language.[470] The ECtHR has also found that the right to education implies the right to be educated in (one of) the national language(s).[471]

Given the increasing importance of the digital environment, a number of CoE documents have been adopted in this area, which invite states to ensure that children have access to the digital environment in a way that is inclusive and takes into account children's developing capacities and the particular circumstances of children in vulnerable situations.[472] They also recommend that digi-

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

467 *Ibid.*, paras. 59 and 61; see also ECtHR, *Bayev and Others v. Russia*, No. 67667/09, 13 November 2017; ECtHR, *A.R. and L.R. v. Switzerland*, No. 22338/15, 19 December 2017.

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

469 See also Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities (2006), Commentary on Education under the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002, 2 March 2006, Part 2.1.

470 For further clarification see Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on Education under the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002, 2 March 2006, Part 2.3, and Thematic Commentary No. 3: The language rights of persons belonging to national minorities under the Framework Convention, ACFC/44DOC(2012)001 rev, 5 July 2012, Part VI.

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

472 Council of Europe, Committee of Ministers (2018), Recommendation CM/Rec(2018)7 on guidelines to respect, protect and fulfil the rights of the child in the digital environment, 4 July 2018.

tal literacy education should be included in the basic education curriculum from the earliest years, taking into account children's developing capacities.[473]

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.[474] The Single Permit Directive[475] provides for the equal treatment of those holding a residence permit, and the Long-term Residence Directive provides for the equal treatment of third-country nationals who are long-term residents.[476] 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 (2004/114/EC) regulates the conditions of entry and residence of third-country nationals for a period exceeding three months for the purposes of studies, pupil exchange, unremunerated training or voluntary service.[477] 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.[478] School pupils for instance are required to provide evidence of participation in a pupil exchange scheme operated by an organisation recognised by the

473 Council of Europe, Committee of Ministers (2019), Recommendation CM/Rec(2019)10 on developing and promoting digital citizenship education, 21 November 2019; Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)2 on the Internet of citizens, 10 February 2016.

474 See, for example, EU, European Parliament and Council of the European Union (2011), Directive 2011/95/EU 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, Art. 27.

475 EU, European Parliament and Council of the European Union (2011), Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343.

476 EU, Council of the European Union (2003), Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2003 L 16.

477 EU, Council of the European Union (2004), 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), OJ 2004 L 375/12.

478 *Ibid.*, Art, 6.

Member State.[479] 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.[480] Access to economic activities, including employment, by higher education students are subject to restrictions.[481]

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.[482] This includes public and private, 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 an EU migrant worker was able to access a means-tested educational grant under EU free movement law.[483]

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 into the host state and into their country of origin should they subsequently return.[484] While this seems to offer quite generous and valuable supplementary support to children following their admission to a

479 EU, Council of the European Union (2004), 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), OJ 2004 L 375/12, Art. 7.

480 *Ibid.*, Art. 10.

481 *Ibid.*, Art. 17.

482 EU, European Parliament and Council of the European Union (2011), Regulation (EU) 492/2011 on freedom of movement for workers within the Union, OJ 2011 L 141/1, Art. 10; European Parliament and Council of the European Union (2004), Directive 2004/38/EC 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, Art. 24 (1).

483 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.

484 EU, Council of the European Union (1977), Directive 77/486/EEC on the education of the children of migrant workers, OJ 1977 L 199, (Note that third-country national migrant children are excluded from its scope).

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.[485]

> Example: The issue in *Baumbast and R v. Secretary of State for the Home Department*[486] 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.

The *Baumbast* decision was followed by successive cases[487] and has been codified in Article 12 (3) of Directive 2004/38/EC (Free Movement Directive).[488]

Third-country national children have the right to access only *publicly funded* education under the same conditions as nationals, and are excluded from

485 EU, Commission of the European Communities (1984), Reports on the implementation of Directive 77/486/EEC, COM(84) 54 final and COM(88) 787 final, 10 February 1984.

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

487 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*, 23 February 2010.

488 EU, European Parliament and Council of the European Union (2004), Directive 2004/38/EC 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).

associated benefits such as maintenance grants.[489] Some EU immigration instruments require 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).[490]

The educational rights of asylum-seeking children are weaker; 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.[491] As such, education may be provided in accommodation centres rather than schools, and 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).[492]

Under CoE law, Article 2 of 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*,[493] 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.[494]

489 EU, European Parliament and Council of the European Union (2011), Refugee Qualification (Directive 2011/95/EU), OJ 2011 L 337, Art. 11; Council of the European Union (2003), Long-term Residence Directive (Directive 2003/109/EC), OJ 2003 L 016, Art. 14; Council of the European Union (2003), Directive 2003/86/EC on the right to family reunification, OJ 2003 L 251, Art. 14; European Parliament and Council of the European Union (2013), Reception Conditions Directive (2013/33/EU), OJ 2013 L 180, Art. 14(c).

490 EU, European Parliament and Council of the European Union (2011), Directive 2011/95/EU 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.

491 EU, European Parliament and Council of the European Union (2013), Reception Conditions Directive (2013/33/EU), OJ 2013 L 180. (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.)

492 EU, European Parliament and Council of the European Union (2013), Reception Conditions Directive (2013/33/EU), OJ 2013 L 180.

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

494 See also Section 3.3.

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).[495]

Furthermore, the European Convention on the Legal Status of Migrant Workers[496] 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 right to equal 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).[497]

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.

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 staying irregularly 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.

495 See e.g. ECSR, *European Committee for Home-based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, 24 January 2018.

496 Council of Europe (1977), European Convention on the Legal Status of Migrant Workers, CETS No. 93, 24 November 1977.

497 United Nations (1990), Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990.

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

Children of EU migrants can access social welfare and health support on the same basis as nationals, following three months of residence in the host state.[498] Similar rights are extended to the children of those who have acquired long-term residence in a Member State, although these may be restricted to so-called 'core benefits'.[499] In regard to refugee and asylum-seeking children, 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 of the Reception Conditions Directive (recast), Articles 21, 23 (4) and 25). The Qualification Directive contains similar provisions for vulnerable child migrants.

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 newborn 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).[500] In

498 EU, European Parliament and Council of the European Union (2004), Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158, Art. 24.

499 EU, Council of the European Union (2003), Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2003 L 16, Art. 11 (4)).

500 ECtHR, *Oyal v. Turkey*, No. 4864/05, 23 March 2010, paras. 71–72.

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*,[501] 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 operation 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).[502]

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).

Example: The case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*[503] concerned an HIV-positive Roma teenager who had a severe intellectual disability and 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.[504]

As regards consent to medical treatment in the absence of an emergency, the ECtHR found that medical treatment without parental consent is in breach of Article 8 of the ECHR.

501 ECtHR, *Iliya Petrov v. Bulgaria*, No. 19202/03, 24 April 2012.

502 *Ibid.*

503 ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], No. 47848/08, 17 July 2014. See also the description of this ECHR ruling in Chapter 7.

504 See also Section 7.

Example: In *Glass v. the United Kingdom*,[505] diamorphine had been administered to a child with a 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.[506]

Example: In *M.A.K. and R.K. v. the United Kingdom*,[507] 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.[508]

At the same time, the ECtHR has upheld the principle of the best interests of the child in healthcare even where there is a conflict with the interest or wishes of the parents, including in the context of vaccination schemes and end-of-life decisions.

Example: In the case of *Vavřička and Others v. the Czech Republic*,[509] the applicants complained about the consequences of non-compliance with the general statutory duty in Czechia to ensure routine vaccination of children against diseases that are well known to medical science. Compliance with the duty could not be physically enforced. However, parents who failed to comply, without good reason, could be fined, and non-vaccinated children were not accepted in nursery schools (an exception was made for those who cannot be vaccinated for health reasons). The Court found that the vaccination duty and the direct consequences thereof amounted to an interference in terms of Article 8 of the ECHR. However, states are obliged to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development. With regard to immunisation, the objective has to be that every

505 ECtHR, *Glass v. the United Kingdom*, No. 61827/00, 9 March 2004.

506 *Ibid.*, para. 83.

507 ECtHR, *M.A.K. and R.K. v. the United Kingdom*, Nos. 45901/05 and 40146/06, 23 March 2010.

508 *Ibid.*, para. 79.

509 ECtHR, *Vavřička and Others v. the Czech Republic*, No. 47621/13, 8 April 2021.

child is protected against serious diseases, through vaccination or indirectly by virtue of herd immunity. On that basis, the Court considered that the state's health policy was consistent with the best interests of the child and, as the vaccination duty in question was also reasonably proportional to the legitimate aims pursued, the state had not exceeded its margin of appreciation in the present case or violated the ECHR.

Example: In the case *Parfitt v. the United Kingdom*,[510] the applicant's five-year-old daughter suffered from acute necrotising encephalopathy and was in a permanent vegetative state with no prospect of improvement. The UK High Court made a declaration to the effect that it would not be unlawful for the hospital caring for the applicant's daughter to withdraw treatment. The Court, having regard to the margin of appreciation afforded to the authorities in such cases, found no breach of Article 2 of the ECHR. The domestic court had taken into account the evidence of 12 highly respected specialist doctors. The court had given due and careful consideration to the applicant's wishes but had concluded that her daughter's invasive care regime was a continuing burden, which brought her no benefit. Notwithstanding the presumption that life should be preserved, the domestic court had considered that it was not in the child's best interests that her life should be prolonged. The application was declared inadmissible.[511]

In accordance with Articles 6 and 8 of the Oviedo Convention,[512] when a child does not have the legal capacity to consent to a medical intervention, that intervention may only be carried out with the authorisation of his or her representative, except in an emergency situation. Whereas the Oviedo Convention 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 increasingly determining factor in proportion to his or her age and degree of maturity" (Article 6 (2)). Acknowledging the need to recognise the developing nature of the decision-making capacity of children including in matters regarding their own health, the CoE is preparing a guide containing principles and good practices for involving children in medical decision making.[513] Genetic testing of children must be deferred until they

510 ECtHR, *Parfitt v. the United Kingdom*, No. 18533/21, 20 April 2021.

511 See also ECtHR, *Gard and Others v. the United Kingdom*, No. 39793/17, 27 June 2017.

512 Council of Europe (1997), 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, 4 April 1997.

513 For more information, se the CoE web page on the guide.

attain decision-making capacity, unless that delay would be detrimental to their health or well-being.[514]

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.[515] 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 *Guidelines on child-friendly healthcare*.[516]

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*[517] 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 healthcare charges. The ECSR ruled that individuals who have not reached the age of majority, including unaccompanied children, must be provided with free medical care.

Example: In *Defence for Children International (DCI) v. Belgium*,[518] 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 healthcare extending beyond urgent medical assistance and including

514 Council of Europe (2008), Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes, CETS No.203, 27 November 2008.

515 On sexual and reproductive health education, see also under education (Section 8.2).

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

517 ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 8 September 2004, paras. 35–37.

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

primary and secondary care, as well as psychological assistance". It also stated that the lack of reception facilities for foreign children unlawfully in the country made access to healthcare 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.[519]

The European Convention on the Legal Status of Migrant Workers[520] 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[521] 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,[522] and access for adolescents to sexual and reproductive information.[523] It has also clarified that children's right to health entails "the right to control one's health and body, including sexual and reproductive freedom to make responsible choices".[524] 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".[525]

519 See also ECSR, *European Committee for Home-based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, 24 January 2018.

520 Council of Europe (1977), European Convention on the Legal Status of Migrant Workers, CETS No. 93, 24 November 1977.

521 United Nations, General Assembly (1966), International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3.

522 United Nations, Committee on the Rights of the Child (2006), *General Comment No. 7 (2005): Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, 20 September 2006, para. 27.

523 United Nations, Committee on the Rights of the Child (2003), *General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*, CRC/GC/2003/4, 1 July 2003, para. 28.

524 United Nations, Committee on the Rights of the Child (2013), *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, CRC/C/GC/15, 17 April 2013, para. 24.

525 *Ibid.*, para. 31.

8.4. Right to housing

Key points

- The right to adequate housing is guaranteed in Article 31 of the ESC.
- Adequate shelter is to be provided to children residing irregularly in a country and the living conditions in shelters must respect 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 in order to combat social exclusion and poverty. The Racial Equality Directive includes housing among the goods and services available to the public to which non-discriminatory access and supply should be granted.[526] Non-differential treatment regarding housing benefits applies to third-country nationals who are long-term residents. EU law aims to ensure that family members of third-country nationals will not constitute a burden for the Member States' social assistance systems.[527] 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 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.[528]

The Reception Conditions Directive (Article 24 (2)) obliges Member States to accommodate asylum-seeking unaccompanied children with relatives, in foster care or in appropriate accommodation. The CJEU has ruled that material reception conditions, including housing, cannot be withdrawn as a sanction, as it would deprive applicants of their basic needs.

526 EU, Council of the European Union (2000), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180, Art. 3.

527 See also FRA and ECtHR (2020), *Handbook on European law relating to asylum, borders and immigration*, 17 December 2020.

528 EU, Council of the European Union (2003), Directive 2003/86/EC of 22 September 2003 on the right to family reunification of 22 September 2003 (Family Reunification Directive), OJ L 251, 3.10.2003, pp. 12–18, Art. 7 (1) (a).

Example: The case of *Zubair Haqbin*[529] concerned a preliminary ruling reference in proceedings between Mr Zubair Haqbin and the Federal Agency for the Reception of Asylum Seekers, Belgium (Fedasil), concerning a claim for compensation brought by Mr Haqbin against Fedasil, following two decisions of the latter that temporarily excluded him from material reception conditions. Mr Haqbin, of Afghan nationality, arrived in Belgium as an unaccompanied child and lodged an application for international protection. He was placed in a reception centre where he was involved in a brawl with other residents. Following that incident, the director of the reception centre decided to exclude Mr Haqbin from material aid for 15 days. The CJEU ruled for the first time on the scope of the right conferred on Member States by Article 20 (4) of Directive 2013/33/EU laying down standards for the reception of applicants for international protection. Based on the CJEU's interpretation, a Member State cannot apply a sanction consisting in the withdrawal, even temporarily, of material reception conditions, relating to housing, food or clothing, in so far as it would have the effect of depriving the applicant of the possibility of meeting his or her most basic needs. The imposition of other sanctions must, under all circumstances, comply with the conditions concerning the principle of proportionality and respect for dignity. In the case of an unaccompanied child, those sanctions must, in this light, be determined by taking particular account of the best interests of the child.

Under CoE law, there is no general 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*[530] 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

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

530 ECtHR, *Bah v. the United Kingdom*, No. 56328/07, 27 September 2011.

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 has also examined cases of eviction of Traveller families from caravan sites.[531]

Example: The case *Winterstein and Others v. France*[532] concerned eviction proceedings brought against a number of Traveller families who had been living in the same place for many years. The domestic courts issued orders for the families' eviction, on pain of penalty for non-compliance. Although the orders were not enforced, many of the families moved out. Only four families were provided with alternative accommodation in social housing; the so-called family sites where the remaining families were to be accommodated were not created. In the particular circumstances of the case, the principle of proportionality required particular consideration to be given to the consequences of eviction and the risk that the families would be rendered homeless. The domestic authorities had initially failed to do so. Moreover, numerous international and CoE instruments stressed the need, in the event of forced eviction of Roma or Travellers, to provide alternative accommodation, bearing in mind that they belonged to a vulnerable minority. The Court accordingly found that the applicants' Article 8 rights had been breached.

The ECtHR has indirectly dealt with the issue of the quality of housing, stating that inadequate housing does not justify placing children in public care[533] (see

531 ECtHR, *Connors v. the United Kingdom*, No. 66746/01, 27 May 2004.

532 ECtHR, *Winterstein and Others v. France*, No. 27013/07, 17 October 2013.

533 ECtHR, *Wallová and Walla v. the Czech Republic*, No. 23848/04, 26 October 2006, paras. 73–74; ECtHR, *Havelka and Others v. the Czech Republic*, No. 23499/06, 21 June 2007, paras. 57–59.

also Section 5.2. and Section 6.2). The ECtHR has also had occasion to consider a state's positive obligations, in the context of care and living conditions, towards unaccompanied foreign children even when they are irregularly present in the country.

> Example: The case of *Khan v. France*[534] concerned the failure by the French authorities to provide an unaccompanied foreign child with care before and after the dismantling of the makeshift camps set up in the southern section of the lande de Calais ('Calais heath'). The applicant, who had arrived in France as an 11-year-old, lived in the camp for six months in an environment that was manifestly unsuitable for children, characterised in particular by unhealthy, precarious and unsafe conditions. The situation worsened after the dismantling of the camp, which had meant the demolition of the hut in which the applicant had been living and a general deterioration of living conditions on site. Although the applicant had been subject to a placement order, the authorities had not taken any action to protect him. While the domestic authorities faced a complex task in identifying children among all the persons present on the site and providing them with appropriate care, the Court was not convinced that they had done all that could reasonably be expected of them to fulfil their positive obligation in the present case, bearing in mind that the applicant, as a young unaccompanied foreign child unlawfully present in the territory, had therefore belonged to one of the most vulnerable categories in society. The combination of the applicant's living environment and the non-enforcement of the protection order had amounted to degrading treatment and a violation of Article 3 of the ECHR.

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".[535] Evictions are permissible, if they are justified and carried out in conditions that respect dignity, and if alternative

534 ECtHR, *Khan v. France*, No. 12267/16, 28 May 2019.

535 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009, para. 43.

accommodation is made available.[536] 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."[537]

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.[538] 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.[539]

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

536 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.

537 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009, para. 62; ECSR, *European Federation of National Organisations Working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, 20 July 2014.

538 ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 23 October 2012, paras. 82–83. See also FRA (2010), *Separated, asylum-seeking children in European Union Member States*, 7 December 2010, p. 30.

539 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009, para. 64.

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). Article 10 (3) of the Work–Life Balance Directive stipulates entitlement to paternity leave, parental leave and flexitime.[540] Article 11 of the Long-term Residence Directive[541] stipulates that long-term residents are to enjoy equal treatment with nationals as regards social security, social assistance and social protection as defined by national law. Based on Article 29 of the Qualification Directive,[542] the beneficiaries of international protection are to receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State. Member States must ensure that material reception conditions are available to applicants when they apply for international protection.[543]

The CJEU holds that, where a Member State's own nationals are required only 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.[544] The refusal of parental leave to certain categories of persons, such as commissioning mothers who have a baby through a surrogacy arrangement, is discriminatory.[545] The same applies to male civil servants who are refused parental leave if their wives do not work or exercise

540 EU, European Parliament and Council of the European Union (2019), Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ 2019 L 188.

541 EU, Council of the European Union, Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16.

542 EU, European Parliament and Council of the European Union (2019), 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), OJ 2011 L 337.

543 EU, European Parliament and Council of the European Union (2013), 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), OJ 2013 L 180.

544 CJEU, C-85/96, *María Martínez Sala v. Freistaat Bayern*, 12 May 1998, paras. 60–65.

545 CJEU, C-363/12, *Z v. A Government Department and The Board of Management of a Community School* [GC], 18 March 2014.

any profession unless the wives are unable to meet the needs related to the upbringing of the child due to serious illness or injury.[546] Similarly, Member States have to establish a parental leave regime in the event of the birth of twins that ensures the 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.[547]

Under CoE law, the ECtHR examined alleged discrimination in the granting of parental leave and parental allowances in several cases.

Example: In *Konstantin Markin v. Russia*,[548] 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.

Example: In *Yocheva and Ganeva v. Bulgaria*,[549] the first applicant complained of discrimination as a single mother. She was refused a monthly allowance provided to families in which children have only one living parent, because her children's father was unknown. The ECtHR found that the relevant law was based on an outdated and stereotypical understanding of families as necessarily having two legal parents. At the same time, children whose father was unknown had, in objective terms, been deprived of the care and protection of one of their parents in the same way as children one of whose parents had died. The Court concluded that the first applicant had suffered discrimination on the grounds of both her family status and her sex and that there was a violation of Article 14 taken in conjunction with Article 8 of the ECHR.

546 CJEU, C-222/14, *Konstantinos Maïstrellis v. Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton*, 16 July 2015, para. 53.

547 CJEU, C-149/10, *Zoi Chatzi v. Ypourgos Oikonomikon*, 16 September 2010, paras. 72–75.

548 ECtHR, *Konstantin Markin v. Russia* [GC], No. 30078/06, 22 March 2012.

549 ECtHR, *Yocheva and Ganeva v. Bulgaria*, Nos. 18592/15 and 43863/15, 11 May 2021.

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.[550] 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.[551]

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 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).[552] The ECSR finds that the absence of any general system of family benefits is not in conformity with the ESC.[553]

The ECSR accepts, however, that the payment of child benefits may be made conditional based on the child's residence.[554] 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 (child) workers from the "general range of protection offered by the social security system at large". It is

550 Council of Europe, Committee of Ministers (2019), Declaration by the Committee of Ministers on addressing child poverty, 11 December 2019.

551 ECtHR, *Stummer v. Austria* [GC], No. 37452/02, 7 July 2011, para. 82.

552 ECSR (2020), Conclusion 2019 - Austria, March 2020, p. 21.

553 ECSR (2011), Conclusions 2011 – Turkey (Art. 16), 2011/def/TUR/16//EN, 9 December 2011.

554 ECSR (2014), Conclusions XX-2 (Spain), November 2014, p. 23.

hence in violation of the state's obligation to progressively raise the system of social security.[555]

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".[556]

The European Convention on the Legal Status of Migrant Workers[557] 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).[558]

Under international law, the right to an adequate standard of living is guaranteed in Article 11 of the International Covenant on Economic, Social and Cultural Rights and Article 27 of the CRC.

555 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.

556 ECSR, *European Committee for Home-based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 82/2012, 19 March 2013, para. 42.

557 Council of Europe (1977), European Convention on the Legal Status of Migrant Workers, CETS No. 93, 24 November 1977.

558 Council of Europe, European Convention on Social Security, CETS No. 78, 14 December 1972.

9 Migration and asylum

EU	Issues covered	CoE
TFEU, Article 21 Charter of Fundamental Rights, Article 7 (family life) Article 45 (freedom of movement) Freedom of Movement Directive (2004/38/EC) Asylum Procedures Directive (2013/32/EU) Dublin Regulation (No. 604/2013) Schengen Borders Code Regulation (562/2006), Annex VII, 6 CJEU, C-129/18, *SM v. Entry Clearance Officer*, 2019 CJEU, C-91/20, *LW v. Bundesrepublik Deutschland*, 9 November 2021	Entry and residence	ECHR, Article 8 (family life) ESC, Article 19
Asylum Procedures Directive (2013/32/EU), Article 25(5)	Age assessment	ECHR, Article 8 (private life) ECSR, *European Committee for Home-based Priority Action for the Child and the Family (EUROCEF) v. France,* Complaint No. 114/2015, 2018

EU	Issues covered	CoE
Family Reunification Directive (2003/86/EC) Qualification Directive (2011/95/EU), Article 31 Reception Conditions Directive (2013/33/EU) Temporary Protection Directive (2001/55/EC) Dublin Regulation (No. 604/2013) CJEU, C-550/16, *A and S v. Staatssecretaris van Veiligheid en Justitie*, 2018	**Family reunification and separated children**	ECHR, Article 8 (right to respect for private and family life) ECtHR, *Jeunesse v. the Netherlands* [GC], No. 12738/10, 2014 (family life, child's best interests) ECtHR, *Gül v. Switzerland*, No. 23218/94, 1996 (deportation of family) ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, No. 60665/00, 2006
Reception Conditions Directive (2013/33/EU), Article 11 Return Directive (2008/115/EC), Article 17 CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others,* 2017	**Detention of children**	ECHR, Article 5 (right to liberty) ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 2006 (detention in view of expulsion) ECtHR, *S.F. and Others v. Bulgaria*, No. 8138/16, 2017 ECtHR, *A.M. and Others v. France*, No. 24587/12, 2016 ECtHR, *Bistieva and Others v. Poland*, No. 75157/14, 2018 ECtHR, *R.R. and Others v. Hungary*, No. 36037/17, 2021 (detention in transit zone) ECtHR, *Moustahi v. France*, No. 9347/14, 2020
Freedom of Movement Directive (2004/38/EC), Preamble (para. 24), Articles 7, 12, 13 and 28 (3) (b) TFEU, Article 20 Return Directive (2008/115/EC) Dublin Regulation (No. 604/2013) CJEU, C-112/20, *M.A. v. État belge*, 2021 CJEU, C-441/19, *TQ v. Staatssecretaris van Justitie en Veiligheid*, 2021 CJEU, C-648/11, *The Queen, on the application of MA and Others v. Secretary of State for the Home Department*, 2013	**Expulsion**	ECHR, Article 8 (right to respect for private and family life) *ECtHR, Üner v. the Netherlands*, No. 46410/99, 2006 ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 2014 (deportation of children)

EU	Issues covered	CoE
Charter of Fundamental Rights, Articles 47–48 (right to an effective remedy and to a fair trial, presumption of innocence and right of defence) Dublin Regulation (No. 604/2013) Qualification Directive (2011/95/EU), Article 31 Asylum Procedures Directive (2013/32/EU), Articles 7 and 25 Victims' Rights Directive (2012/29/EU), Article 8	Access to justice	ECHR, Article 13 (right to an effective remedy) ESC, Article 16 Convention on the Legal Status of Migrant Workers, Article 6 ECtHR, *Rahimi v. Greece*, 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 and has extensively done so. Provisions covering migrant children govern a range of migration situations, including long-term work-related migration, asylum, and subsidiary protection, and also address the situation of migrants in an irregular situation. In addition to the protection afforded to all children, including migrant children, under Article 24 of the EU Charter of Fundamental Rights, Articles 18 and 19 of the charter specifically deal with the right to asylum and protect, expulsion or extradition. The EU has also paid attention to the specific needs of unaccompanied children, including as regards 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.[559] The CJEU has extensive case law on the protection of children in the context of asylum and migration.

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

559 See also, FRA (2010), *Separated, asylum-seeking children in European Union Member States*, 7 December 2010; FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union who are not removed*, 7 April 2017, pp. 27–38; FRA (2011), *Migrants in an irregular situation: Access to healthcare in 10 European Union Member States*, 11 October 2011, pp. 26–30; FRA (2018), *Children's rights and justice – Minimum age requirements in the EU*, 25 April 2018; FRA (2020), *Fundamental rights of refugees, asylum applicants and migrants at the European borders*, 27 March 2020.

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 the rights of migrant, refugee and asylum-seeking children and their family members to family reunification, access to justice and ongoing residence in the host state. The CoE Committee of Ministers have also adopted a recommendation calling for effective guardianship for unaccompanied and separated children in the context of migration.[560]

At international level, the UN Convention Relating to the Status of Refugees[561] along with its 1967 Protocol is the centrepiece of international refugee protection. Moreover, a number of CRC provisions and general comments of the CRC Committee uphold children's rights in the context of migration and asylum and have informed the development of legal measures at European level.[562] Specifically, 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; Article 20 ensures the provision of special protection to any child who is temporarily or permanently deprived of their family environment; and Article 22 provides refugee children with the right to special protection and assistance. Most individual complaints that the CRC Committee considers, under the third protocol of the CRC, refer to the area of migration or asylum.

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).

560 See also Council of Europe, Committee of Ministers (2019), Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019.

561 United Nations, General Assembly (1951), Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, Vol. 189, p. 137.

562 United Nations (2017), *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 (2017) of the Committee on the Rights of the Child in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017.

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 to another EU Member State is considered free movement and 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. Article 45 of the EU Charter of Fundamental Rights equally guarantees the freedom of movement of EU citizens.

The rights of children who move with EU-national parents/carers are governed by the Free Movement Directive.[563] This stipulates that family members have a right to enter and reside in the host state either with or following the primary EU citizen'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 person with whom they have moved is an EU national. For the first three months following their move, the family's right of residence is

563 Please note that relevant provisions of the directive also apply in the EEA. See 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 Sates, 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.

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 ECJ has also ruled on the entry and residence rights of third-country national children under *kafala* with an EU citizen.

> Example: In *SM v. Entry Clearance Officer*,[564] an Algerian national, SM, was refused entry clearance for the territory of the United Kingdom as an adopted child of a national of the European Economic Area (EEA) under the Algerian *kafala* system. According to the CJEU, the concept of a 'direct descendant' of a citizen of the Union, under Directive 2004/38/EC "must be interpreted as not including a child who has been placed in the permanent legal guardianship of a citizen of the Union under the Algeria *kafala* system, because that placement does not create any parent–child relationship between them". However, it is for the competent national authorities to facilitate the entry and residence of a child placed in the legal guardianship of citizens of the EU under the Algerian *kafala* system as one of the 'other family members' of a citizen of the EU, pursuant to Article 3 (2) of Directive 20004/38/EC and Article 24 (2) of the Charter of Fundamental Rights. This should be done by carrying out a balanced and reasonable assessment of all the circumstances of the case that takes into account the best interests of the child. If the assessment establishes that the child and the guardian are considered to lead a genuine family life and that the child is dependent on the guardian, then that child should be granted a right of entry and residence.

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.[565]

564 CJEU, C-129/18, *SM v. Entry Clearance Officer*, 26 March 2019.

565 Council of the European Union (2003), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251.

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.[566] 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.

Example: In *LW v. Bundesrepublik Deutschland*[567] the request for a preliminary ruling concerned the interpretation of Directive 2011/95/EU regarding the residence status of a child with Tunisian nationality, born in Germany to a recognised Syrian refugee father and a Tunisian mother, all living in Germany. The Court ruled that a Member State cannot be precluded, under more favourable national provisions, from granting refugee status to the minor child of a third-country national with refugee status. This includes cases in which that child was born in the territory of that Member State and even if the child has the nationality of a third country in which the child would not be at risk of persecution, provided that the child is not caught by an exclusion ground (Article 12 (2) of the directive), and that the child is not, by nationality or other element of personal legal status, entitled to better treatment in that Member State than that resulting from the grant of refugee status.

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)[568] and the Regulation establishing the criteria and mechanisms for determining the Member State

566 See specifically EU, European Parliament and Council of the European Union (2013), Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (Reception Conditions Directive (recast)), OJ 2013 L 180, Art. 21, and European Parliament and Council of the European Union (2008), Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), OJ 2008 L 348, Art. 3 (9).

567 CJEU, C-91/20, *LW v. Bundesrepublik Deutschland*, 9 November 2021.

568 EU, European Parliament and Council of the European Union (2013), Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180/60, Art. 25 (6).

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.[569] Both texts also contain specific guarantees for unaccompanied children, including their legal representation. The Regulation (562/2006) on the Schengen Borders Code 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.[570]

Under CoE law, 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.[571]

Article 19 of the ESC obliges Member States to facilitate, as far as possible, the reunion of the family of a foreign worker permitted to settle in the territory.

In addition to this, the CoE Committee of Ministers' Recommendation on effective guardianship for unaccompanied and separated children in the context of migration sets clear guiding principles for putting at the forefront the protection, assistance and safety of children in migration through guardianship, based

569 EU, European Parliament and Council of the European Union (2013), Regulation (EU) No. 604/2013 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 2013 L 180/31–180/59, Art. 6.

570 EU, European Parliament and Council of the European Union (2006), Regulation (EC) No. 562/2006 of 15 March 2016 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105, Annex VII, 6.

571 ECtHR, *Şen v. the Netherlands*, No. 31465/96, 21 December 2001; ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, No. 60665/00, 1 December 2005.

on the conviction that the prompt appointment of guardians and their role are paramount for acting in the best interests of the child, and for ensuring that the child's rights and well-being are respected.[572]

9.2. Age assessment

Key points

- 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.[573]
- Age assessment procedures must respect the child's rights.

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 "with full respect for the individual's dignity," as well as being "the least invasive examination", and "be carried out by qualified medical professionals".[574] 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 the examination, or that of the legal representative, should be obtained. The refusal to undergo age assessment cannot result in a rejection of the application for international protection. Practices regarding consent to medical examination in the context of age assessment vary in Member States, requiring sometimes only the consent of the child, or only of the guardian, or both.[575]

572 Council of Europe, Committee of Ministers (2019), Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019.

573 See also FRA and ECtHR (2020), *Handbook on European law relating to asylum, borders and immigration*, 17 December 2020, Section 10.

574 EU, European Parliament and Council of the European Union (2013), Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180.

575 FRA (2018), *Age assessment and fingerprinting of children in asylum procedures – Minimum age requirements concerning children's rights in the EU*, 25 April 2018; see also European Asylum Support Office, *Age assessment practices in EU+ countries: updated findings*, July 2021. For an overview of the various methods applied in each country, see European Asylum Support Office (2018), *Practical guide on age assessment*, March 2018; European Asylum Support Office (2021), *Asylum report 2021*, para. 5.1.2.

Under CoE law, particularly invasive practices used in the context of age assessment procedures 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.[576] 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.

The ESCR has considered several issues relating to children's human rights in the context of age assessment.

> Example: In *EUROCEF v. France*,[577] the ECSR analysed the use of bone testing to determinate the age of unaccompanied children in France and found a violation of Article 17 (1) of the ESC. In particular, the ECSR considered the use of such medical tests to be highly contested because they are unreliable and undermine children's dignity and physical integrity.

The Committee of Ministers recommendation on guardianship lays down that when it is uncertain whether or not a person is a child, and even after the national age assessment procedures have been conducted, states should ensure that they have a guardian or that a competent authority upholds a guarantee of respect for their rights.[578] The Parliamentary Assembly of the Council of Europe has also adopted a recommendation providing principles and guidance on child age assessment for unaccompanied migrant children.[579]

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 his or her identity, which may involve confirming the child's age. Age assessment procedures, however, should be a last resort.

576 ECtHR, *Yazgül Yilmaz v. Turkey*, No. 36369/06, 1 February 2011.

577 ECSR, *European Committee for Home-based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, 24 January 2018.

578 Council of Europe, Committee of Ministers (2019), Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019.

579 Council of Europe, Parliamentary Assembly (2017), Recommendation 2117, Child-friendly age assessment for unaccompanied migrant children, 24 November 2017.

In any case, the principle of the best interests of the child 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.[580] The UN Committee on the Rights of the Child has examined several individual complaints regarding age assessment. The committee has emphasised the need for a guardian or legal representative supporting the child during age assessment, and has criticised the examination of genitalia as an age assessment method.[581]

9.3. Family reunification for separated children

Key points

- European-level provisions focus mainly on reuniting children safely with their parents, either in the host country or in 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 legal 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 interests to join his/her parents abroad. 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

580 United Nations, Committee on the Rights of the Child (2005), *General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6, 1 September 2005, para. 31 (A).

581 United Nations (2021), Opinion approved by the Committee in relation to the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 76/2019, CRC/C/86/D/76/2019, 17 August 2021.

family.[582] 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.[583] The child's best interests principle must always be applied when considering a decision concerning family reunification.[584]

According to the CJEU, the applicable date for determining the age of family members requesting family reunification should not be affected by the length of the procedures. More specifically, the date to assess whether or not a refugee is an unaccompanied child for the purposes of the Family Reunification Directive is the date on which they entered the EU Member State and made the asylum application, and not the date of the application for family reunification.[585]

> Example: The case of *A and S v. Staatssecretaris van Veiligheid en Justitie*[586] concerned an application for family reunification of an unaccompanied child who attained the age of majority during the asylum procedure. The secretary of state rejected that application, as the child had already become an adult when the refugee status was granted. The CJEU ruled that Article 2 (f) of the reunification directive must be interpreted as meaning that a third-country national or stateless person who is below the age of 18 at the time of entry into the territory of a Member State and of applying for asylum in that state, but who, in the course of the asylum procedure, attains the age of majority and is thereafter granted refugee status, must be regarded as a minor for the purposes of that provision.

In regard 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

582 EU, Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251, Art. 10 (3) (a) and (b), respectively.

583 See also FRA and ECtHR (2020), *Handbook on European law relating to asylum, borders and immigration*, 17 December 2020, Section 6.3 on family reunification.

584 EU, Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251, Art. 5 (5).

585 The same interpretation was followed by the CJEU in relation to the age of the children of an adult applicant requesting the reunification with his minor children, *Joined Cases C-133/19, C-136/19 and C-137/19 B. M. M. (C-133/19 and C-136/19), B. S. (C-133/19), B. M. (C-136/19), B. M. O. (C-137/19) v. État belge*, 16 July 2020.

586 CJEU, C-550/16, *A and S v. Staatssecretaris van Veiligheid en Justitie*, 12 April 2018, paras. 55–60 and 64.

(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).[587] However, this directive has to date not been applied, because a Council decision on the existence of a mass influx of displaced persons, required to implement it, has not yet been taken.

Article 24.3 of the Reception Conditions Directive 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).[588] In addition, 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).

587 EU, Council of the European Union (2001), 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.

588 EU, European Parliament and Council of the European Union (2013), Regulation (EU) No. 604/2013 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 2013 L 180.

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 (Article 10 (2)).

Under CoE law, Article 8 of the ECHR does not provide migrant parents and their children with 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.[589] Such decisions must always be a proportionate response to wider public policy concerns, including the aim of deporting or preventing the entry of a parent who has been involved in criminal activity.

Example: The case of *Jeunesse v. the Netherlands*[590] 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 refusal 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.

Example: *Gül v. Switzerland*[591] 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 their minor son to

589 ECtHR, *Bajsultanov v. Austria*, No. 54131/10, 12 June 2012; ECtHR, *Latifa Benamar and Others v. the Netherlands*, No. 43786/04, 5 April 2005.

590 ECtHR, *Jeunesse v. the Netherlands* [GC], No. 12738/10, 3 October 2014.

591 ECtHR, *Gül v. Switzerland*, No. 23218/94, 19 February 1996.

Switzerland; they had left the son behind in Turkey. The Swiss authorities refused to grant him this request, mainly on the grounds that the applicant 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 itself in its country of origin, where the minor son had always lived. The Court found no breach of Article 8 of the ECHR.

Example: The case of *Tuquabo-Tekle and Others v. the Netherlands*,[592] by comparison, involved the family reunification claim of a mother, her husband and three of her children living in the Netherlands, to be joined by her daughter residing in Eritrea. The mother had first obtained the right to reside in Norway and to bring her children on humanitarian grounds. Only her eldest son came to join her in Norway, one year later, while her other two children remained living in Eritrea, and were to join her at a later stage. Afterwards she moved to the Netherlands with her son to live with her husband, and the couple had two children. Subsequently, Ms Tuquabo-Tekle and her husband acquired Dutch nationality. Several years later, Ms Tuquabo-Tekle applied for a provisional residence visa for her 14-year-old daughter, who was still residing in Eritrea. The Dutch authorities rejected the request on the basis that the close family ties between the mother and her child had meanwhile ceased to exist. The Court ruled that the state had violated the rights under Article 8 of the ECHR. Considering that the applicants had established strong bonds in the Netherlands and maintained only loose ties to their country of origin, the best way to develop family life, according to the ECtHR, was to grant the daughter the right to settle in the Netherlands.[593]

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

592 ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, No. 60665/00, 1 March 2006.

593 ECtHR, *Tuquabo-Tekle and Others v. the Netherlands*, No. 60665/00, 1 March 2006.

child's best interests principle, as enshrined in Article 3 of the CRC, underpins all decisions relating to family reunification with a child or unaccompanied child.

9.4. Detention

Key points

- European law authorises the detention of children in an immigration context only as a measure of last resort and for the shortest period of time possible.
- National authorities are obliged to place children in appropriate alternative accommodation.[594]

Under EU law, Article 11 of the Reception Conditions Directive and Article 17 of the Return Directive require 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 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.

Unaccompanied children, detained pending removal, should be placed in institutions with staff and facilities that can respond to the needs of persons of their age (Article 17 (4) of the Return Directive).

Example: In *Al Chodor*,[595] the Czech police detained the applicant and his two minor children pending their transfer to Hungary pursuant to Dublin

594 For more information, see FRA (2017), *European legal and policy framework on immigration detention of children*, June 2017.

595 CJEU, C-528/15, *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v. Salah Al Chodor and Others*, 15 March 2017.

Regulation rules. The CJEU found that an applicant for international protection can be detained under the Dublin Regulation only if national law provides for objective criteria to determine if there is a risk of absconding. It noted that any measure on deprivation of liberty must be accessible, precise and foreseeable, as Article 6 of the EU Charter of Fundamental Rights requires. The CJEU concluded that, in the absence of these objective criteria in a binding provision of general application under national law, detention is unlawful.

Under CoE law, the detention of migrant children has been addressed in the context of Articles 3 and 5 of the ECHR.[596] The ECtHR has consistently held that the placement of children with their families in administrative detention should be a measure of last resort and that the domestic authorities should explore all other viable alternatives in accordance with Article 5 (1) of the ECHR.[597]

Example: *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[598] concerns an unaccompanied five-year-old child 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, even though 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 was 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 interests of the child as enshrined in Article 3 of the CRC. The ECtHR found violations of Articles 3, 5 and 8 of the ECHR.

The legality of detention was also tested in court, where the child in question was accompanied by a parent.

596 See, for example, ECtHR, *H.A. and Others v. Greece*, No. 19951/16, 28 February 2019; ECtHR, *Bilalova and Others v. Poland*, No. 23685/14, 26 March 2020.

597 See also ECSR (2020), Annual Conclusions 2019, 24 March 2020; Council of Europe (2018), *Legal and practical aspects of effective alternatives to detention in the context of migration – Analysis by the Steering Committee for Human Rights (CDDH)*, 7 December 2017.

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

Example: In *S.F. and Others v. Bulgaria*,[599] the ECtHR considered the detention of a family with three children in a border police detention facility and the length of their stay. The Court noted that the immigration detention of children, whether accompanied or not, raises particular concerns, since children are extremely vulnerable and have specific needs. Irrespective of the time spent in detention, the conditions in the police detention facility were not suitable for children. The ECtHR thus found a breach of Article 3 of the ECHR.

Example: The case of *A.M. and Others v. France*[600] concerned the administrative detention of children accompanied by their parents in the context of a deportation procedure. The ECtHR found that, although the material conditions in pre-removal detention centres were generally appropriate, the conditions in these centres were a source of anxiety for young children, in particular the noise and the loudspeaker announcements they had been exposed to. The placement of children in detention centres amounted to inhuman and degrading treatment in breach of Article 3 of the ECHR on account of the convergence of three factors: the children's young ages, the duration of their administrative detention and the fact that the premises concerned were not adapted for children.[601]

Example: In *Bistieva and Others v. Poland*,[602] the applicant together with her husband and their children had arrived in Poland and applied for asylum. The asylum application was rejected, and the family fled to Germany. The family was then sent back to Poland, where they were detained for more than five months. Although there was a risk that the family might abscond, the Court nevertheless held that the authorities had failed to provide sufficient and relevant reasons for detaining the family for such a lengthy period of time. There had therefore been a violation of Article 8 of the ECHR.

Example: In *R.R. and Others v. Hungary*,[603] a family with three children was confined for nearly four months in a transit zone at the border

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

600 ECtHR, *A.M. and Others v. France*, No. 24587/12, 12 July 2016.

601 See also similar cases: ECtHR, *A.B. and Others v. France*, No. 11593/12, 12 July 2016; ECtHR, *R.K. and Others v. France*, No. 68264/14, 12 July 2016; ECtHR, *R.C. and Others v. France*, No. 76491/14, 12 July 2016.

602 ECtHR, *Bistieva and Others v. Poland*, No. 75157/14, 10 April 2018.

603 ECtHR, *R.R. and Others v. Hungary*, No. 36037/17, 2 March 2021.

awaiting the outcome of their asylum requests. The Court found that this had amounted to de facto deprivation of liberty, in the light of, *inter alia*, the nature and degree of the restrictions actually imposed upon them. As their detention lacked a strictly defined statutory basis, it amounted to a violation of Article 5 (1) of the ECHR. The Court also addressed the conditions in which the children had been held. Although EU law obliged the authorities to take into account any special reception needs linked to the applicants' vulnerable status, the facilities were unsuitable for children and there was a lack of medical services. The presence of elements resembling a prison environment and the constraint inherent during confinement must have also caused the children anxiety and psychological disturbance and degraded the parents' images in the eyes of the children. In the light of the long duration of the family's stay, the repetition and accumulation of the above-mentioned conditions would necessarily have harmful consequences for those exposed to them. The applicant children and mother had accordingly been subjected to degrading treatment, in violation of Article 3 of the ECHR.

The legality of detention when the child in question was accompanied by an unrelated adult was also tested in court.

Example: In *Moustahi v. France*,[604] the French authorities intercepted two children travelling to Mayotte in a makeshift boat. They were detained, together with adults, before their immediate removal. During this time, the children were associated with an unrelated adult and were included in his removal order. The Court found that the applicant children had been arbitrarily associated with an adult, not in order to protect their best interests, but to facilitate their speedy deportation. This was a relevant factor in determining, *inter alia*, that the conditions and detention of the children had amounted to a violation of Article 3 and Article 5 (1) and (4) of the ECHR.

Under international law, Article 37 of the CRC states that no child shall be deprived of liberty unlawfully or arbitrarily, and that it should be a measure of last resort and for the shortest appropriate period of time. When considering the detention of children, the best interests of the child and the obligation of Member States to protect children and to ensure their well-being need to be

604 ECtHR, *Moustahi v. France*, No. 9347/14, 25 July 2020.

considered.[605] The CRC Committee has suggested that any kind of child immigration detention should be forbidden by law.[606]

9.5. Expulsion

Key points

- The vulnerability of migrant children to expulsion is intrinsically linked to their parents' residence status in the host state.
- The best interests principle should guide all decisions relating to the expulsion of migrant 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 when establishing family life elsewhere would be difficult.[607]

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,

605 See United Nations (2019), *Children deproved of liberty – The United Nations global study*, 2019.

606 United Nations (2017), *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017.

607 For the purposes of this chapter, the term 'expulsion' will be used to mean the lawful removal of a non-national or other person from a state. It is otherwise referred to as 'return', 'removal', 'repatriation', 'extradition' or 'deportation', depending on the legal context. See also FRA and ECtHR (2020), *Handbook on European law relating to asylum, borders and immigration – Edition 2020*, 17 December 2020, Section 6.4.

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 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 initially this education-related concession only applied to children in families with sufficient money to support themselves,[608] later case law has confirmed that it extends to children in education who may be dependent on social welfare support.[609]

Furthermore, family members and particularly third-country national parents also enjoy a right to remain in the EU, 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)). Family members who are third-country nationals will keep the right of residence in the event of the EU citizen's death, if they have been residing in the host Member State, as family members, for at least one year before the death (Article 12 (2) of the directive). Otherwise, if the EU citizen from the host Member State leaves the EU, third-country family members do not retain their right of residence, or at least the directive does not provide for any precise rules for such a situation. Article 13 of the directive allows, under certain conditions, family members to retain the right to remain in the event of termination of family ties (divorce, annulment of marriage or termination of registered partnership).[610]

The CJEU has referred to a child's status as an EU citizen under Article 20 of the TFEU. The Court found that granting the child's third-country national parents permission to work and reside in the EU Member State of the child's citizenship

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

609 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.

610 For more details see FRA (2018), *Making EU citizens' rights a reality: National courts enforcing freedom of movement and related rights*, 20 August 2018.

enables the child to effectively enjoy the rights attached to their status as an EU citizen, in so far as the child would otherwise have to leave the EU to accompany their parents.[611] 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".[612] The CJEU has ruled that the best interests of the child are to be assessed in each case even if the return decision concerns only the parent.[613]

> Example: In *M.A. v Belgium*,[614] the CJEU considered the case of a third-country national with a daughter born in Belgium. The parent was subject to an order to leave Belgium and an entry ban on account of the commission of offences. The CJEU held that Article 5 of the Return Directive (2008/115/EC), read in conjunction with Article 24 of the Charter of Fundamental Rights of the EU, must be interpreted as meaning that Member States are required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but the child's father.

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) acknowledges children's immunity from expulsion unless it is deemed to be in their best interests and in accordance with the CRC.

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 must be satisfied that the child will be returned to a member of his/

611 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEm)*, 8 March 2011.

612 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 (2020), *Handbook on European law relating to asylum, borders and immigration*, 17 December 2020.

613 CJEU, C-112/20, *M.A. v. État belge*, 11 March 2021.

614 *Ibid*.

her family, a nominated guardian or adequate reception facilities in the country of return (Article 10 (2)). When Member States implement the Return Directive they "shall take due account of: (a) the best interests of the child; (b) family life; (c) the state of health of the third-country national concerned, and respect the principle of non-refoulement".[615] The CJEU ruled on the need to assess the adequacy of reception facilities in the country of return before taking a return decision on an unaccompanied child. If adequate reception facilities are found and the return decision is appropriate, the CJEU underlined the importance of implementing the return decision so that situations of legal limbo are avoided.

Example: In *T.Q. v Staatssecretaris van Justitie en Veiligheid*,[616] the CJEU considered the case of an unaccompanied Guinean child who entered the Netherlands when he was 15 years and four months old and was obliged to leave the country, as a residence permit was not granted. The CJEU held that Member States must undertake an assessment of the best interests of the child before issuing a return decision, regardless of the age of the unaccompanied child. In this context, Member State must ensure that adequate reception facilities are available for the unaccompanied minor in the state of return. The CJEU also held that, where a Member State is satisfied of adequate reception facilities and has adopted a return decision in respect of an unaccompanied child, that Member State is precluded by Article 8 (1) of the Returns Directive from subsequently refraining from removing that child until he or she reaches the age of 18 years. The CJEU clarified that in such a case the child must be removed unless there are changes in their situation.

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).[617] Furthermore, the regulation provides a checklist of factors to assist the authorities' determination of what is in the child's best

615 EU, European Parliament and Council of the European Union (2008), Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348, Art. 5.

616 CJEU, C-441/19, *TQ v Staatssecretaris van Justitie en Veiligheid*, 14 January 2021.

617 EU, European Parliament and Council of the European Union (2013), Regulation (EU) No. 604/2013 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 2013 L 180.

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*,[618] 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.[619]

Under CoE law, states are, under specific conditions, permitted to interfere with the right to respect for family life in accordance with Article 8 (2) of the ECHR.

Example: In *Üner v. The Netherlands*[620] 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".[621]

Example: The case of *Tarakhel v. Switzerland*[622] concerns the refusal of the Swiss authorities to examine the asylum application of an Afghan couple

618 CJEU, C-648/11, *The Queen, on the application of MA and Others v. Secretary of State for the Home Department*, 6 June 2013.

619 See also CJEU, C-441/19, *TQ v. Staatssecretaris van Justitie en Veiligheid*, 14 January 2021.

620 ECtHR, *Üner v. the Netherlands*, No. 46410/99, 18 October 2006, paras. 57–58. See also ECtHR, *Boultif v. Switzerland*, No. 54273/00, 2 August 2001.

621 See also ECtHR, *Assem Hassan Ali v. Denmark*, No. 25593/14, 23 October 2018.

622 ECtHR, *Tarakhel v. Switzerland* [GC], No. 29217/12, 4 November 2014.

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 Regulation without first obtaining 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

Key point

- Migrant children have the right to an effective remedy and to legal assistance in certain proceedings.[623]

Under EU law, children's rights to access justice in an immigration context are set out in a range of different instruments. First, the right to an effective legal remedy and to a fair trial is generally set out in Article 47 of the 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

623 See also FRA and ECtHR (2020), *Handbook on European law relating to asylum, borders and immigration*, 17 December 2020, Section 5.5 on legal assistance in asylum and return procedures.

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, including on legal assistance, 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 the Victims' Rights Directive.[624]

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.[625] However, Article 13 of the ECHR (the right to an effective remedy) has been relied on in certain circumstances.

> Example: *Rahimi v. Greece*[626] 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 and Degrading Treatment or Punishment, 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.

624 EU, European Parliament and Council of the European Union (2012), Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L 315/55.

625 ECtHR, *Maaouia v. France* [GC], No. 39652/98, 5 October 2000.

626 ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011.

Accordingly, it found violations of Article 3, Article 5 (paragraphs 1 and 4) and Article 13 of the ECHR.[627]

The ESC, in Article 16, requires states to ensure the necessary conditions for the full development of the family by promoting the economic, legal and social protection of family life. 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 of access to the courts and administrative authorities" (Article 26) are directed exclusively at migrant workers rather than their family members.[628]

In addition, the CoE comprehensive *Guidelines on child-friendly justice* set out how all justice and administrative proceedings, including immigration proceedings, should be adapted to meet the needs of children.[629] Moreover, in 2018, the Committee of Ministers Recommendation on effective guardianship for unaccompanied and separated children in the context of migration recognised that a state-appointed guardian plays an important role in safeguarding the rights and best interests of unaccompanied and separated children by informing, assisting, supporting and, where provided by law, representing them in processes affecting them.[630]

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.

627 See also ECtHR, *Abdullahi Elmi and Aweys Abubakar v. Malta*, Nos. 25794/13 and 28151/13, 22 November 2016; also ECtHR, *Moustahi v. FranceMoustahi v. France*, No. 9347/14, 25 June 2020, paras. 65–67.

628 Council of Europe (1997), European Convention on the Legal Status of Migrant Workers, CETS No. 93, 24 November 1977.

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

630 Council of Europe, Committee of Ministers (2020), Recommendation Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, 11 December 2019.

10 Personal data and consumer protection

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 General Data Protection Regulation (GDPR) (2016/679/EU)	**Children and data protection**	ECHR, Article 8 (right to respect for private and family life) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108+) ECtHR, *Avilkina and Others v. Russia*, No. 1585/09, 2013 (disclosure of medical records) ECtHR, *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 2008
Charter of Fundamental Rights, Article 38 TFEU, Article 169 Consumer Rights Directive (2011/83/EU) European Accessibility Act (2019/882) Unfair Business-to-Consumer Commercial Practices Directive (2005/29/EC) General Product Safety Directive (2001/95/EC) Clinical Trial Regulation (536/2014/EU)	**Protection of children as consumers**	Convention on the Elaboration of a European Pharmacopoeia Convention on Human Rights and Biomedicine, Article 17, and its Additional Protocol concerning Biomedical Research, Chapter V European Convention on Transfrontier Television

EU	Issues covered	CoE
Regulation on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control (609/2013/EU) Toy Safety Directive (2009/48/EC) Directive concerning products which, appearing to be other than they are, endanger the health or safety of consumers (87/357/EEC) Audiovisual Media Services Directive (recast) (2018/1808) CJEU, C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 2008 (sale over the internet of DVDs) CJEU, C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 (licence for playing a game)		

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 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 he main conventions on media and data protection and, in terms of consumer protection, the 1964 Convention on the Elaboration of a European Pharmacopoeia. The ECtHR has also decided on a number of cases concerning the data protection of individuals.

The following sections will concentrate on specific aspects of data protection (Section 10.1) and consumer law relating to children (Section 10.2). For each of these issues, the general legal framework and its applicability to children are analysed, as well as the specific norms for the protection of children, where relevant.

10.1. Children and personal data protection

Key points

- Under EU and CoE law, personal data protection has been acknowledged as a fundamental right. Under EU law the right to data protection is a distinct fundamental right and it applies to everyone, including children (Article 8 of the Charter of Fundamental Rights).
- For most online services, parental consent to the processing of personal data will be necessary, depending on the age of the children (age threshold varies among EU Member States between 13 and 16 years).
- Article 8 of the ECHR includes the right to the protection of personal data.

10.1.1. European data protection law

Under EU law, Article 8 (2) of the EU Charter of Fundamental Rights recognises personal data protection as a distinct fundamental right. The charter grants protection of personal data to everyone, including children. Article 8 (2) explicitly enshrines several elements of this right in the charter (fair processing for specified purposes, consent or other legitimate basis laid down 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 protection of personal data established in Article 8 may be limited in accordance with the law. Any such limitations must respect the essence of the right to personal data protection. They can be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or are needed to protect the freedoms and rights of others (Article 52 of the charter).[631] The EU has competence to legislate on data protection matters (Article 16 of the TFEU).[632] Personal data protection has emerged as one of the

631 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.

632 For a general overview of European data protection law, see CoE, Committee of Ministers (2018), *12th Annual Report of the Committee of Ministers*; FRA (2018), *Handbook on European data protection law – 2018 edition*, Luxembourg, Publications Office.

key areas of European law relating to protection of fundamental rights. The GDPR, adopted in 2016, is the main instrument in this field.[633]

The GDPR, in recital 75, identifies children as vulnerable individuals and recognises that they merit specific protection with regard to their personal data. They may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data. To this end the European Data Protection Board (EDPB) is developing guidelines about the processing of children's data.[634] "The consent of the holder of parental responsibility should not be necessary in the context of preventive or counselling services offered directly to a child. […] Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand."[635] The GDPR explicitly requires that the protection of children's personal data be taken into account when the processing of personal data is based on the legitimate interest of the controller or a third party (Article 6 (1) (f)) and information about personal data processing is provided to a child (Article 12 (1)). Processing of data relating to children is noted to carry certain risks, and further application of the GDPR with regard to the protection of children can be specified in codes of conduct. Such codes of conduct can, in particular, include rules on how the information must be provided to a child and how the consent of the holder of parental responsibility is obtained (Article 41 (2)).

For most online services, where the service is relying on the consent of the child to process their data, the consent of the parent or guardian is also required up to a certain age. This applies to social networking sites as well as to platforms for downloading music and buying online games. The age threshold for obtaining parental consent varies among EU Member States between 13 and

633 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). The Law Enforcement Directive (Directive (EU) 2016/680) is the main instrument dealing with the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

634 EDPB, Working Programme 2021/2022, 16 March 2021

635 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), recitals 38 and 58.

16 years.[636] Pursuant to Article 4 (11) of the GDPR, consent must be freely given, specific, informed and unambiguous, and children or their parents or guardians should be provided with easy-to-use mechanisms so that they can withdraw consent at any time. Companies have to make reasonable efforts, taking into consideration the technology available, to check that it is the holder of parental responsibility over the child who gives or authorises the consent. The reasonable efforts that organisations must take will also depend on the nature of the processing and the risks associated with it for the child. These efforts should be kept under review in the light of emerging technologies in this field. When personal data are processed in relation to the offer of information society services to a child, and such processing relies on the consent of the child or the holder of parental responsibility, children always have the right to have their data erased (Article 17 (1) (f) of the GDPR). This is known as the right to be forgotten.

Where children access an online service, irrespective of age verification measures that an organisation deploys, the organisation must ensure that child-specific data protection measures are in place to enhance the level of protection afforded to child users against the risks that their use of the service poses to them. Some of these measures could include ensuring that the service adheres to the obligation of data protection by design and default (Article 25 of the GDPR), conducting a data protection impact assessment (Article 35), adhering to the principle of data minimisation and reviewing profiling settings. Profiling means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects of a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements (Article 4 (4)).

Such specific protection should, in particular, apply to using children's personal data for the purposes of marketing or creating personality or user profiles, and collecting personal data about children when they use services offered directly to them (recital 38 of the GDPR).

The guidelines that the EDPB issued[637] on targeting social media users point out that the adverse impact of targeting may be considerably greater on vulnerable categories of individuals, such as children. Targeting can influence the

636 *Ibid.*, Art. 8.

637 EDPB (2020), *Guidelines 8/2020 on the targeting of social media users*, 2 September 2020.

shaping of children's personal preferences and interests, ultimately affecting their autonomy and their right to development. Several institutions have held that, in general, organisations should avoid profiling children for marketing purposes, as children are more vulnerable.[638] Children can be particularly susceptible in the online environment and more easily influenced by behavioural advertising.[639]

Recital 71 of the GDPR stipulates that solely automated decision-making, including profiling, with legal or similarly significant effects should not apply to children.

Working Party 29, now the EDPB,[640] recommended that exceptions to the rule against this form of processing should not, in general be relied on in relation to processing children's data other than in limited circumstances, such as when it is necessary to protect their welfare. In these cases there must be suitable safeguards in place to ensure that they are appropriate for children.

Certain categories of data are considered sensitive, such as genetic data, biometric data uniquely identifying a child, personal data relating to criminal convictions, and personal data that reveal racial or ethnic origins, political opinions, religious or other beliefs, mental and physical health, or sexual life. Processing children's data in such categories is allowed only where appropriate exceptions apply (Article 9 of the GDPR).

The Directive on privacy and electronic communications [641] protects the confidentiality of communications and the terminal equipment of the user, including children. It implements the fundamental right to respect for private life with regard to communications (Article 7 of the Charter of the Fundamental Rights).

638 See, for example, Council of Europe (2018), *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*, CM/Rec(2018)7, p. 17; Irish Data Protection Commission (2020), *Children front and centre: Fundamentals for a child-oriented approach to data processing*, December 2020, p. 54.

639 Article 29 Data Protection Working Party (2018), *Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679*, 22 August 2018.

640 Article 29 Data Protection Working Party (2018), *Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679*, 22 August 2018.

641 EU, European Parliament (2002), Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications), OJ 2002 L 201.

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,[642] various forms of surveillance[643] and the protection against storage of personal data by public authorities.[644] Furthermore, the ECtHR ruled that national law must set out appropriate measures to ensure judicial remedies against infringements of data protection rights.

Example: *Avilkina and Others v. Russia*[645] *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*,[646] an 11-year old's fingerprints and DNA taken in relation to 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 CoE 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

642 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.

643 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.

644 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.

645 ECtHR, *Avilkina and Others v. Russia*, No. 1585/09, 6 June 2013.

646 ECtHR, *S. and Marper v. the United Kingdom* [GC], Nos. 30562/04 and 30566/04, 4 December 2008.

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 children, given their special situation and the importance of their development and integration into society. In conclusion, the retention of data constituted a disproportionate interference with the applicant's right to respect for private life.

The modernised CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[647] (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.[648]

The principles laid down in Convention 108+ relate 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, genetic and biometric data, as well as data processed for the information they reveal relating to trade-union membership or ethnic origin, 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

647 Council of Europe (1981), Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, 28 January 1981; Council of Europe (2001), Additional Protocol to Convention 108 regarding supervisory authorities and transborder data flows, CETS No. 181 , 8 November 2001; Council of Europe (2018), Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 223, 10 October 2018.

648 Council of Europe (2018), Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 223, 10 October 2018.

are possible only when overriding interests, such as state security or defence, are at stake. The Consultative Committee of Convention 108 adopted guidelines on children's data protection in an education setting[649] setting forth the fundamental principles and advising legislators, policy makers, data controllers and the industry how to uphold these rights.

The CoE guidelines on children's rights in the digital environment invite states to ensure that children's personal data is processed fairly, lawfully, accurately and securely, for specific purposes and with the free, explicit, informed and unambiguous consent of the children and/or their parents, carers or legal representatives, or in accordance with another legitimate basis laid down by law. States should ensure that the processing of special categories of data that are considered sensitive, such as genetic data, biometric data uniquely identifying a child, personal data relating to criminal convictions, and personal data that reveal racial or ethnic origins, political opinions, religious or other beliefs, mental and physical health, or sexual life, should in all instances be allowed only where appropriate safeguards are enshrined in law.[650]

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.[651]

649 Council of Europe, Consultative Committee of Convention 108, *Children's data protection in an education setting – Guidelines*, T-PD(2019)06BISrev5, 20 November 2020.

650 Council of Europe, Committee of Ministers (2018), *Guidelines to respect, protect and fulfil the rights of the child in the digital environment, Recommendation CM/Rec(2018)7*, Section 3.4.

651 See also United Nations (2021), *General Comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25, 2 March 2021.

10.2. 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.

10.2.1. 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*[652] 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

652 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*[653] 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 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.[654] 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. If consumers, including children, are provided with relevant and sufficient information, they will be able to consider all relevant facts and make an informed choice; these 'information requirements' are set by the CRD. Based on Directive (EU) 2019/882 on the accessibility requirements for products and services, those requirements also apply to underage consumers.[655]

653 CJEU, C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 14 October 2004.

654 EU, European Parliament and Council of the European Union (2011), Directive 2011/83/EU of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC, OJ 2011 L 304/64.

655 EU, European Parliament and Council of the European Union (2019), Directive 2019/882/EU of 17 April 2019 on the accessibility requirements for products and services, OJ 2019 L 151/70.

10.2.2. Unfair commercial practices targeting children

Under EU law, Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market,[656] covers all business-to-consumer transactions (whether operated offline or online, involving both goods and services). Children are included in the directive under the category '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 all the necessary information for consumers to be provided in a clear and comprehensible manner, and at a suitable time (Articles 6 and 7).

The CoE's Committee of Ministers issued *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*. Based on them, states should take measures to ensure that children are protected from commercial exploitation in the digital environment, including exposure to age-inappropriate forms of advertising and marketing. This includes ensuring that business enterprises do not engage in unfair commercial practices towards children, requiring that digital advertising and marketing towards children be clearly distinguishable to them as such, and requiring all relevant stakeholders to limit the processing of children's personal data for commercial purposes.[657]

10.2.3. Product safety

Under EU law, there is a comprehensive framework to ensure that only safe and otherwise compliant products are available for sale. In particular, Directive 2001/95/EC on general product safety dedicates specific attention to the safety of children by including them in the category of consumers who can be particularly vulnerable to the risks that the products under consideration pose (recital 8 of the directive). Therefore, the safety of the product needs to

656 EU, European Parliament and Council of the European Union (2005), Directive 2005/29/EC 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 and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149/22.

657 Council of Europe, Committee of Ministers (2018), *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*, Recommendation CM/Rec(2018)7.

be assessed, taking into account all the relevant aspects, in particular the categories of consumers that a product targets. The European Commission has published a proposal for a new General Product Safety Regulation.[658]

Council Directive 87/357/EEC is a specific product safety directive for the approximation of Member States' laws concerning products which, appearing to be other than they are, endanger the health or safety of consumers.[659] It prohibits the marketing, importing and manufacturing of products that look like foodstuff, but are not edible. Member States must carry out checks to ensure that no such products are marketed. If a Member State bans 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 10.2.6.

The CoE Committee of Ministers *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* provide that States should promote and encourage businesses to implement safety and privacy by design in products, services' features and functionalities aimed at or used by children.[660]

10.2.4. Clinical trials involving children

Under EU law, Regulation (EU) No. 536/2014 on clinical trials for human medicinal products includes specific provisions for children in the vulnerable population category (Article 10 (1)).[661] 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

658 EU, European Parliament and Council of the European Union (2021), Proposal for a regulation on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council, COM(2021) 346 final, 30 June 2021.

659 EU, Council of the European Union, 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.

660 Council of Europe, Committee of Ministers (2018), *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*, Recommendation CM/Rec(2018)7, para. 54.

661 EU, European Parliament and Council of the European Union (2014), Regulation (EU) 536/2014 of 16 April 2014 on clinical trials on medicinal products for human use, OJ 2014 L 158/1.

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 clinical trials be performed on children without having previously obtained their consent or the consent of their legal representatives (Article 35 (1)).

Under COE law, Article 17 of the Convention on Human Rights and Biomedicine contains similar principles,[662] as does Chapter V of its Additional Protocol concerning Biomedical Research.[663]

10.2.5. Food intended for infants and young children

Under EU law, Regulation 609/2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control focuses on the nutritional composition and safety of foods specifically manufactured for infants and young children under the age of three years.[664] It regulates placing products on the market, the required information on the composition of food, requirements for infant formula and milk-based drinks for young children, etc. The regulation also establishes definitions of infant formula and follow-on formula, processed cereal-based food and baby

662 Council of Europe (1999), 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 (Oviedo Convention), No. 164, 1 December 1999.

663 Council of Europe (2007), Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research, No. 195, 1 September 2007.

664 EU, European Parliament and Council of the European Union (2014), Regulation (EU) 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No. 41/2009 and (EC) No. 953/2009, OJ 2013 L 181/35.

food, food for special medical purposes, and total diet replacement for weight control.

10.2.6. Toy safety

Under EU law, Directive 2009/48/EC[665] defines toys in Article 2 as "products designed or intended, whether or not exclusively, for use in play by children under 14 years of age".[666] 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 directive 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).[667]

10.2.7. Children and advertising

Under EU law, the Audiovisual Media Services Directive,[668] revised in 2018, 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)). The revision of the directive in 2018 extended these audiovisual rules to video-sharing platforms, such as YouTube and others.

Under CoE law, the European Convention on Transfrontier Television[669] 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

665 European Union (2009), Directive 2009/48/EC of 18 June 2009 on the safety of toys, OJ 2009 L 170.

666 *Ibid.*, Art. 2 (1).

667 The European Commission has also concluded 'voluntary agreements' with European toy industries/traders in order to improve toy safety. See the Commission's web page on the topic for further information..

668 EU, European Parliament and Council of the European Union (2018), Directive (EU) 2018/1808 of the European Parliament and the Council of 14 November 2018 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 2018 L 303.

669 Council of Europe (2002), European Convention on Transfrontier Television, CETS No. 132, 5 May 1989. Amended according to the provisions of the Protocol, CETS No. 171, 2002.

and violent material and of programmes inciting to racial hatred. It identifies advertising standards and regulates advertising time and advertising breaks. The Committee of Ministers guidelines on child rights in the digital environment invite States to ensure that children are protected from commercial exploitation in the digital environment, including through exposure to age-inappropriate forms of advertising and marketing.[670]

670 Council of Europe, Committee of Ministers (2018), *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*, Recommendation CM/Rec(2018)7, para. 57.

11 Children's rights within criminal justice and alternative (non-judicial) proceedings

EU	Issues covered	CoE
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) Right to Interpretation and Translation Directive (2010/64/EU) Right to Information Directive (2012/13/EU) Access to a Lawyer Directive (2013/48/EU) Procedural Safeguards Directive (2016/800)	**Fair trial guarantees**	ECHR, Article 6 (fair trial) ESC, Article 17 Lanzarote Convention ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 1999 (children in court) ECtHR, *Panovits v. Cyprus*, No. 4268/04, 2008 (access to a lawyer)
Charter of Fundamental Rights, Articles 4 (prohibition of torture, inhuman or degrading treatment) and 6 (right to liberty) Procedural Safeguards Directive (2016/800)	**Detention**	ECHR, Articles 3 (prohibition of torture, inhuman or degrading treatment) and 5 (right to liberty) ESC, Article 17 European Convention for the Protection of Torture and Inhuman or Degrading Treatment of Punishment ECtHR, *Nart v. Turkey*, No. 20817/04, 2008 (pre-trial detention) ECtHR, *Blokhin v. Russia*, No. 47152/06, 2016

EU	Issues covered	CoE
		ECtHR, *Bouamar v. Belgium*, No. 9106/80, 1988 (detention for educational supervision) ECtHR, *D.G. v. Ireland*, No. 39474/98, 2002 (detention for educational supervision) ECtHR, *Güveç v. Turkey*, No. 70337/01, 2009 (conditions of detention) ECtHR, *Çoşelav v. Turkey*, No. 1413/07, 2012
Victims' Rights Directive (2012/29/EU) Child Sexual Abuse Directive (2011/93/EU) Human Trafficking Directive (2011/36/EU) CJEU, C-105/03, *Criminal proceedings against Maria Pupino*, 2005 (standing of child witnesses in court)	**Child witnesses and victims**	ECHR, Articles 3 (prohibition of torture, inhuman or degrading treatment) and 8 (private life) Lanzarote Convention, Article 31 ECtHR, *Kovač v. Croatia*, No. 503/05, 2007 (child witness) ECtHR, *S.N. v. Sweden*, No. 34209/96, No. 34209/96, 2002 (child witness) ECtHR, *R.R. and Others v. Hungary*, Nos. 19400/11 and 36037/17, 2012 (exclusion of family from the witness protection programme) ECtHR, *X and Others v. Bulgaria*, No. 22457/16, 2021 (child witnesses and victims)

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 judicial proceedings as victims and/or as 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.[671] 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.[672]

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.

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 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 a fair and public hearing within a reasonable time, the right to be defended, represented and advised, and the right 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

671 Council of Europe, Committee of Ministers (2010), *Guidelines on child-friendly justice*, 17 November 2010, para. 24.

672 See also FRA and ECtHR (2016), *Handbook on European law relating to access to justice*, 22 June 2016.

criminal proceedings: the Right to Interpretation and Translation Directive,[673] the Right to Information Directive[674] and the Access to a Lawyer Directive.[675] 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 discussed in Section 11.1.2.

Even in the absence of child-specific provisions, Member States must observe the charter when implementing provisions of EU 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 of the directives mentioned.[676]

The Procedural Safeguards Directive establishes, for the first time at EU level, specific procedural safeguards for children accused or suspected of having committed a crime. It provides for the right to an individual assessment (Article 7) to assess the personality and socio-economic, family and personal circumstances of the child, with the full participation of the child. Member States might use the individual assessment when determining measures for the child or when taking any decision in the criminal proceedings, including when sentencing. It also requires that children benefit from prompt information about their rights, the assistance of parents (or other appropriate persons) and questioning behind closed doors.[677] In addition, children deprived of liber-

673 EU, European Parliament and Council of the European Union (2010), Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 2010 L 280/1.

674 EU, European Parliament and Council of the European Union (2012), Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142/1.

675 EU, European Parliament and Council of the European Union (2013), Directive 2013/48/EU 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.

676 The CJEU has dealt with the interpretation of Art. 24 in proceedings relating to international child abduction (see Section 5.4).

677 EU, European Parliament and Council of the European Union (2016), Directive (EU) 2016/800/EU of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children suspected or accused in criminal proceedings, OJ 2016 L 132/1.

ty should be entitled to receive appropriate education, guidance, training, and medical care, and to be kept separate from adults.[678]

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/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;[679] 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.

Everyone must be presumed innocent until proven guilty according to law (Article 6 (2) of the ECHR). In addition, 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 which have generated child-specific case law concern mainly the right to effective participation and the right to access a lawyer. These two specific fair trial guarantees are therefore further elaborated in this chapter.[680]

Article 17 of the ESC specifically protects the effective exercise of the right of mothers and children to social and economic protection, and provides that the Contracting Parties will take all appropriate and necessary measures to that end, including establishing or maintaining appropriate institutions or services.

678 See also Section 11.2. Also relevant to child protection is EU, European Parliament and Council of the European Union (2016), Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ 2016 L 297.

679 ECtHR, *Nortier v. the Netherlands*, No. 13924/88, 24 August 1993; ECtHR, *Adamkiewicz v. Poland*, No. 54729/00, 2 March 2010.

680 See also Council of Europe (2007), Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007, Chapter VII.

The ECSR found in its case law a violation of Article 17 based on two grounds: the first was that the state must ensure mandatory legal assistance to children below the age of criminal responsibility already in the pre-trial stage of the proceedings; the second was that diversion from judicial proceedings (alternatives to proceedings, such as settlement or conditional termination or withdrawal of criminal proceedings) should be the preferred manner of dealing with children in most cases. Diversion options should be available from as early as possible after contact with the system, before a trial commences, and throughout the proceedings. The principle applies to an even greater degree when children below the age of criminal responsibility can still be engaged in the child justice system.[681]

The CoE's *Guidelines on child-friendly justice* are directly relevant to children who are suspected or accused.[682] Even though they are not legally binding, the guidelines represent a milestone in ensuring that justice proceedings, including those part of the criminal justice system, take into account the specific needs of children. They build on existing ECtHR case law and other European and international legal standards, such as the UN CRC, and 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. The following sections are of specific importance for children in criminal proceedings: 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 speedy proceedings (Section D (4)); and the right to child-sensitive interviews or hearings (Section D (5)).

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 into 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

681 ECSR, *International Commission of Jurists (ICJ) v. Czech Republic*, Complaint No. 148/2017, 20 October 2020.

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

parents, the right to appeal and the right to have their privacy fully protected at all stages of the proceedings.

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), such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules);[683] the *UN guidelines for the prevention of juvenile delinquency* (Riyadh Guidelines);[684] and the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules).[685] 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 guidance regarding juvenile delinquency prevention policies.

The UN Committee on the Rights of the Child issued General Comment No. 10 on children and juvenile justice, which offers detailed guidance on how to interpret and implement the CRC as far as juvenile justice is concerned.[686] This comment deals with important juvenile justice principles, including the right to effective participation as part of the right to a fair trial (for further information, see 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

683 United Nations, General Assembly (GA) (1985), UN Standard Minimum Rules for the Administration of Juvenile Justice, UN Doc. GA Res. 40/33, 19 November 1985.

684 United Nations, GA (1990), *UN guidelines for the prevention of juvenile delinquency*, UN Doc. GA Res. 45/112, 14 December 1990.

685 United Nations, GA (1990), UN Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc. GA Res. 45/113, 14 December 1990.

686 United Nations, Committee on the Rights of the Child (2007), *General Comment No. 10 (2007) on children's rights in juvenile justice*, CRC/C/GC/07, 25 April 2007; United Nations, Committee on the Rights of the Child (2016), *General Comment No. 19 (2016) on public budgeting for the realization of children's rights*, CRC/C/GC/19, 20 July 2016.

the child principle and the principle of non-discrimination in the juvenile justice system, and age limits. The UN Committee on the Rights of the Child in its General Comment on children's rights in the justice system (No. 24) recommends setting the minimum age of criminal responsibility at 14, or preferably higher.[687] It also recommends granting all children the right to be dealt with in the context of juvenile justice and not to transfer 16- and 17-year-olds to the adult criminal system in cases of serious offences.[688] Other general comments of the CRC Committee, for example on the right to be heard,[689] which is connected to the right to participate effectively in justice proceedings, and the protection against all forms of violence,[690] are also relevant for juvenile justice.

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 Procedural Safeguards Directive on procedural safeguards for criminally suspected or accused children includes the right to effective participation, including in the individual assessment, as well as the right to legal representation.[691]

Under CoE law, the ECtHR has elaborated under Article 6 ECHR specific requirements for ensuring children's effective participation in criminal trials. As a general rule, proceedings should ensure that the child's age, level of maturity and emotional capacities are taken into account.[692] Concrete examples of 'effective participation' requirements include the child's presence during the hearings, holding of *in camera* hearings, limiting trial 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

687 United Nations, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019, Section C.

688 *Ibid*.

689 United Nations, Committee on the Rights of the Child (CRC) (2009), *General Comment No. 12 (2009) on the right of the child to be heard*, CRC/C/GC/12, 1 July 2009.

690 United Nations, Committee on the Rights of the Child (2011), *General Comment No. 13 (2011) on the right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011.

691 EU, European Parliament and Council of the European Union (2016), Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children suspected or accused in criminal proceedings, OJ 2016 L 132/1.

692 ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999, para. 61.

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*[693] concerns the murder of a two-year-old by two ten-year-olds. They were committed to public trial under significant media attention. The court procedure was partly modified, in that shorter sessions were held, the applicant's parents were placed close to him, a play area was available during breaks, etc. Nevertheless, the applicant and his co-accused were tried in an adult court, and most of the rigours 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 public nature 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.

The recognition of the right to effective participation is also at the core of the CoE'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".[694] 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.[695] The Lanzarote Convention stipulates that the effective participation of children in proceedings must be "treated as priority and carried out without any unjustified delay". It also provides rules for interviews with the child, which must be carried out without unjustified delays, by professionals trained for this purpose and in premises designed for this purpose.

693 ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999.

694 Council of Europe, Committee of Ministers (2010), *Guidelines on child-friendly justice*, 17 November 2010, para. II. C.

695 *Ibid.*, Section D.

11.1.2. Access to a lawyer

Under EU law, the Access to a Lawyer Directive includes reference to children in recitals 52 and 55 of its preamble, as well as in Article 5 (2)–(4).[696] Pursuant to recital 55 and Article 5 (2), if a child is deprived of liberty, the holder of parental responsibility shall be notified and given reasons, unless this would be contrary to the child's best interests. In the latter case, another appropriate adult shall be informed. Article 3 (3) requires 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, and to have a lawyer present during questioning and during investigative or evidence-gathering acts. According to Article 6 (3) of the Procedural Safeguards Directive, children must be assisted by a lawyer from whichever of the following is the earliest: (a) before they are questioned by the police or other law enforcement or judicial authority; (b) when investigating or other competent authorities carry out an investigative act; (c) without undue delay after deprivation of liberty; (d) when they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.[697] If no lawyer is present, the competent authorities must postpone the questioning of the child, or other investigative or evidence-gathering acts, for a reasonable time to allow for the arrival of the lawyer or, if the child has not nominated a lawyer, to arrange a lawyer for the child (Article 6 (7)).

Under CoE law, the ECtHR considers access to a lawyer to be one of the fundamental elements of the right to a fair trial.[698] 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's scrutiny of whether an applicant had effective access to a lawyer is stricter in cases involving children.[699]

696 EU, European Parliament and Council of the European Union (2013), Directive 2013/48/EU 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.

697 EU, European Parliament and Council of the European Union (2016), Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children suspected or accused in criminal proceedings, OJ 2016 L 132/1, Art. 6.

698 ECtHR, *Salduz v. Turkey* [GC], No. 36391/02, 27 November 2008, para. 51; ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], Nos. 50541/08 et al., 13 September 2016; ECtHR, *Beuze v. Belgium*, No. 71409/10, 9 November 2018.

699 ECtHR, *Salduz v. Turkey* [GC], No. 36391/02, 27 November 2008, para. 60; see also ECSR, *International Commission of Jurists (ICJ) v. Czech Republic*, Complaint No. 148/2017, 20 October 2020.

Example: The case of *Panovits v. Cyprus*[700] 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 have reasonably appreciated the consequences of him 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.

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 at any stage of judicial proceedings.
- If detained, children are to be treated age-appropriately and with respect for their dignity.
- Children should not be detained together with adults.
- Alternatives to detention should always be considered.

Every person has the right to liberty. Deprivation of liberty therefore constitutes an exception and includes any form of placement in an institution by

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

decision of a judicial or administrative authority, from which the juvenile is not permitted to leave at will.[701] 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 (4) 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.

11.2.1. Forms of detention (substantive and procedural guarantees)

Under EU law, Article 10 of the Procedural Safeguards Directive obliges Member States to ensure that the deprivation of liberty of a child at any stage of the proceedings is limited to the shortest appropriate period of time.[702] Due account is to be taken of the age and the individual circumstances of the case. Member States must ensure that detention is imposed on children only as a measure of last resort and that any detention is based on a reasoned decision, subject to judicial review by a court. Such a decision must also be subject to periodic review, at reasonable intervals of time, by a court, either *ex officio*

701 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, Rule 21.5.

702 EU, European Parliament and Council of the European Union (2016), Directive 2016/800/EU of 11 May 2016 on procedural safeguards for children suspected or accused in criminal proceedings, OJ 2016 L 132/1, Art. 10.

or following a request. Member States shall ensure that, where possible, the competent authorities have recourse to alternative measures to detention.[703]

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 for 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.[704] 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.[705]

Some of the acceptable reasons for refusing bail to the detainee in cases of pre-trial detention include the risks of absconding, of prejudicing the administration of justice, of committing further offences or of causing public disorder.

703 *Ibid.*, Art. 11; see also Charter of Fundamental Rights of the European Union, Art. 6 .

704 ECtHR, *Idalov v. Russia*, No. 5826/03, 22 May 2012, para. 112.

705 ECtHR, *Smirnova v. Russia*, Nos. 46133/99 and 48183/99, 24 July 2003, para. 58.

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.[706]

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.[707] This implies that the authorities should consider alternatives to pre-trial detention.[708] Furthermore, state authorities should display special diligence in bringing children to trial within a reasonable time.[709]

Example: In *Nart v. Turkey*,[710] 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".[711] 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.

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

706 *Ibid.*, paras. 58–59; ECtHR, *Ladent v. Poland*, No. 11036/03, 18 March 2008, para. 55.

707 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.

708 ECtHR, *Dinç and Çakır v. Turkey*, No. 66066/09, 9 July 2013, para. 63; ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009, para. 108.

709 ECtHR, *Kuptsov and Kuptsova v. Russia*, No. 6110/03, 3 March 2011, para. 91; see also Council of Europe, European Committee of Social Rights (2020), Annual Conclusions 2019, 24 March 2020.

710 ECtHR, *Nart v. Turkey*, No. 20817/04, 6 May 2008.

711 *Ibid.*, para. 31.

and violent behaviour. Article 5 (1) (d) of the ECHR primarily targets forms of detention outside the scope of the juvenile justice system.

Example: In *Blokhin v. Russia*,[712] a 12-year-old suffering from attention-deficit hyperactivity disorder, was arrested and taken to a police station on suspicion of extorting money from another child. Since he could not be prosecuted under domestic law, a court ordered his placement in a temporary detention centre for juvenile offenders for 30 days to "correct his behaviour" and prevent his committing further acts of delinquency. Recalling that detention for educational supervision must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements, the ECtHR noted that none of the domestic courts had stated that the applicant's placement in the correction facility was for educational purposes. Not did it see how any meaningful educational supervision, to change a child's behaviour and offer appropriate treatment and rehabilitation, could be provided during a maximum period of 30 days. A violation of Article 5 was found.

Example: The case of *Bouamar v. Belgium*[713] 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*[714] concerns the placement of a child in a detention centre, without charge or conviction. The applicant had a serious personality disorder. The ECtHR held that, in the context of the detention of children, the notion of 'educational supervision' should not be equated

712 ECtHR, *Blokhin v. Russia*, No. 47152/06, 23 March 2016.

713 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

714 ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002.

strictly with notions of classroom teaching. Educational supervision entails many aspects of the exercise of parental rights by the local authority for the benefit and protection of the child. The ECtHR also 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 concluded that the applicant's detention was not compatible with Article 5 (1) (d) of the ECHR.

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*,[715] 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 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.

715 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

The Procedural Safeguards Directive requires Member States to ensure that children who are detained are held separately from adults, unless it is considered to be in the child's best interests not to do so, including during police custody.[716] When a detained child reaches the age of 18, Member States must provide for the possibility to continue to hold that person separately from other detained adults only if this is compatible with the best interests of children who are detained with that person. When children are detained, Member States must take appropriate measures to ensure their health and physical and mental development; their right to education and training; their right to family life; access to reintegration programmes; and respect for their freedom of religion or belief. The measures taken must be proportionate and appropriate to the duration of the detention.

Under CoE law, the ECtHR found that detaining children together with adults might lead to a breach of Article 3[717] or Article 5 of the ECHR.[718] Further, lack of adequate medical care in detention could also raise issues under Article 3.[719] Other aspects which may potentially raise issues under Article 3 include available cell space, lighting, and recreational activities.[720] In assessing the compatibility of conditions of detention with the standards of Article 3 of 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, 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.

Example: In *Güveç v. Turkey*,[721] a 15-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

716 EU, European Parliament and Council of the European Union (2016), Directive (EU) 2016/800/EU of 11 May 2016 on procedural safeguards for children suspected or accused in criminal proceedings, OJ 2016 L 132/1, Art. 12.

717 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

718 ECtHR, *Nart v. Turkey*, No. 20817/04, 6 May 2008.

719 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

720 ECtHR, *Kuptsov and Kuptsova v. Russia*, No. 6110/03, 3 March 2011, para. 70.

721 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

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.[722]

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.[723]

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 interests 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.[724] In addition to taking reasonable measures to

722 Council of Europe, European Committee of Social Rights (2020), Annual Conclusions 2019, 24 March 2020, Art. 17 (1).

723 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, Rule 59.1.

724 ECtHR, *Anguelova v. Bulgaria*, No. 38361/97, 13 June 2002; ECtHR, *H.Y. and Hü.Y. v. Turkey*, No. 40262/98, 6 October 2005.

protect inmates, state authorities must also conduct effective investigations into arguable allegations of ill-treatment or death.

Example: The case of *Çoşelav v. Turkey* concerns the suicide of a 16-year-old in prison,[725] 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.

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 EU law, the Victim's Rights Directive 2012/29/EU 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.[726] In addition, a child-sensitive approach must prevail, which

725 ECtHR, *Çoşelav v. Turkey*, No. 1413/07, 9 October 2012.

726 EU, European Parliament and Council of the European Union (2012), Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ 2012 L 315/55.

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). It concerns 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 services should be made available (see Section 38 of the resolution accompanying the directive).[727]

The Child Sexual Abuse Directive requires a comprehensive approach for serious criminal offences such as the sexual exploitation of children and child pornography.[728] Member States must take the necessary measures to ensure that in criminal investigations of any of the offences connected to sexual abuse all interviews with the child victim or, where appropriate, with a child witness may be audiovisually recorded and that these audiovisually recorded interviews may be used as evidence in criminal court proceedings (Article 20 (4)).

727 See EU, FRA (2014), *Victims of crime in the EU: The extent and nature of support for victims*, 12 January 2015, p. 36; FRA (2015), *Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, 5 May 2015; FRA (2017), *Child-friendly justice: Perspective and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*, 22 February 2017; FRA (2018), *Children's rights and justice – Minimum age requirements in the EU*; FRA (2018), *Mapping minimum age requirements: Children's rights and justice*, 25 April 2018.

728 EU, European Parliament and Council of the European Union (2011), Directive 2011/93/EU 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 2011 L 335, .

According to the Human Trafficking Directive, a child victim must receive legal counselling and legal representation free of charge.[729] In addition to measures available to all victims of trafficking in human beings, Member States should ensure that specific assistance, support and protective measures are available to child victims. Child victims of trafficking are particularly vulnerable, so additional protective measures should be available to protect them in interviews during criminal investigations and proceedings. For example, in cases of unaccompanied children, a guardian and/or a representative should be appointed to safeguard the child's best interests. A decision on the future of each unaccompanied child victim should be taken within the shortest possible time with a view to finding a durable solution based on an individual assessment of the best interests of the child, which should be a primary consideration.

Before its replacement by the Victims' Rights 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.[730] 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).[731]

Example: In the *Pupino* case,[732] 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

729 EU, European Parliament and Council of the European Union (2011), Directive 2011/36/EU 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 2011 L 101.

730 CJEU, C-105/03, *Criminal proceedings against Maria Pupino* [GC], 16 June 2005, para. 53.

731 *Ibid.*; see also CJEU, C-507/10, *Criminal proceedings against X*, 21 December 2011.

732 CJEU, C-105/03, *Criminal proceedings against Maria Pupino* [GC], 16 June 2005.

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 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".[733] 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.[734]

Under CoE law, the ECtHR ruled that there is a duty of the state to protect victims' interests, including 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.[735] The ECtHR has a number of rulings concerning sexual offences in which children testified against the alleged perpetrators. 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.[736] 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

733 *Ibid.*, para. 53.

734 *Ibid.*, para. 59.

735 ECtHR, *Doorson v. the Netherlands*, No. 20524/92, 26 March 1996.

736 ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002, para. 47.

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.[737]

Example: In *Kovač v. Croatia*,[738] 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 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*,[739] a 10-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

737 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.

738 ECtHR, *Kovač v. Croatia*, No. 503/05, 12 July 2007.

739 ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.

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 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*[740] 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,

740 ECtHR, *R.R. and Others v. Hungary*, No. 19400/11, 4 December 2012.

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.

Example: The case of *X and Others v. Bulgaria* concerned allegations of child sexual abuse in an orphanage. In regard to the procedural part, the Court ruled that the Bulgarian authorities had breached their procedural obligation under Article 3 of the ECHR, which requires authorities to conduct an effective investigation into arguable claims of torture or inhuman or degrading treatment.[741] Although the Bulgarian authorities had taken a series of investigative steps, the Court found that these had not met the required level of 'effectiveness'. One of the reasons for this was a failure to take any steps to involve the victims in the investigation. In its interpretation of Article 3, the Court took into account other applicable international instruments and in particular the Lanzarote Convention.

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 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*[742] also pay attention to the protection of the child victim and witness, particularly when they give evidence in judicial proceedings. The guidelines call upon member States to make "[e]very

741 ECtHR, *X and Others v. Bulgaria*, No. 22457/16, 2 February 2021, paras. 192 and 228; see also Section 7.1.1.

742 Council of Europe, Committee of Ministers (2010), *Guidelines on child-friendly justice*, 17 November 2010; see also EU, FRA (2015), *Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, 5 May 2015.

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".[743] To this end, trained professionals should be involved, and, for example, audio-visual 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 need to protect 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*.[744] 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".[745] The guidelines 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.[746] 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

743 Council of Europe, Committee of Ministers (2010), *Guidelines on child-friendly justice, 17 November 2010*, para. 64.

744 UN Economic and Social Council, Resolution 2005/20, *Guidelines on justice in matters involving child victims and witnesses of crime*, 22 July 2005.

745 *Ibid.*, para. 9 (d).

746 United Nations, Committee on the Rights of the Child (2009), *General Comment No. 12 (2009) on the right of the child to be heard*, CRC/C/GC/12, 1 July 2009, paras. 62–64; United Nations, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019.

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".[747] 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".[748]

747 United Nations, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children's rights in the child justice system,* CRC/C/GC/24, 18 September 2019, para. 63.

748 *Ibid.*, para. 64.

Further reading

Chapter 1
Introduction to European children's rights law: context, and key principles

Council of Europe (2016), Disability Strategy 2017–2023, 30 November 2016.

Council of Europe (2018), Counter-terrorism Strategy (2018–2022), 4 July 2018.

Council of Europe (2018), Gender Equality Strategy 2018–2023, 7 March 2018.

Council of Europe, Committee of Ministers (2020), Council of Europe Strategic Action Plan for Roma and Traveller Inclusion (2020–2025), 22 January 2020.

Council of Europe, Committee of Ministers (2020), Youth Sector Strategy 2030, 22 January 2020.

Council of Europe, Committee of Ministers (2022), Council of Europe Strategy for the Rights of the Child (2022-2027), 23 February 2022.

Council of Europe, Committee of Ministers (2021), Action plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021–2025), 5 May 2021.

Council of Europe, Committee on Bioethics (2019), Strategic Action Plan on Human Rights and Technologies in Biomedicine (2020–2025), 18 December 2019.

ECSR (2018), *Digest of the case law of the European Committee of Social Rights*, December 2018.

EU, Council of the European Union (2021), Council Recommendation (EU) 2021/1004 establishing a European Child Guarantee, OJ 2021 L 233, 22 June 2021.

EU, European Commission (2012), *European strategy for a better internet for children*, COM(2012) 196 final, 2 May 2012.

EU, European Commission (2021), EU Strategy on the Rights of the Child, 2021.

EU, European Parliament, Council of the European Union, European Commission (2007), Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303, 14 December 2007.

FRA (2010), *Developing indicators for the protection, respect and promotion of the rights of the child in the European Union*, Luxembourg, Publications Office of the European Union (Publications Office), October 2010.

UNICEF (United Nations Children's Fund), Innocenti Research Centre (2007), *Law reform and the implementation of the Convention on the Rights of the Child*, December 2007.

UNICEF, Innocenti Research Centre (2013), *Championing children's rights: A global study of independent human rights institutions for children*, October 2012.

United Nations, Committee on the Rights of the Child (2009), *General Comment No. 12 (2009) on the right of the child to be heard*, CRC/C/GC/12, 1 July 2009.

United Nations, 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)*, CRC/C/GC/14, 29 May 2013.

Chapter 2
Civil rights and freedoms

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

Council of Europe (2016), *Child participation assessment tool*, March 2016.

Council of Europe (2019), *Media regulatory authorities and protection of minors*, Strasbourg, Council of Europe Publishing, 10 April 2019.

Council of Europe (2020), *Listen – act – change – Council of Europe handbook on children's participation for professionals working for and with children*, October 2020.

FRA (2010), *Developing indicators for the protection, respect and promotion of the rights of the child in the European Union*, Luxembourg, Publications Office, 4 November 2010.

FRA (2014), *Child-friendly justice: Key terms*, Luxembourg, Publications Office, 29 September 2014.

FRA and ECtHR (2018), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, 21 March 2018.

Chapter 3
Equality and non-discrimination

Council of Europe (2014), *LGBTI children have the right to safety and equality*, Human Rights Comment by the Council of Europe Commissioner for Human Rights, 2 October 2014.

Council of Europe, Advisory Committee on the FCNM (2006), *Commentary on education under the Framework Convention for the Protection of National Minorities*, ACFC/25DOC(2006)002, 2 March 2006.

EU, European Commission (2020), *A union of equality: EU Roma strategic framework for equality, inclusion and participation*, COM(2020) 620 final, 7 October 2020.

EU, European Commission (2020), *Union of equality: LGBTIQ equality strategy 2020–2025*, COM(2020) 698 final, 12 November 2020.

EU, European Commission (2021), *Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive')*, COM(2021) 139 final, 19 March 2021.

European Network of Legal Experts in the Non-discrimination Field, O'Dempsey, D. and Beale, A. (2011), *Age and employment*, Luxembourg, Publications Office, 17 November 2011.

FRA (2011), *Migrants in an irregular situation: Access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office, 11 October 2011.

FRA (2016), *Second European Union Minorities and Discrimination Survey: Roma – Selected findings*, Luxembourg, Publications Office, 29 November 2016.

FRA (2017), *Second European Union Minorities and Discrimination Survey – Main results*, Luxembourg, Publications Office, 6 December 2017.

FRA (2020), *A long way to go for LGBTI equality*, Luxembourg, Publications Office, 14 May 2020.

FRA and ECtHR (2018), *Handbook on European non-discrimination law*, Luxembourg, Publications Office, 21 March 2018.

Chapter 4
Personal identity issues

Council of Europe (2015), *Human rights and intersex people*, issue paper published by the Council of Europe Commissioner for Human Rights, 2015.

FRA (2015), *The fundamental rights situation of intersex people*, FRA Focus, Vienna, 12 May 2015.

Chapter 5
Family life

FRA (2014), *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Luxembourg, Publications Office, 30 June 2014.

Chapter 6
Alternative care to family care and adoption

Council of Europe (2013), *Securing children's rights – A guide for professionals working in alternative care*, December 2013.

EU, European Parliament, EPRS, European Added Value Unit (2016), *Cross-border recognition of adoptions – European added value assessment*, 30 November 2016.

European Network for Guardianship Institutions (2011), *Care for unaccompanied minors: Minimum standards, risk factors and recommendations for practitioners*, Guardianship in practice, final report, Utrecht, October 2011.

FRA (2014), *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Luxembourg, Publications Office, 30 June 2014.

United Nations, Committee on the Rights of the Child (2006), *General Comment No. 7 (2005): Implementing child rights in early childhood*, CRC/C/GC/7/Rev. 1, 20 September 2006.

United Nations, General Assembly (2010), *Guidelines for the alternative care of children*, UN Doc. A/RES/64/142, 24 February 2010.

United Nations, Human Rights Council (2009), *United Nations guidelines for the alternative care of children*, UN Doc. A/HRC/11/L.13, 15 June 2009.

Chapter 7
Child protection against violence and exploitation

Council of Europe (2005), *Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005.

Council of Europe (2018), *Safe at school: Education sector responses to violence based on sexual orientation, gender identity/expression or sex characteristics in Europe*, November 2018.

Council of Europe, Lanzarote Committee (2017), *Interpretative opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs)*, 12 May 2017.

Council of Europe, Lanzarote Committee (2017), *Special report: Protecting children affected by the refugee crisis from sexual exploitation and sexual abuse*, 3 March 2017.

Council of Europe, Lanzarote Committee (2018), *2nd implementation report: Protection of children against sexual abuse in the circle of trust: The strategies*, 31 January 2018.

Council of Europe, Lanzarote Committee (2019), *Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children*, 6 June 2019.

EU (2020), *EU strategy on victims' rights (2020–2025)*, COM(2020) 258 final, 24 June 2020.

EU, European Commission (2020), 'The EU Strategy on the Rights of the Child and the European Child Guarantee', May 2020.

EU, European Commission (2021), *EU strategy on combatting trafficking in human beings 2021–2025*, COM(2021) 171, 14 April 2021.

FRA (2009), *Child trafficking in the European Union: Challenges, perspectives and good practices*, Luxembourg, Publications Office, 7 July 2009.

FRA (2015), *Severe labour exploitation: Workers moving within or into the European Union – States' obligations and victims' rights*, Luxembourg, Publications Office, 2 June 2015.

FRA (2015), *Violence against children with disabilities: Legislation, policies and programmes in the EU*, Luxemburg, Publications Office, 2 December 2015.

UNICEF (2006), *Behind closed doors: The impact of domestic violence on children*.

UNICEF and WHO (2020), *COVID-19: Protecting children from violence, abuse and neglect in the home*, 1 May 2020.

United Nations, 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.

United Nations, 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.

Chapter 8
Economic, social and cultural rights and adequate standard of living

Council of Europe (2019), *Protecting the child from poverty: The role of rights in the Council of Europe*, Strasbourg, Publications Office, 14 November 2019.

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

Council of Europe, Parliamentary Assembly (2016), Resolution 2139 (2016), Ensuring access to health care for all children in Europe, 25 November 2016.

Council of Europe, Parliamentary Assembly (2019), Resolution 2284 (2019), Addressing the health needs of adolescents in Europe, 24 May 2019.

EU, European Commission (2020), *Feasibility study for a child guarantee – Final report*, March 2020.

FRA (2018), *Combating child poverty: An issue of fundamental rights*, Luxembourg, Publications Office, 17 October 2018.

Chapter 9
Migration and asylum

Council of Europe (2017), *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, September 2017.

Council of Europe (2018), *How to convey child-friendly information to children in migration: A handbook for frontline professionals*, Strasbourg, Council of Europe Publishing, December 2018.

Council of Europe (2018), *Legal and practical aspects of effective alternatives to detention in the context of migration – Analysis by the Steering Committee for Human Rights (CDDH)*, 7 December 2017

European Asylum Support Office (2018), *Practical guide on age assessment*, Second edition, Luxembourg, Publications Office.

European Asylum Support Office (2021), *Age assessment practices in EU+ countries: Updated findings*, Luxembourg, Publications Office, July 2021.

European Parliament Committee on Civil Liberties (2013), *Report on the situation of unaccompanied minors in the EU*, 2012/2263(INI), 26 August 2013.

Eurydice, European Commission (DG Education and Culture) (2009), *Integrating immigrant children into schools in Europe*, April 2009.

FRA (2010), *Separated, asylum-seeking children in European Union Member States*, Luxembourg, Publications Office, 07 December 2010.

FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office, 7 April 2017.

FRA (2011), *Migrants in an irregular situation: Access to healthcare in 10 European Union Member States*, Luxembourg, Publications Office, 11 October 2011.

FRA (2017), *Together in the EU: Promoting the participation of migrants and their descendants*, Luxembourg, Publications Office, 15 March 2017

FRA (2019), *Integration of young refugees in the EU: good practices and challenges*, Luxembourg, Publications Office, 19 November 2019.

FRA (2020), *Relocating unaccompanied children: Applying good practices to future schemes*, Luxembourg, Publications Office, 11 May 2020.

FRA and ECtHR (2020), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office, 17 December 2020.

United Nations High Commissioner for Refugees (2018), *The 'essential right' to family unity of refugees and others in need of international protection in the context of family reunification*, Legal and Protection Policy Research Series, Geneva, Division of International Protection, January 2018.

United Nations (2019), *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017.

United Nations, Committee on the Rights of the Child (2005), *General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/61, 1 September 2005.

Chapter 10
Personal data and consumer protection

Council of Europe, Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data

(Convention 108) (2019), *Children's data protection in education systems: Challenges and possible remedies*, 11 September 2019.

Council of Europe, Lanzarote Committee (2017), *Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs)*, 12 May 2017.

Council of Europe, Lanzarote Committee (2018), *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*, Recommendation CM/Rec(2018)7, September 2018.

Council of Europe Commissioner for Human Rights (2019), *Unboxing artificial intelligence: 10 steps to protect human rights*, 14 May 2019.

FRA (2018), *Handbook on European data protection law – 2018 edition*, Luxembourg, Publications Office, 25 May 2018.

United Nations, Committee on the Rights of the Child (2021), *General Comment No. 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25, 24 March 2021.

Chapter 11
Children's rights within criminal justice and alternative (non-judicial) proceedings

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

EU, European Commission (2014), *Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 Member States of the European Union*, Luxembourg, Publications Office, 16 April 2014.

FRA (2014), *Violence against women: An EU-wide survey – Main results*, Luxembourg, Publications Office, 5 March 2014.

FRA (2014), *Victims of crime in the EU: The extent and nature of support for victims*, Luxembourg, Publications Office, 12 January 2015.

FRA (2015), *Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, Luxembourg, Publications Office, 5 May 2015.

FRA (2017), *Child-friendly justice – Perspective and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*, Luxembourg, Publications Office, 22 February 2017.

FRA (2018), *Children's rights and justice – Minimum age requirements in the EU*, Luxembourg, Publications Office, 25 April 2018

FRA (2018), *Mapping minimum age requirements: Children's rights and justice*, Luxembourg, Publications Office, 25 April 2018.

FRA and ECHR (2016), *Handbook on European law relating to access to justice*, Luxembourg, Publications Office, 22 June 2016.

United Nations, 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.

United Nations, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019): Children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019.

Case law

Case law of the Court of Justice of the European Union

Case law of the European Court of Human Rights

Case law of the European Committee of Social Rights

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 GC 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 **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, a **simple Boolean search** is available by clicking on the arrow appearing inside the **Search field**. The 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 down 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 down 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, and a concise presentation of the facts and the law, with an 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.[749] 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 click 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 cases

749 Available since 30 April 2004: Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish; since 1 May 2004: Czech, Estonian, Hungarian, Latvian, Lithuanian, Polish, Slovak and Slovenian; 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*.

from any year and before any of the three courts: the Court of Justice, the General Court and/or the Civil Service Tribunal.

Alternatively, one can also use the **Name of parties** field to search using 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 multifunctional search fields available to help narrow down 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.

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 andin 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/.

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/.

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/.

National case-law: 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 at http://curia.europa.eu/jcms/jcms/Jo2_7062/.

Legal instruments referenced

United Nations legal instruments

On core UN treaties, including the CRC, and their monitoring bodies, see https://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 https://www.hcch.net/en/instruments/conventions.

Council of Europe 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 the European Union Fundamental Rights Information System on the FRA website at https://fra.europa.eu/en/databases/efris/.

Short-hand name	Full reference
Children's rights/civil rights	
Convention for the Protection of Human Rights and Fundamental Freedoms	Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, CETS No. 5, Rome, 4.11.1950, pp. 1–15.
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms	Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, CETS No. 9, Paris, 20.3.1952, pp. 1–3.
Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms	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.
European Convention on the Exercise of Children's Rights	European Convention on the Exercise of Children's Rights, CETS No. 160, Strasbourg, 25.1.1996, pp. 1–10.
European Convention on the Legal Status of Children Born out of Wedlock	European Convention on the Legal Status of Children Born out of Wedlock, CETS No. 85, Strasbourg, 15.10.1975, pp. 1–5.
Convention on Human Rights and Biomedicine	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.
Personal identity issues	
Framework Convention for the Protection of National Minorities	Framework Convention for the Protection of National Minorities, CETS No. 157, Strasbourg, 1.2.1995, pp. 1–10.
European Convention on Nationality	European Convention on Nationality, CETS No. 166, Strasbourg, 6.11.1997, pp. 1–13.
Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession	Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, CETS No. 200, Strasbourg, 19.5.2006, pp. 1–7.
Family life and parental care	
Convention on Contact concerning Children	Convention on Contact concerning Children, CETS No. 192, Strasbourg, 15.5.2003, pp. 1–13.
European Convention on the Adoption of Children (revised)	European Convention on the Adoption of Children (revised), CETS No. 202, Strasbourg, 27.11.2008, pp. 1–11.
European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children	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.

Short-hand name	Full reference
Child protection against violence and exploitation	
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	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.
European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CETS No. 126, Strasbourg, 26.11.1987, pp. 1–9.
Convention on Cybercrime	Convention on Cybercrime, CETS No. 185, Budapest, 23.11.2001, pp. 1–27.
Council of Europe Convention on Action against Trafficking in Human Beings	Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, Warsaw, 16.5.2005, pp. 1–21.
Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence	Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, Istanbul, 11.5.2011, pp. 1–31.
Economic, social and cultural rights	
European Social Charter	European Social Charter, CETS No. 35, Turin, 18.10.1961, pp. 1–18.
European Social Charter (revised)	European Social Charter (revised), CETS No. 163, Strasbourg, 3.5.1996, pp. 1–29.
Migration and asylum	
European Convention on the Repatriation of Minors	European Convention on the Repatriation of Minors, CETS No. 71, The Hague, 28.5.1970, pp. 1–9.
European Convention on the Legal Status of Migrant Workers	European Convention on the Legal Status of Migrant Workers, CETS No. 93, Strasbourg, 24.11.1977, pp. 1–14.
European Convention on Social Security	European Convention on Social Security, CETS No. 78, Paris, 14.12.1972, pp. 1–42.
European Code of Social Security (revised)	European Code of Social Security CETS No. 139, Strasbourg, 06.11.1990, pp. 1–33.
Consumer and data protection	
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data	Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, Strasbourg, 28.1.1981, pp. 1–10.
European Convention on Transfrontier Television	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	Full reference
Non-discrimination	
Racial Equality Directive (2000/43/EC)	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.
Employment Equality Directive (2000/78/EC)	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.
Gender Goods and Services Directive (2004/113/EC)	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.
Family life and parental care	
Brussels IIa Regulation (recast)	Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, OJ L 178, 2.7.2019, pp. 1–115.
Maintenance Regulation (EC) No. 4/2009	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.
Mediation Directive (2008/52/EC)	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.
Access to Justice Directive (2002/8/EC)	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.
Work–Life Balance Directive (2019/1158)	Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, pp. 79–93
Child protection against violence and exploitation	
Young Workers Directive (94/33/EC)	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.

Short-hand name	Full reference
Anti-Trafficking Directive (2011/36/EU)	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.
Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU)	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.
Victims' Rights Directive (2012/29/EU)	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.
Residence Permits for Victims of Trafficking Directive (2004/81/EC)	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.
Commission Decision 2007/698/EC	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.
Directive establishing the European Electronic Communications Code (recast) (2018/1972)	Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (recast), OJ L 321, 17.12.2018, pp. 36–214.
Audiovisual Media Services Directive (recast) (2018/1808)	Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 303, 28.11.2018, pp. 69–92.
Directive on electronic commerce (2000/31/EC)	Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, pp. 1–16.
Directive on privacy and electronic communications (2002/58)	Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, pp. 37–47.
Migration and asylum, including social rights of migrant children	
Asylum Procedures Directive (2013/32/EU)	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.

Short-hand name	Full reference
Dublin Regulation (EU) No. 604/2013	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.
Qualification Directive (2011/95/EU)	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.
Regulation (EU) No. 492/2011	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.
Free Movement Directive (2004/38/EC)	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.
Council Directive 77/486/EEC on the education of the children of migrant workers	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.
Family Reunification Directive (2003/86/EC)	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, pp. 12–18.
Temporary Protection Directive (2001/55/EC)	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.
Reception Conditions Directive (2013/33/EU)	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.
Return Directive (2008/115/EC)	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.

Short-hand name	Full reference
Long-term Residentce Directive (2003/109/EC)	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.
Schengen Borders Code Regulation (EC) No. 562/2006	Regulation (EC) No. 562/2006 of the European Parliament and of the Council o f15 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.
Consumer and personal data protection	
Consumer Rights Directive (2011/83/EU)	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.
Directive 87/357/EEC concerning products which, appearing to be other than they are, endanger the health or safety of consumers	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.
Distance Selling Directive (97/7/EC)	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.
General Product Safety Directive (2001/95/EC)	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.
Regulation on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control	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. Regulation 609/2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009, OJ L 181, 29.6.2013, pp. 35–56
Toy Safety Directive (2009/48/EC)	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.

Short-hand name	Full reference
Audiovisual Media Services Directive (recast) (2018/1808)	Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 303, 28.11.2018, pp. 69–92.
General Data Protection Regulation (2016/679)	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016, pp. 1–88.
Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector	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.
Directive on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (2016/680/EU)	Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data and repealing Council Framework Decision 2008/977/JHA, OJ L119, 4.5.2016, pp. 89–131.
Unfair Business-to-Consumer Commercial Practices Directive (2005/29/EC)	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.
Regulation 536/2014 on clinical trials on medicinal products for human use	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.
Criminal justice and alternative proceedings	
Right to Interpretation and Translation Directive (2010/64/EU)	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.

Short-hand name	Full reference
Right to Information Directive (2012/13/EU)	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.
Access to a Lawyer Directive (2013/48/EU)	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.
Charter of Fundamental Rights	Charter of Fundamental Rights of the European Union, OJ 2021 C 326, 26.10.2012, pp. 391–407.
Directive on procedural safeguards for children who are suspected or accused persons in criminal proceedings (2016/800)	Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspected or accused persons in criminal proceedings, OJ L 132, 21.5.2016, pp. 1–20.
Children with disabilities	
Council Decision 2010/48/EC	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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doi:10.2811/610564 TK-09-21-398-EN-N

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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Children are full-fledged holders of rights. They are beneficiaries of all human and fundamental rights and subjects of special regulations, given their specific characteristics. This handbook aims to illustrate how European law and case law accommodate the specific interests and needs of children. It also considers the importance of parents and guardians or other legal representatives and makes reference, where appropriate, to situations in which rights and responsibilities are most prominently vested in children's carers.

This handbook aims to raise awareness and improve knowledge of the legal standards that protect and promote children's rights in Europe. It is a point of reference on both European Union (EU) and Council of Europe (CoE) law related to these subjects, explaining how each issue is regulated under EU law, including the Charter of Fundamental Rights of the European Union, as well as under the European Convention on Human Rights, the European Social Charter and other CoE instruments.

The 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. It explains key jurisprudence, summarising major rulings of both the Court of Justice of the European Union and the European Court of Human Rights.

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Publications Office

ISBN 978-92-871-9750-4 (CoE)
ISBN 978-92-9461-457-5 (FRA)