

# Returning unaccompanied children: fundamental rights considerations

## FRA Focus

*Individuals who are not entitled to stay in the European Union are typically subject to being returned to their home countries. This includes children who are not accompanied by their parents or by another primary caregiver. But returning such children, or finding another durable solution, is a delicate matter, and doing so in full compliance with fundamental rights protections can be difficult. This focus paper therefore aims to help national authorities involved in return-related tasks, including child-protection services, to ensure full rights compliance.*

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## Introduction

Individuals who are not entitled to stay in a European Union (EU) Member State are typically subject to being returned to their home country – in accordance with the Return Directive (Directive 2008/115/EC), the main EU law instrument regulating returns.<sup>1</sup> The directive also applies to children, including those who are not accompanied by their parents.

From a fundamental rights point of view, returning migrants to their home countries is a sensitive activity. EU Member States face particular challenges in applying the requirements flowing from EU law to unaccompanied children, the EU Agency for Fundamental Rights (FRA) has observed. This focus paper therefore aims to support national authorities entrusted with return-related tasks in applying the Return Directive to unaccompanied children in full compliance with fundamental rights. It complements a FRA report on immigration detention of children, published in 2017.<sup>2</sup>

### Note on terminology: who are ‘unaccompanied children’?

Unaccompanied children are children who are not accompanied by their parents or a primary caregiver.\* Although taken from the EU asylum *acquis*, this definition can also be used in the context of return. Under EU law, this definition also encompasses children who are accompanied by family members other than their parents or primary caregiver, and who are often referred to as ‘separated children’.\*\* Under international and EU law, a child is any person under the age of 18.\*\*\*

\* 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 (Reception Conditions Directive), Art. 2 (e).

\*\* UN, Committee on the Rights of a Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, 1 September 2005, para. 8.

\*\*\* UN Convention on the Rights of the Child (CRC), 20 November 1989 (UNTS No. 27531, vol. 1577, p. 3), Art. 1; Reception Conditions Directive, Art. 2 (d).

This focus paper is structured as follows:

- **Section 1** gives an overview of the issue and of EU Member States practices.
- **Section 2** presents the ‘best interests of the child’ as an overarching principle in any action affecting children, which is also applicable in the context of returns.
- **Section 3** gives guidance on how to assess the best interests of the child.
- **Section 4** looks at two specific scenarios at the border affecting unaccompanied children, namely non-admission at the border and passing back to another Member State.
- **Section 5** describes how to implement the outcome of the best interest assessment.
- **Section 6** briefly discusses child-protection oversight and monitoring.

The analysis takes the relevant provisions of the Return Directive as a starting point, alongside its implementation guidance, the non-legally binding Return Handbook.<sup>3</sup> The provisions of the Return Directive are analysed in light of the EU Charter of Fundamental Rights<sup>4</sup> (the ‘Charter’); the European Convention on Human Rights<sup>5</sup> (ECHR), as interpreted by the European Court of Human Rights (ECtHR); the United Nations Convention on the Rights of the Child (CRC),<sup>6</sup> as interpreted by its monitoring body, the Committee on the Rights of the Child (CRC Committee); as well as other instruments of international law binding on all Member States, including the 1996 Hague Convention on Child Protection.<sup>7</sup>

1 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, 12.24.2008, pp. 98-107. The Return Directive was proposed to be recast in September 2018 (see European Commission (2018)). For a fundamental-rights centred analysis of the recast proposal, see FRA (2019).

2 In June 2017, FRA published a comprehensive report on the European legal and policy framework on the immigration detention of children (see FRA (2017b)). See also FRA’s earlier report on detention of third country nationals in return procedures (FRA 2010). These comparative reports cover pre-removal detention of unaccompanied children and its fundamental rights implications.

3 Commission Recommendation of 27.09.2017 establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks, C(2017) 6505 final, Brussels, 27.09.2017, Annex (Return Handbook).

4 Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

5 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (ETS No. 5).

6 United Nations Convention on the Rights of the Child, New York, 20 November 1989 (1577 U.N.T.S., p. 3).

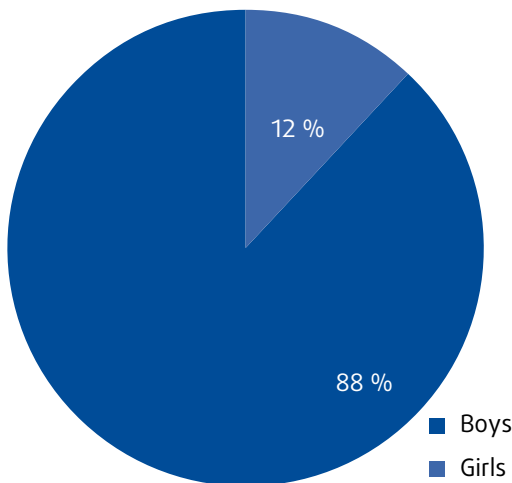
7 Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, 19 October 1996. All EU Member States are parties to it.

# 1. The phenomenon and Member States' practices

A significant number of children arrive in EU Member States without their parents or other primary caregiver.<sup>8</sup> As Figure 1 shows, according to Eurostat, almost 20,000 unaccompanied children sought asylum in the EU in 2018; over 31,000 did so in 2017. Most are boys (88 %).

**Figure 1: Unaccompanied children seeking asylum in the EU (2009-2018), by gender, absolute numbers and %**

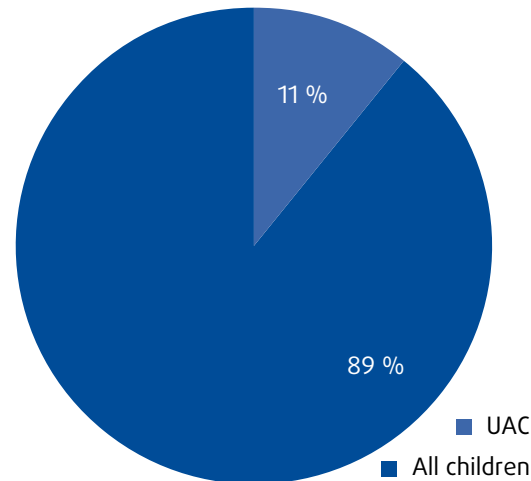
	Total	Boys	Girls
2009	12,225	10,115	2,090
2010	10,620	8,485	2,125
2011	11,695	9,655	2,035
2012	12,545	10,490	2,075
2013	12,730	10,655	2,070
2014	23,160	19,920	3,220
2015	95,215	86,430	8,270
2016	63,250	56,415	5,990
2017	31,405	27,795	3,585
2018	19,745	16,935	2,795



Source: Eurostat, migr\_asyunaa, data extracted on 4 June 2019

More than one in ten children who applied for asylum in 2017 and 2018 were unaccompanied, as Figure 2 shows.

**Figure 2: Proportion of asylum-seeking children who were unaccompanied, 2017 and 2018**



Note: UAC = unaccompanied children  
Source: Eurostat, migr\_asyappctza and migr\_asyunaa, data extracted on 22 July 2019

Among unaccompanied children who sought asylum in 2017 and 2018, most were nationals of the following countries: Afghanistan, Eritrea, The Gambia, Guinea, Pakistan and Syria (see Figure 3).

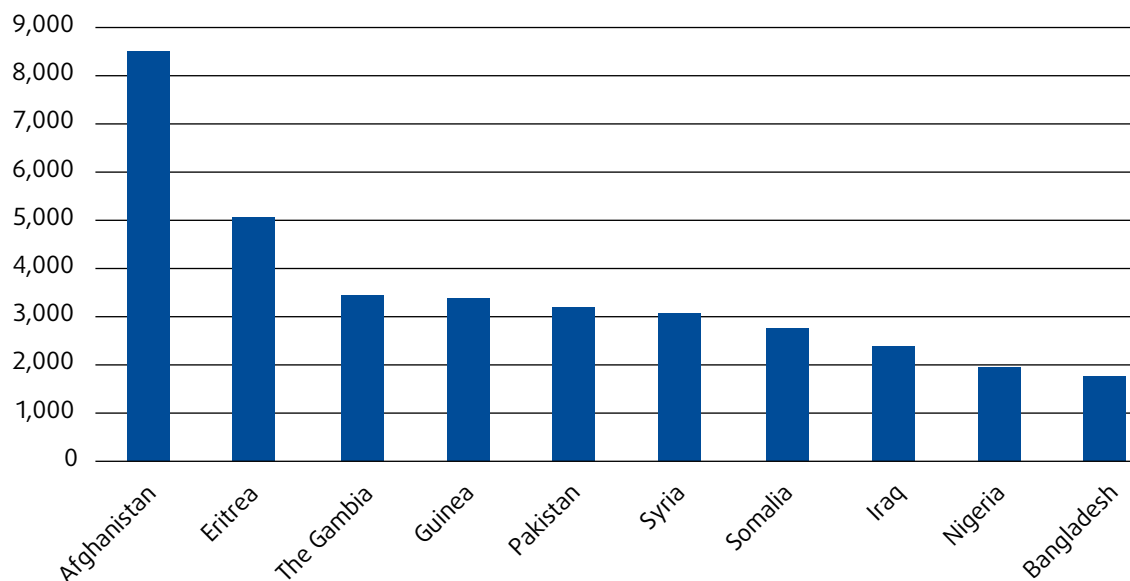
Asylum statistics do not provide the full picture, however. They do not include unaccompanied children who do not apply for international protection, which is the case with many unaccompanied children in France, with Moroccan children in Spain, and with Albanian children in Italy.

Policies on the return of unaccompanied children vary considerably across EU Member States. Some – for example, France and Italy – provide a right to stay to unaccompanied children.<sup>9</sup> The majority of EU Member States do not prohibit forced returns of unaccompanied children, but never – or rarely – remove them in practice. Instead, they provide unaccompanied children with a legal status, at least until they reach the age of majority.

<sup>8</sup> See FRA's periodic overviews of migration-related fundamental rights concerns.

<sup>9</sup> In France, unaccompanied children are covered by the law on child welfare and not required to hold a residence permit. In Italy, a residence permit for unaccompanied children exists, see Law No. 47/ 2017, Art. 10 (1) (a).

**Figure 3: Unaccompanied children seeking asylum, 2017 and 2018, top nationalities**



Source: Eurostat, migr\_asyunaa, data extracted on 22 July 2019

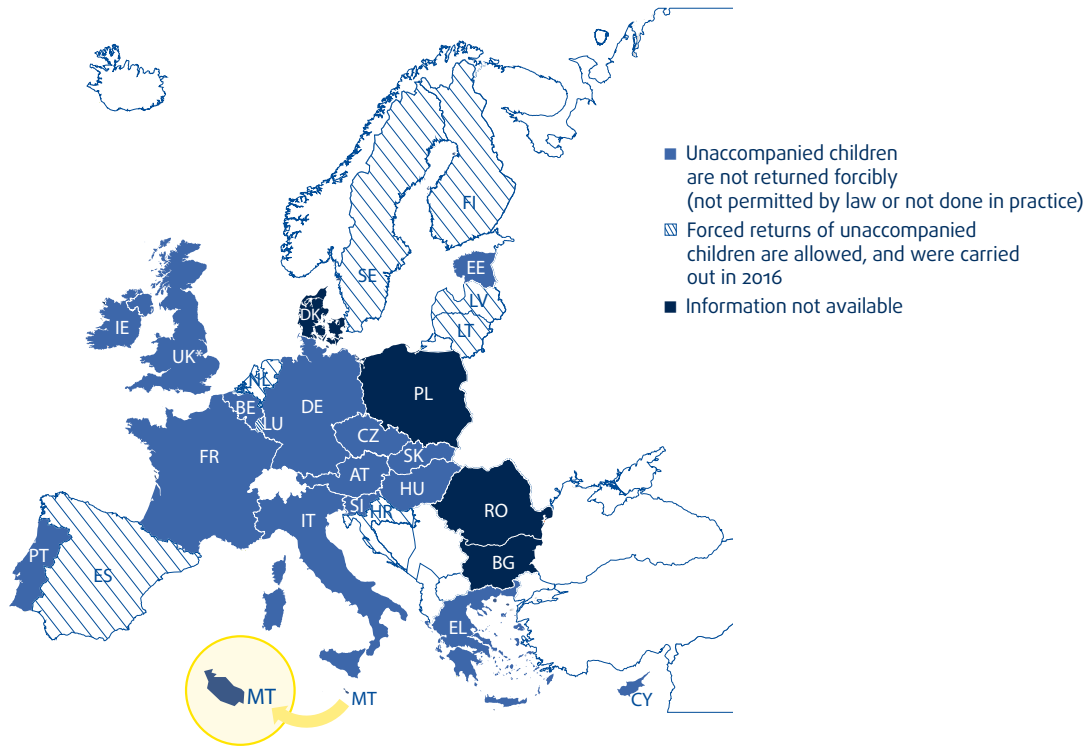
When returns of unaccompanied children do take place, most are voluntary. For instance, in 2016, Germany helped 170 unaccompanied children to return; Sweden and the Netherlands carried out 103 and 60 voluntary returns, respectively. According to an ad hoc query launched within the European Migration Network in 2017, eight EU Member States reported that they had carried out forced returns of unaccompanied children in 2016. These include Croatia

(70 children), Latvia (22 children), Sweden (21 children), the Netherlands (ten children), Finland (fewer than ten children), Spain (five children), and Luxembourg and Lithuania (one child each).<sup>10</sup> In the United Kingdom, Home Office guidance sets out the procedure to follow in case of removal (forced return) of a child.<sup>11</sup> Figure 4 illustrates EU Member States' practices in relation to returning, or not returning, unaccompanied children.

<sup>10</sup> European Migration Network, *EMN Ad-Hoc Query on Return of Unaccompanied Minors, requested by FI EMN NCP on 3rd March 2017, compilation*.

<sup>11</sup> United Kingdom, Home Office, *Children's asylum claims, version 2.0, 9 October 2017*.

**Figure 4: EU Member States’ practices concerning the forced return of unaccompanied children**



Note: \* For the United Kingdom, no numbers of forced returns were available. However, the Home Office’s guide on children’s asylum claims outlines the steps to be taken in returns of unaccompanied children, which include removal (forced return).

Source: FRA, 2019 [based on European Migration Network (2018), *Approaches to Unaccompanied Minors following Status Determination, in the EU plus Norway – Synthesis Report for the EMN Study*; EMN Ad-Hoc Query on Return of Unaccompanied Minors, requested by FI EMN NCP on 3rd March 2017, *compilation*; and, for the United Kingdom, Home Office (2017), *Children’s asylum claims*, version 2.0, 9 October 2017]

## 2. Best interests of the child – an overarching principle

### EU Charter of Fundamental Rights

#### Article 24 – Rights of the child

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

The best interests of the child are the starting point when examining the return of unaccompanied children in an irregular situation. This horizontal principle serves as a yardstick throughout all return-related actions and decisions.

The best interests of the child principle is one of the four guiding principles of the CRC (Article 3). It is also a central element of the rights of the child protected by the Charter and the Treaty on European Union (TEU, Article 3 (3)). The Court of Justice of the EU (CJEU) has expressly recognised the need to respect children’s rights and requires Member States to take due account of the CRC when implementing EU law.<sup>12</sup> It has stressed that, when authorities make any return-related decisions, the best interests of the child must be taken into due account.<sup>13</sup>

The principle of the best interests of the child is also mirrored in secondary EU legislation on return. The Return Directive specifies that, when implementing this directive, Member States’ authorities must take due account of the best interests of the child, which must be a primary consideration in their actions.<sup>14</sup>

When deciding on the return of an unaccompanied child who does not have the right to stay in the EU, immigration law enforcement authorities, the police and other return-enforcing authorities are obliged to give primary consideration to the child’s best interests. This requires the early involvement of child

protection services, who should remain engaged during all steps of the return procedure.

As clarified by the CRC Committee, the principle of the best interests of the child applies at two different levels. First, it applies when making a decision that affects an individual child. Second, the principle also obliges states to reflect it in laws, policies and practices at all levels of government.<sup>15</sup>

According to the CRC Committee and the UN Migrant Workers Committee, the principle of the best interests of the child is not only an interpretative legal principle: it is also a substantive right and a rule of procedure.<sup>16</sup> It requires EU Member States to take proactive measures and to set up specific procedures to assess the best interests of the child before taking any decision affecting the child. The CRC Committee recommends, in its General Comment No. 14 on best interests of the child, that any decision concerning a child must be motivated, justified and explained.<sup>17</sup> This is particularly important when deciding on a durable solution for the child, as it will affect significantly the child’s future.

Various international soft law instruments offer interpretative and operational guidance on the assessment and determination of the best interests of the child. In addition, the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children’s Fund (UNICEF) and the European Asylum Support Office (EASO) developed practical guidance. Such materials are set out in [Table 1](#).

12 CJEU, C-540/03, *European Parliament v. Council of the European Union* [GC], 27 June 2006, paras. 37, 57; CJEU, C-244/06, *Dynamic Medien Vertriebs GmbH v. Avides Media AG*, 14 February 2008, para. 39.

13 CJEU, C-82/16, *K.A. and Others* [GC], 8 May 2018, paras. 103, 107.

14 See Return Directive, Art. 5 (a) and Art. 10 (1), read together with recital (22). These provisions have also been recalled in the case law of the CJEU; see CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, para. 48.

15 UN, Committee on the Rights of the Child (CRC Committee), *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, para. 15a; UN, CRC Committee, *General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003, para. 12.

16 UN, CRC Committee, *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, para. 6; subsequently confirmed and detailed by UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *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, paras. 27-32.

17 UN, CRC Committee, *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, para. 97.

**Table 1: Main interpretative tools to help determine the best interests of the child in the context of migration**

International organisation /EU body (source)	Title of document
UN Committee on the Rights of the Child & UN Migrant Workers Committee	<i>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</i> , 16 November 2017
UN Committee on the Rights of the Child	<i>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)</i> , 29 May 2013
UN Committee on the Rights of the Child	<i>General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin</i> , 1 September 2005
UNHCR & UNICEF	<i>Joint guidance on the determination of the best interests of unaccompanied and separated children</i> , 2014
UNHCR	<i>Guidelines on Determining the Best Interests of the Child</i> , November 2018 [provisionally released]
EASO	<i>Practical guide on the best interests of the child in asylum procedures</i> , 2019

Source: FRA, 2019

The weight to give to the best interests of the child varies according to the type of decision involved. Decisions on parental rights, custody or adoption must follow what is in the best interests of the child, which in these cases is not just primary but ‘paramount’,<sup>18</sup> meaning that the best interests of the child are to be the determining factor.<sup>19</sup> For other decisions, including return decisions and removal orders, the best interests of the child are a central, but not the only, factor to consider. Article 3 of the CRC and Article 24 of the Charter require that they be given primary consideration, which means that the child’s best interests must bear more weight than other factors.<sup>20</sup> This does not exclude, however, weighing them in relation to other legitimate interests or protected rights. Under specific

circumstances, these other considerations – when rights-based – could outweigh the best interests of the child. Non rights-based arguments, such as those relating to general migration control, cannot override best interests’ considerations, according to the CRC Committee and the Parliamentary Assembly of the Council of Europe.<sup>21</sup> This balancing exercise requires a formal procedure to assess the different interests at stake when deciding on returning an unaccompanied child. In this regard, the European Court of Human Rights ruled that the extreme vulnerability of a child takes precedence over the person’s status as a migrant in an irregular situation.<sup>22</sup> Migrant children should thus be treated first and foremost as children.<sup>23</sup>

18 CRC, Art. 9 and Art. 21.

19 UN, CRC Committee, *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, para. 38.

20 UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *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, para. 28.

21 UN, CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 86; Council of Europe, Parliamentary Assembly (2011a), para. 5.15.

22 ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 55; ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, para. 56.

23 Council of Europe, Parliamentary Assembly (2011b), p. 5.

### 3. Assessing the child's best interests

#### Return Directive, Article 10 (1)

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

This section focuses on how to assess the best interests of the unaccompanied child before issuing a return decision, granting the child a right to stay, or adopting another durable solution. It does not, however, look at situations in which unaccompanied children are reunited with their parents in another EU Member State or in a third country other than the country of origin.

#### 3.1 A formal 'best interests' assessment

An unaccompanied child may find him or herself in an irregular situation in different circumstances, as Figure 5 illustrates. The child may be apprehended after irregularly crossing a border or while living in an EU Member State without papers. The child may have applied for international protection and received a final, negative decision. Or the child's residence permit may have been rejected, withdrawn or not renewed.

At this initial stage, the Return Directive forms the basic legal framework under EU law for deciding whether or not the child should be allowed to stay. This is the phase before initiating the return

procedure *per se*, with immigration authorities deciding on either issuing a return decision or regularising the child's stay pursuant to Article 6 (4) of the Return Directive.<sup>24</sup> As noted, granting some form of residence right is the default option in some EU Member States.

The Return Directive does not exist in a legal vacuum. Member States must in practice implement and apply its provisions in accordance with international human rights standards, including those in the CRC, and with refugee protection obligations, as well as with the Charter.<sup>25</sup> As shown in Figure 5, this means that the child's best interests must be assessed before making a decision on the child's future. The European Parliament has also called on Member States to implement the principle of the best interests of the child "for all decisions concerning children [in the context of migration], regardless of their status."<sup>26</sup>

The CRC Committee authoritatively asserted, in its General Comment No. 6, that the ultimate aim in addressing the fate of unaccompanied children is to identify a 'durable solution' that addresses all their protection needs; takes into account the child's views; and overcomes the child's situation of being without parents or caretakers.<sup>27</sup> Aside from returning an unaccompanied child to his or her country of origin, and in some specific cases, resettlement with family members in a third country, 'durable solutions' for them encompass integration into the host Member State and granting some form of legal status in accordance with the national law of Member States.<sup>28</sup> A durable solution must give primary consideration to the child's best interests. This requires determining the best interests on the basis of the child's individual circumstances.

24 Art. 6 (4): "Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay."

25 See Return Directive, recitals (22) and (24) and Art.1.

26 European Parliament (2018), para. J.A.

27 UN, CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/ GC/2005/6, 1 September 2005, para. 79.

28 See the Anti-Trafficking Directive (Directive 2011/36/EU), recital (23) (in the context of unaccompanied child victims of trafficking).



## ‘Best interests assessment’ and ‘best interests determination’

According to the CRC Committee, the ‘best-interests assessment’ consists of evaluating and balancing all the elements necessary to take a decision in a specific situation for a specific child. When deciding on a durable solution for the child, the term ‘best-interests determination’ is generally used to underline that, in such situations, the assessment of the best interests must follow a formal process with strict procedural safeguards.

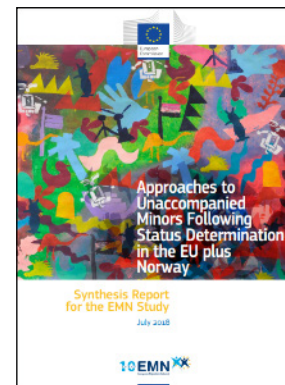
*UN, CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC /C/GC/14, 29 May 2013, para. 47. See also UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, 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, para. 31. See also UNHCR & UNICEF (2014), p. 16, Figure 1.*

When assessing the child’s best interests for purposes of finding a durable solution for the child, return is thus only one of the options to be considered (see [Figure 5](#)).<sup>29</sup> Regularisation and integration into the receiving Member State or transfer to another Member State or a third country (e.g. for family reunification purposes) must also be duly considered. Given that the rights guaranteed by the CRC must apply to all children under the Member States’ jurisdiction, irrespective of their status and without discrimination (Article 2), access to education, healthcare and psychosocial support should be ensured while awaiting the identification of a durable solution.

The European Commission also underlined, in its 2017 Communication on the protection of children in migration, that “the identification of durable solutions should look at all options, such as integration in a Member State, return to the country of origin, resettlement or reunification with family members in a third country. It is essential that a thorough best interest determination be carried out in all cases.”<sup>30</sup> Therefore, the identification of a durable solution needs to be based on a comprehensive approach, after having reviewed all possible options that best safeguard the best interests of the particular child.

EU Member State practices with respect to assessing the best interests of unaccompanied children are diverse. They depend not only on the Member State concerned, but also on the different actors, or on the specific procedure, involved.<sup>31</sup> Initial evidence suggests that most best interest

assessments are informal, undertaken on an ad hoc basis, with no systematic method, and with no record being made of the assessments.<sup>32</sup> According to a study by the European Migration Network, only half of the EU Member States have established legal or policy provisions that mandate the assessment of an unaccompanied child’s best interests during the return procedure: Austria, Belgium, the Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Spain, and Sweden. Finland and Sweden have issued specific operational guidance to facilitate the work of relevant immigration authorities in conducting best interest assessments.<sup>33</sup>



29 See e.g. UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *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, para. 33.

30 European Commission, COM(2017) 211 final, p. 11. The EU Anti-Trafficking Directive (Directive 2011/36/EU) equally identifies these options as durable solutions (see recital (23)).

## 3.2 Assistance by appropriate bodies

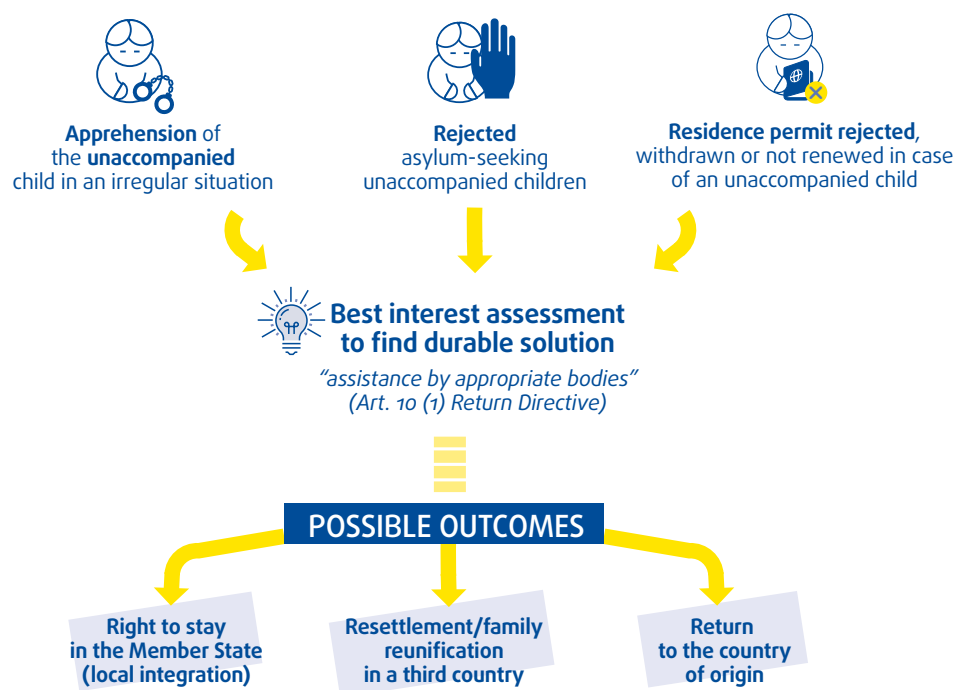
The assessment to determine whether return or another durable solution is in the best interests of a child should be carried out by the competent

31 UNHCR & UNICEF (2014).

32 FRA (2018), Section 8.2.3.

33 European Migration Network (2018), Section 4.1.1.

**Figure 5: Overview of the ‘best interests’ assessment and determination in the context of return and the possible outcomes**



Source: FRA, 2019

authorities under national law, and on the basis of a multidisciplinary approach. It should involve, at minimum, the child, the child’s appointed guardian, the parents in the country of origin, and the competent child-protection services.<sup>34</sup> Evaluating the individual circumstances and needs of each child before taking a return decision is a key safeguard for preventing unlawful returns.<sup>35</sup>

A central requirement under Article 10 (1) of the Return Directive is the “assistance by appropriate bodies”. Their assistance should start at the earliest possible point in time, before the launch of the return procedure.<sup>36</sup> The Council of Europe’s Twenty

Guidelines on forced return enshrine a similar obligation to provide assistance to the child.<sup>37</sup>

According to the Commission’s guidance,<sup>38</sup> the “appropriate bodies other than the authorities enforcing return” should be separate from the return-enforcing authorities. These could be a governmental body, a non-governmental body, or a combination of both, providing for multidisciplinary cooperation between government-supported and non-governmental guardian systems and/or child-protection services. Their “appropriateness” is to be assessed by the competent authority using objective criteria – such as expertise in the area of child rights and child protection and their previous activities.<sup>39</sup> UNHCR and UNICEF underline the central role of actors with child-protection expertise and a core mandate to protect children, as is the case for child-protection services.<sup>40</sup> Child-protection services need to comply with the standards established in the areas of safety, health, suitability of staff and competent supervision. When more

34 Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600 (OJ L 66, 11.3.2017, pp. 15-21), para. 13 (d); and also reiterated in the Return Handbook, p. 44. See also UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *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, para. 32 (c).

35 European Council on Refugees and Exiles & Save the Children (2011), p. 20.

36 Return Handbook, p. 46.

37 Guideline No. 2 (5): “Before deciding to issue a removal order in respect of a separated child, assistance – in particular legal assistance – should be granted with due consideration given to the best interests of the child.”

38 Return Handbook, p. 46.

39 Lutz, F. & Mananashvili, S. (2016), p. 706.

40 UNHCR & UNICEF (2014).

actors are involved, the different roles and responsibilities of each actor must be clear and transparent for the unaccompanied child to allow for his/her active involvement and effective participation.

Article 10 (1) of the Return Directive does not specify the kind of “assistance” to be granted. The term “assistance” needs to be interpreted in a way that gives it meaningful content and takes duly into account the best interests of the child. However, a fundamental aspect of this “assistance” is the assessment of the child’s best interests.

Nonetheless, assistance should not be limited to a one-off assessment of the child’s best interests. Instead, it should include other forms of support to promote the child’s well-being. It should be continuous and stable, covering the return and – if possible – the post-return phase.<sup>41</sup> Different aspects of this kind of assistance are expressly mentioned by the Return Directive – such as legal assistance, provision of necessary medical assistance and health care, contact with family, access to basic education<sup>42</sup> – to support the realisation of the rights of the child as set out in the CRC.

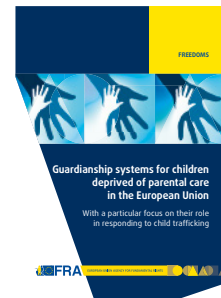
If needed due to uncertainty about the unaccompanied child’s age, such assistance may include a timely and multidisciplinary age-assessment procedure, with the child given the benefit of the doubt when the procedure is inconclusive.<sup>43</sup> The Return Directive does not contain provisions on age assessments. However, based on a systemic interpretation of the Union migration and asylum *acquis*, the Commission recommends<sup>44</sup> referring to the relevant provisions of the Asylum Procedures Directive (Directive 2012/32/EU,<sup>45</sup> Article 25 (5)), as well as taking into account related guidance developed by EASO.<sup>46</sup> The European Parliament has also stressed that, in the context of age assessments, “medical examinations on children should be carried out in a manner that is not intrusive and respects children’s dignity”.<sup>47</sup>

Appointing a guardian to every child deprived of parental care without delay is a requirement under Article 20 (1) of the CRC, as authentically interpreted by the CRC Committee in its General

Comment No. 6.<sup>48</sup> A guardian exercising parental care in *loco parentis* is a key component of appropriately protecting the rights of unaccompanied children. Yet the mere provision of guardianship is not sufficient to comply with the obligation for appropriate bodies to provide assistance to children.<sup>49</sup> The CRC Committee and the CMW Committee also recommend that, once unaccompanied children are referred to an administrative procedure – for example, if a return procedure is launched – they should be provided with a legal representative in addition to a guardian.<sup>50</sup> A comprehensive overview of the roles and responsibilities of guardians and the functioning of guardianship systems is provided in the guardianship handbook produced by FRA and the European Commission (see box).

### Handbook on Guardianship for children deprived of parental care

FRA and the European Commission published a handbook in 2014 to strengthen national guardianship systems and ensure that they are better equipped to deal with the specific needs of child victims of trafficking. The handbook provides guidance and recommendations to EU Member States, setting forth the core principles, the design and management of guardianship systems. The handbook is available in all EU languages.



For more information, see FRA (2015), *Guardianship systems for children deprived of parental care in the European Union – with a particular focus on their role in responding to child trafficking*, Luxembourg, Publications Office of the EU, 2015.

41 European Council on Refugees and Exiles & Save the Children (2011), p. 19.

42 Return Directive, Art. 5 (b)-(c), Art. 13 (4) and Art. 14 (1).

43 European Commission, COM(2017) 211 final, pp. 10-11.

44 Return Handbook, p. 46.

45 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.

46 European Asylum Support Office (2018).

47 European Parliament (2018), para. J.18.

48 UN, CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/ GC/2005/6, 1 September 2005, para. 21.

49 Return Handbook, p. 47.

50 UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *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, para. 32 (c). For more on these requirements, see FRA (2014b).

The UN Guidelines for the Alternative Care of Children underline that, as soon as an unaccompanied child is taken into care, all reasonable efforts should be made to trace his/her family and re-establish family ties when this is in the best interests of the child and would not endanger those involved.<sup>51</sup> Family tracing should be carried out regardless of the child's irregular status, with the involvement of child-protection services and the child's guardian once appointed.<sup>52</sup> If the third country concerned is party to the 1996 Hague Convention on Child Protection, the cooperation mechanisms under this convention (the system of the Central Authorities) can also be activated to help trace family members.<sup>53</sup> The main functions of the Central Authorities are to facilitate communication and cooperation between competent authorities in their respective States and to transmit requests and information.

### 3.3 Individual assessment

The EU Return Handbook clarifies that an assessment of a child's best interests must always be carried out on an individual basis.<sup>54</sup> This obligation flows from the CRC.<sup>55</sup> The CRC Committee indicated in its General Comment No. 14 that the best interest assessment always needs to be carried out on an individual basis, and include the evaluation of the child's particular needs, the current situation in the family, and the situation and reception conditions in the country of return.<sup>56</sup>

Other EU law instruments take the same approach. The Anti-Trafficking Directive (Directive 2011/36/EU)<sup>57</sup> requires an individual assessment in the context of identifying child victims of trafficking in human beings, as does the Victims' Rights Directive (Directive 2012/29/EU)<sup>58</sup> concerning child victims of crime.

The individual assessment prior to issuing a decision under the Return Directive should systematically look at all durable solutions before concluding whether return to the country of origin, and primarily reunification with the family there, is in the child's best interests.

EU Member States should also carry out a periodic re-assessment of the child's best interests in light of the developments of the individual case.<sup>59</sup> Such re-assessment should also evaluate changes in the child's vulnerability.

EU law does not specify what factors need to be considered when authorities assess an unaccompanied child's best interests to determine a durable solution or, more specifically, when deciding whether or not to issue a return decision.

International law provides some guidance. Figure 6 illustrates the main aspects that authorities must, according to the CRC Committee, take into account in a best interest assessment. The general elements set out in the first box in Figure 6 apply horizontally, in all situations. The second and third boxes list, respectively, specific factors for all children in the context of migration and for unaccompanied children in return procedures.

51 UN General Assembly (2010), *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly, A/RES/64/142*, 24 February 2010, para. 146.

52 European Commission, COM(2017) 211 final, p. 10.

53 See the table of ratifications on the [website of the Hague Conference on Private International Law](#). These third countries include, among others, Albania, Armenia, Cuba, the Dominican Republic, Georgia, Lesotho, Montenegro, Russia, Serbia, Turkey, Ukraine and Uruguay.

54 Return Handbook, p. 44.

55 See also UNHCR & UNICEF (2014), and European Council on Refugees and Exiles & Save the Children (2011), p. 20.

56 UN, CRC Committee, *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, paras. 24, 32 and 54.

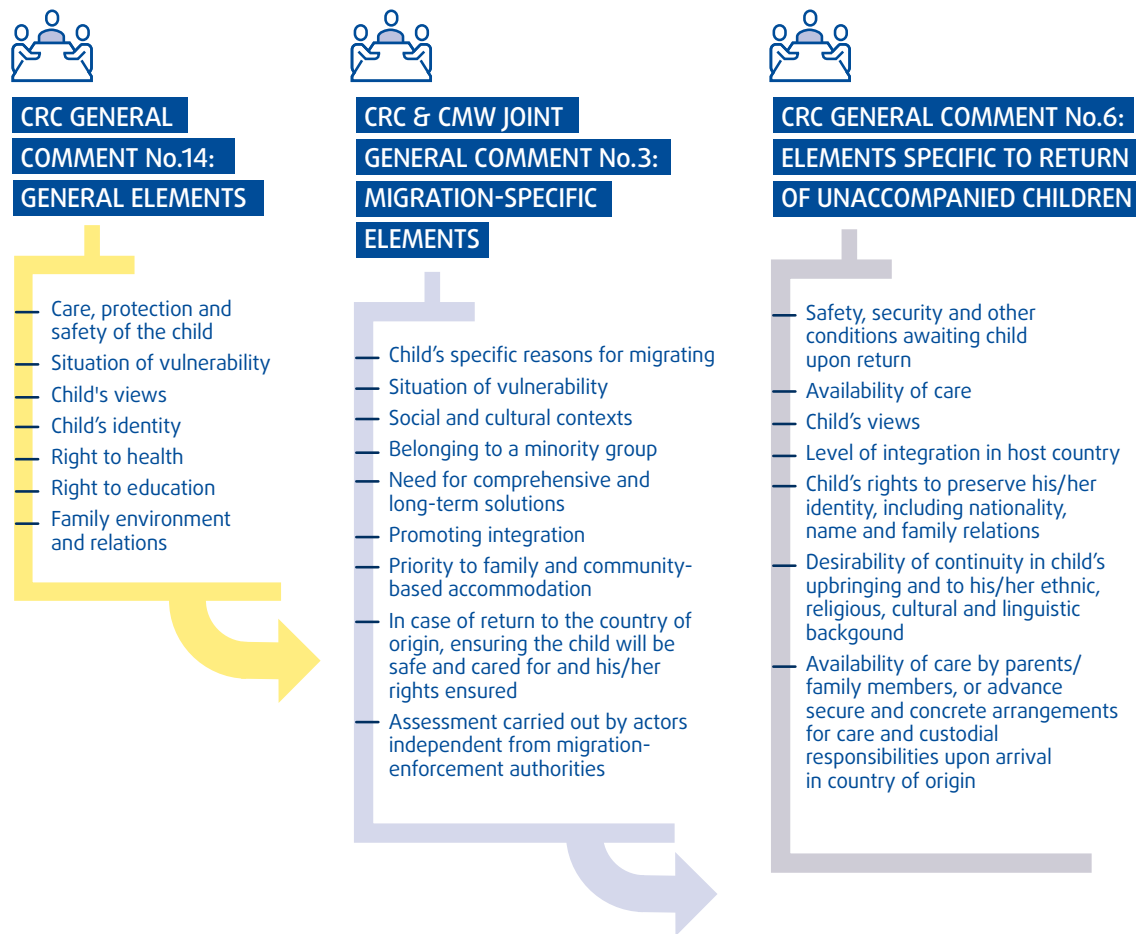
57 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, pp. 1-11; Art. 16 (2).

58 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; Art. 1 (2).

59 Return Handbook, p. 45.



**Figure 6: Main elements of a best interest assessment according to the CRC Committee and the CMW Committee**



Source: FRA, 2019 [based on UN, CRC Committee, General Comment No. 14, 29 May 2013; CRC Committee & Committee on Migrant Workers (CMW Committee), Joint general comment No. 3 on the general principles regarding the human rights of children in the context of international migration, 16 November 2017; and CRC Committee, General Comment No. 6, 1 September 2005]

In a recent decision triggered by an individual complaint, the CRC Committee specifically held that, under the CRC, States must conduct an initial assessment before any removal of an unaccompanied child; the assessment has to include, among others, age and vulnerability assessments.<sup>60</sup> States are also obliged, in light of Article 37 of the CRC and the principle of *non-refoulement*, to evaluate the risk of irreparable damage and grave human rights violations in the country of return, including the grave consequences of insufficient alimentary and sanitary services for children.<sup>61</sup>

In the context of assessing whether or not to return an unaccompanied child, the individual decision-making process must carefully consider the potentially irreversible negative impact of the decision

to be taken in relation to the child on the life of the child, and give primary consideration to this when weighing the different interests at stake. In this process, it is also important to assess other intersecting factors that affect vulnerability.

The weight to be accorded to each of these factors varies according to the circumstances and the situation of the individual child. Nevertheless, some general guidance exists. According to General Comment No. 6 of the CRC Committee, returning an unaccompanied child to the country of origin is not an option if it would lead to a “reasonable risk” that such return would result in the violation of the child’s fundamental human rights, and in particular, if there is a risk of *refoulement*.

The general prohibition of *refoulement*, due to a real risk of torture or other form of ill-treatment in the country of origin – or in the UN treaty bodies’ language: owing to the “real risk of irreparable

60 UN, CRC Committee, *D.D. v. Spain*, communication No. 4/2016, CRC/C/80/D/4/2016, views adopted on 1 February 2019.  
61 *Ibid.*, para. 14.4.

harm<sup>62</sup> – bars the removal of migrants in an irregular situation from a Member State’s territory. This includes unaccompanied children.<sup>63</sup> Additionally, the UN Committee against Torture expanded the scope of this cornerstone principle by applying it to a further scenario when children are involved. No return is permissible when a child would be sent back to a State where his or her child rights either have been violated or would be violated, creating irreparable harm. For example, this covers recruiting the child as a combatant to take part in hostilities, or forcing the child to provide sexual services.<sup>64</sup>

Recently, in a case concerning an individual complaint, the CRC Committee interpreted Article 19 of the CRC (protecting the child from all forms of physical and mental violence) as including a prohibition of *refoulement*. The CRC Committee found that deporting the applicant and her young daughter from Denmark to Somalia, where there was a real risk of the baby undergoing female genital mutilation, would violate Articles 3 and 19 of the CRC. The Committee added that the rights of the child under Article 19 of the CRC cannot be made dependent on the mother’s ability to resist family and social pressure in the country of return. It added that, where “reasonable doubt” exists that the receiving State can protect the child – e.g. from female genital mutilation, which, despite being outlawed, is deeply engrained in society – the sending State should refrain from returning the child.<sup>65</sup>

To fully comply with the above criteria, UNICEF strongly encourages Member States to extensively assess child rights in the country of origin as part of the best-interest determination procedure. This should be conducted by independent child-protection professionals. Such assessments should consider, among others, whether the child will, upon

return, access a safe and protective environment that will enable the child to fulfil his or her needs and develop into adulthood.<sup>66</sup>

When assessing the child’s best interests, one additional factor to consider is whether the child is a victim of trafficking in human beings or has been subject to migrant smuggling. 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 allows residence permits with temporary duration to be issued to such persons.<sup>67</sup> The directive applies to persons who have been smuggled if Member States have embraced this option: ten Member States have done so.<sup>68</sup> In addition, unaccompanied children who have been illegally employed may also be issued a temporary residence permit to facilitate the lodging of complaints against their employers under the Employers Sanctions Directive (Directive 2009/52/EC).<sup>69</sup>

However, under Article 3 (3) of Directive 2004/81/EC, issuing residence permits granting interim protection in case of trafficking and/or smuggling is not compulsory in the case of children. Member States enjoy a wide range of discretion in this regard. Whether or not to extend these benefits to children ultimately depends on their domestic law transposing the directive. By now, all Member States except for Slovakia have included children as falling within the personal scope of their national transposition measures; in Lithuania, children are included under specific conditions.<sup>70</sup> It can be inferred from Directive 2004/81/EC that an important factor to consider when deciding to issue a return decision or to grant a right to stay is whether the child has been identified as a victim of trafficking in human beings, or has been subject of migrant smuggling.<sup>71</sup>

62 UN, Human Rights Committee, *CCPR General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 12; UN, CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/ GC/2005/6, 1 September 2005, para. 27 (mentioning Article 6 [right to life and survival] and Article 37 [right to liberty and freedom from torture] of the CRC as examples of issues that might rise to the level of “irreparable harm”).

63 For a comprehensive overview of these obligations with particular attention to unaccompanied children, see UN, CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/ GC/2005/6, 1 September 2005, paras. 26-28. The same is argued in academia, consider e.g. Farmer, A. (2011), pp. 39-48.

64 UN, Committee Against Torture, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, para. 29 (o).

65 UN, CRC Committee, *I.A.M. (on behalf of K.Y.M.) v. Denmark*, communication No. 3/2016, CRC/C/77/D/3/2016, views adopted on 25 January 2018.

66 UNICEF (2016), p. 3.

67 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; Art. 3.

68 Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 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, COM(2014) 635 final, Brussels, 17.10.2014, p. 3.

69 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.6.2009, pp. 24-32.

70 *Ibid.*

71 See also in this regard the 2005 Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), which obliges Contracting Parties to issue residence permits to child victims as well, in accordance with the best interests of the child (Art. 14 (1)-(2)).



In order to protect child victims of trafficking, a logical prerequisite is that Member States set up mechanisms for their early and rapid identification, in line with Article 11 (4) of the Anti-Trafficking Directive,<sup>72</sup> and operate referral mechanisms to appropriate bodies providing specific assistance, in accordance with Articles 13 and 14 of the Anti-Trafficking Directive.

After identification, child victims of trafficking and – in Member States applying Directive 2004/81/EC to the second group – those who were subject to migrant smuggling, are granted a reflection period under EU law. The duration of the reflection period is determined by national law; it serves to allow victims to recover and to escape the influence of the perpetrators of the offences. This allows them to make an informed decision regarding whether or not to cooperate with the investigating authorities. During this period, no return decision can be enforced against them under Article 6 of Directive 2004/81/EC. If a temporary residence permit – valid for at least six months and renewable – is subsequently given to an unaccompanied child who cooperates with the authorities, it grants its holder the right to stay in the EU Member State concerned. It is accompanied by necessary medical or other assistance if the child has insufficient resources and special needs (Article 9). If the outcome of the best interest assessment already indicates that return is not likely to be a durable solution, issuing a residence permit of longer validity could already be considered at this stage.

Additional safeguards apply to children: taking due account of the best interests of the child may require extending the reflection period. Upon the residence permit's expiry and before deciding on whether or not to return the person concerned, the child's best interests need to be determined anew.<sup>73</sup>

### 3.3 Children's right to be heard

In accordance with Article 12 (2) of the CRC, a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child and must be heard – either directly or through a representative or an appropriate body – in any judicial and administrative proceeding affecting the child. This is an integral part of the best interest assessment. The right to be heard is also a well-established general principle of

EU law binding all EU Member States,<sup>74</sup> and a fundamental right enshrined in Article 41 (2) of the Charter. In the context of children, it also stems from Article 24 of the Charter. Under Article 12 (1) of the CRC, as specified by General Comment No. 12 of the CRC Committee, children's right to be heard comprises giving due weight to their views, taking into account their age and maturity and any communication difficulties they may have in order to make their participation meaningful, and the respect for the child's right to express his or her views freely.<sup>75</sup>

All this is applicable in the return context, including when assessing the child's best interests before issuing a return decision.<sup>76</sup> The EU Return Handbook formulated the following general guidance for Member States, with the aim of ensuring respect of the child's right to be heard in practice.<sup>77</sup> The handbook notes, for example, that children can choose whether or not to express their views; the right to be heard should not be subject to any age limits or other arbitrary restrictions; that children should be heard in an environment that is appropriate to their needs, adapted to their age and maturity; and that children should not be interviewed more often than necessary. The handbook also underlines that hearing a child may require special measures for a child in particularly vulnerable situations, including the provision of interpretation and translation services.

As a prerequisite of the right to be heard, for unaccompanied children to express their views, they need to receive comprehensive and understandable information on what is happening, the next steps, and all available options. The right to information and the right to be heard are very closely related and thus go hand in hand.

The Return Handbook adds that specific emphasis should be given to the need to discuss with the child – in advance and throughout – any processes and procedures, as well as all decisions affecting him/her. Children should be informed in a child-sensitive, gender-sensitive and age-appropriate manner on their rights, on procedures, and on services available for their protection.<sup>78</sup>

<sup>72</sup> See also UNICEF (2006), p. 14.

<sup>73</sup> In this sense, see UN, CRC Committee, *D.D. v. Spain*, communication No. 4/2016, CRC/C/80/D/4/2016, views adopted on 1 February 2019.

<sup>74</sup> CJEU, C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform*, 22 November 2012, paras. 85-89. In the return context, see CJEU, C-383/13 PPU, *G. and R.*, 10 September 2013 and C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014.

<sup>75</sup> UN, CRC Committee, *General Comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, 20 July 2009; which unfolds Article 12 (1) of the CRC.

<sup>76</sup> CJEU, C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, 11 December 2014, paras. 47-49.

<sup>77</sup> Return Handbook, p. 57.

<sup>78</sup> Return Handbook, p. 46.

Providing appropriate and understandable information is an essential element of listening to a child and building trust. If a child does not have enough information or understanding of a particular situation, then the child will be limited in terms of how much they can express views, make decisions or even pose questions. Information provided to children should be adapted to the child's age and can be provided in different ways, including orally and in writing (e.g. by using short video cartoons, drawings, etc.). Developing child-friendly information material in languages that unaccompanied children are able to understand, as well as disseminating such material, is equally important throughout all phases of the return-related procedures.<sup>79</sup> FRA's research in the justice area<sup>80</sup> has noted the

importance of checking that children have understood the information provided, as well as repeating information in the different phases. In the context of return procedures, authorities might want to consider using adequately trained cultural mediators who could facilitate cross-cultural communication. In addition, the child's guardian should be involved in the provision of information and in the interviews with the child.

In the context of criminal justice procedures, FRA asked children what they define as child-friendly. Their replies can also guide the hearing of children in return procedures, complementing the more general guidance provided for by the Return Handbook.

### Children's views on how to conduct hearings with children

More than 300 children interviewed for FRA's research on child-friendly criminal justice proceedings defined professionals with child-friendly behaviour as those who:

- ✓ smile and are friendly, polite, cheerful, empathic and attentive;
- ✓ take children and their situation seriously;
- ✓ frame hearings as conversations between two persons of equal value;
- ✓ adjust their approach and language to the children's age, rather than treating them like adults;
- ✓ speak clearly enough that children can hear them properly;
- ✓ listen carefully;
- ✓ have an informal attitude and create a relaxed atmosphere;
- ✓ engage in small talk to make children feel at ease;
- ✓ are calm and patient and do not raise their voices at children or rush them;
- ✓ offer breaks;
- ✓ make food, water and sweets available;
- ✓ avoid wearing uniforms or official wigs and robes;
- ✓ use child-friendly material;
- ✓ have experience and training in working with children;
- ✓ are genuinely interested, engage children and are available and can be contacted at any time during proceedings.

*The list, as well as further guidance on how to hear a child, can be found in FRA and European Commission (2019), [Children deprived of parental care found in another EU Member State other than their own – A guide to enhance child protection focusing on victims of trafficking](#), Luxembourg, Publications Office, June 2019.*

<sup>79</sup> FRA (2014b), p. 41.

<sup>80</sup> FRA (2017a).





## 4. Specific cases at the border: non-admission and passing children back to another Member State

This section discusses two specific, border-related situations envisaged by the Return Directive, and their implications for the protection of unaccompanied migrant children when refused entry at the external borders or apprehended in the border area. The modalities of the best interest assessment discussed in Section 2, including the various elements and factors to consider, equally apply to these scenarios.

### 4.1 At the external borders

The first situation concerns a possible limitation of the directive's material scope. Article 2 (2) (a) of the Return Directive allows Member States not to apply the directive to "border cases", namely to those migrants in an irregular situation whose entry was refused at the external border; or who have been apprehended in connection with an irregular crossing of external borders and who have not subsequently obtained an authorisation to stay. Once a Member State makes use of this opt-out clause<sup>81</sup> and excludes the application of the directive to these situations, it also affects unaccompanied children who have been subject to these measures at the border or in its vicinity.

Nevertheless, the non-application of the Return Directive in these cases does not deprive children of their legal protection under EU law: Member States must still respect a number of minimum safeguards set forth in the Return Directive as specified in Article 4 (4). These include the full respect of the principle of *non-refoulement* and the obligation incumbent upon national authorities to ensure that the level of legal protection of such unaccompanied children is not less favourable than that set out in those provisions of the directive that govern the limitations on the use of coercive measures (Article 8 (4)-(5)). It also requires Member States to apply the safeguards relating to the postponement of removal (Article 9); to ensure emergency health care and necessary treatment of illness, as well as to take into account the needs of vulnerable persons, including (unaccompanied) children (Article 14 (1) b) and d)), among other things.

<sup>81</sup> Such a derogation must be expressly stated in national implementing legislation; otherwise, it cannot develop legal effect (Return Handbook, p. 13). The European Commission also needs to be officially notified about it.

An additional layer of the legal safety net complements these basic guarantees. First, opting out of applying the Return Directive to "border cases" does not exempt Member States from their obligations under the EU asylum *acquis*, in particular in providing access to asylum procedures, alongside the attached procedural rights.<sup>82</sup> Second, even if such a derogation is used, national legislation and practice on border cases must fully respect international law and international human rights law protecting all migrants. This encompasses, among others, the absolute prohibition of *refoulement* and the principle of duly considering the best interests of the child as set out in the Charter (Article 24 (2)), international instruments<sup>83</sup> and ECtHR case law.<sup>84</sup>

For instance, the CRC Committee confirmed in a recent case concerning the rejection of an unaccompanied child at the border of the Spanish enclave Melilla that the CRC applies to all children, regardless of their legal status, and the convention cannot be curtailed at the border.<sup>85</sup> The CRC Committee underlined that States must conduct an initial best interest assessment prior to any removal, such as the rejection at the border, which needs to include, among others, age and vulnerability assessments. Failing to do so before refusing entry would violate Article 3 (best interests of the child) and Article 37 (right to liberty and freedom from torture) of the CRC. Best interest assessment requires access to territory,<sup>86</sup> as such access constitutes a prerequisite

<sup>82</sup> Return Handbook, p. 16.

<sup>83</sup> For example, Art. 6-7 of the International Covenant on Civil and Political Rights, Art. 3 of the Convention against Torture, as well as Art. 3 of the CRC.

<sup>84</sup> For a general account of the ECtHR's abundant case law concerning *non-refoulement*, see Council of Europe (2017), pp. 17-21. Regarding the interpretation of the best interests of the child principle, see e.g. ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011; ECtHR, *Berisha v. Switzerland*, No. 948/12, 30 July 2013. For an overview of the ECtHR's case law on this principle in the migration context, see e.g. Smyth, Ciara (2015).

<sup>85</sup> UN, CRC Committee, *D.D. v. Spain*, communication no. 4/2016, CRC/C/80/D/4/2016, views adopted on 1 February 2019.

<sup>86</sup> UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of a Child, *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, para. 17.

site to the initial assessment process by the authorities.<sup>87</sup> Even if a child is at the border, he or she falls under the Member State's jurisdiction.<sup>88</sup>

## 4.2 At the internal borders

A similar scenario comes up when an unaccompanied child has been apprehended directly after crossing an internal border between two Member States. In this case, according to Article 6 (3) of the Return Directive, the Member State concerned is entitled, instead of issuing a return decision, to pass the child back to the Member State where he or she came from, on the basis of bilateral readmission agreements predating the directive's entry into force (13 January 2009). Although such 'passing back'<sup>89</sup> does not qualify as a 'return' in application of the directive,<sup>90</sup> Member States clearly act within the scope of EU law (namely the return

*acquis*).<sup>91</sup> Consequently, the Charter kicks in<sup>92</sup> and national authorities must comply with the rights contained therein, including the rights of the child (Article 24). In the CJEU's interpretation, this intra-EU passing back constitutes one of the measures under the Return Directive to "bring the illegal stay to an end"; Member States must therefore make such decisions with due diligence.<sup>93</sup>

In addition, international human rights law binding on all Member States remains fully applicable in this context. Universally accepted instruments include the CRC, as interpreted by the CRC Committee. It requires the best interests of the child to be a primary consideration before deciding on such a 'passing back' (intra-EU readmission). It also obliges the authorities responsible for readmission to cooperate with child-protection services, taking into account the services' expert opinion; and to conduct an individual assessment of each case.

87 Wriedt, V. (2019).

88 ECtHR, *M.A. and Others v. Lithuania*, No. 59793/17, 11 December 2018, para. 70. On the various ways of exercising jurisdiction by States which triggers the application of the ECHR, see European Court of Human Rights (2019).

89 For this terminology, see the Return Handbook, pp. 8, 27.

90 See the definition of 'return' in Art. 3 (3) of the directive, confirmed by the Return Handbook, pp. 8, 28.

91 CJEU, C-47/15, *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, 7 June 2016, paras. 69 and 77, and, more recently CJEU, C-444/17, *Préfet des Pyrénées-Orientales v. Abdelaziz Arib*, 19 March 2019, para. 47.

92 Art. 51 (1) of the Charter and CJEU, C617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013, para. 20.

93 CJEU, C-47/15, *Sélina Affum v. Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai*, 7 June 2016, para. 87.



## 5. Possible outcomes of best interest assessments

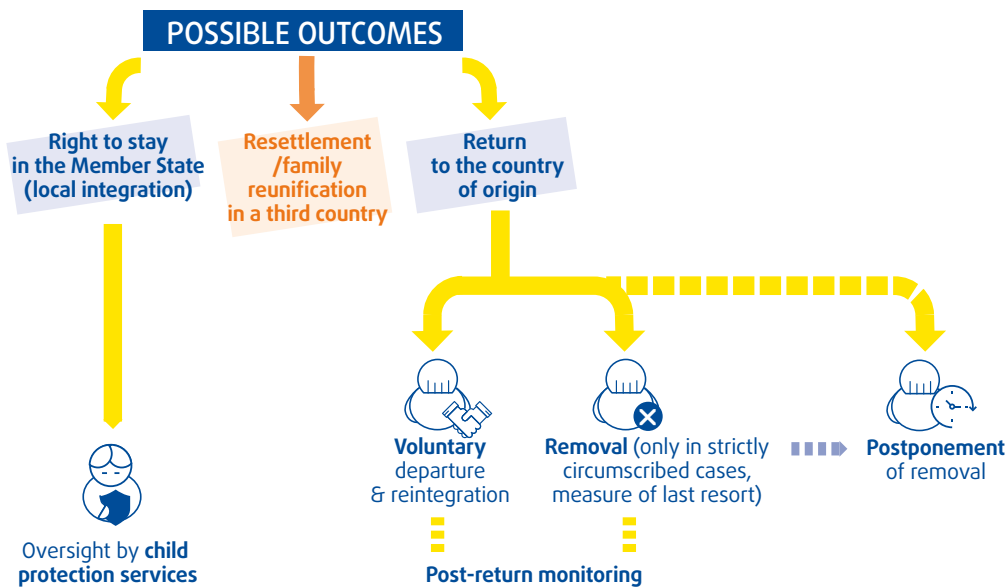
This section relates to the implementation of whichever approach is found to be in an unaccompanied child’s best interests. It discusses possible outcomes and scenarios following the best interest assessment. It does not, however, cover situations in which children are reunited with their parents in another EU Member State or a third country.

The outcomes presented include the granting of a residence permit to the child concerned (Section 5.1); the unaccompanied migrant child’s voluntary departure (Section 5.2.1); removal to the country of origin as a measure of last resort, and only if a number of preconditions are met and adequate

safeguards are in place (Section 5.2.2); and, briefly, the postponement of an already decided removal due to specific circumstances (Section 5.3). Figure 7 illustrates the possible outcomes of best interest assessments.

As FRA pointed out in its 2017 report, children should not be deprived of their liberty on immigration-related grounds. This is especially crucial for unaccompanied children, regardless of the outcome of the best interest assessment. To promote children’s right to protection and care, the EU and its Member States should develop credible and effective

Figure 7: Possible outcomes and durable solutions following best interest assessments



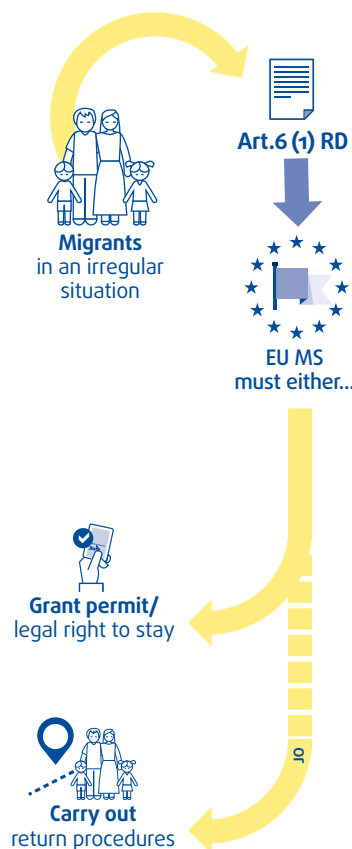
Note: Outcomes presented in orange are not covered in this report.  
 Source: FRA, 2019

systems that make it unnecessary to detain children for return purposes.<sup>94</sup>

Article 6 (1) of the Return Directive recognises two main options vis-à-vis migrants in an irregular situation: it obliges Member States to either carry out return procedures, or to grant them a permit or a legal right to stay. As a consequence, “grey zones” in Member States’ domestic immigration laws as to the legal status of migrants in an irregular situation are no longer permitted, which means that they can no longer be left in legal limbo.<sup>95</sup> Member States are bound to establish clear rules on the consequences of the status of all irregular migrants, including unaccompanied children, allowing either the issuance of return decisions and carrying out returns, or the granting of a right to stay in accordance with their national law.<sup>96</sup> Figure 8 illustrates this ‘binary code’ introduced by the Return Directive.

The European Commission has also reminded Member States to always keep in mind both options. It recommended always basing decisions on the legal status and/or the return of unaccompanied children on individual, multi-disciplinary and robust assessments of their best interests, including family tracing and home assessment. Regardless of what decision is made, assessments need to be adequately documented,<sup>97</sup> with reasons given regarding the balancing of various factors.

**Figure 8: Member States’ two options regarding migrants in an irregular situation under the Return Directive**



Note: RD = Return Directive.  
Source: FRA, 2019

## 5.1 Granting the right to stay

If, following an individual assessment of the best interests of the child and duly taking into account the above fundamental rights considerations, a Member State decides not to remove an unaccompanied child and to grant them the right to stay as the adequate durable solution, such a decision must be framed in legal terms. This requires granting a residence permit or a right to stay in application of Article 6 (4) of the Return Directive. Under Article 3 of Directive 2004/81/EC, the same applies to victims of trafficking in human beings, and, where applicable, to children who have been subject to smuggling. Under the Employers Sanctions Directive, this also applies to migrant worker children, to facilitate the lodging of complaints against their employers (see also Section 3.3).

A number of Member States’ national laws prohibit issuing return decisions to unaccompanied children and some others do not return them as a matter

94 See FRA (2017b). See also UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of a Child, *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, paras. 5 and 9; UN, CRC Committee (2012), *The rights of all children in the context of international migration*, Report of the 2012 Day of General Discussion, para. 32. For more on how international and European law essentially outlaw immigration detention of unaccompanied children see UNHCR (2017).

95 FRA & ECtHR (2014), p. 48.

96 Return Handbook, p. 45.

97 Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, recital (23).

of policy (e.g. Bulgaria, the Czech Republic, France, and Italy) – at least until the children reach the age of majority.

The European Commission and UNICEF both recommend that States provide for long-term residence solutions (stable residence status) for unaccompanied children who are not to be returned. This is particularly so for those who have resided in the Member State concerned for a certain period of time and who have developed firm ties with local society.<sup>98</sup> This approach puts an end to the children’s precarious situation and creates the necessary preconditions for them to develop.

## 5.2 Return

If competent authorities, after carefully assessing an unaccompanied child’s best interests, decide to issue a return decision and thus activate the return process, the key EU rules to follow are encapsulated in the Return Directive, notably in Article 6 (return decision), Article 7 (voluntary departure) and Article 10 (return and removal of unaccompanied children). The possible scenarios are captured in Figure 9.

Once a return decision is issued to a child, procedural safeguards set out in Article 13 of the Return Directive must be fully implemented. In particular, this involves the right to appeal the return decision in front of an independent body as well as the right to free legal aid and representation in a language

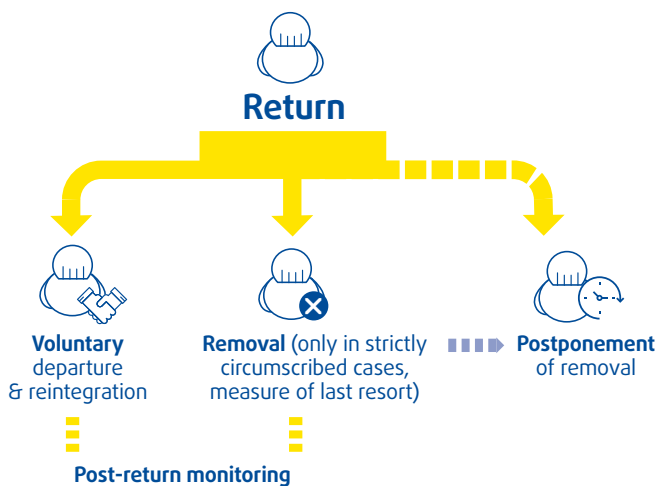
well-understood by the child. To implement these rights adequately, return-enforcing authorities, lawyers and the courts carrying out the judicial review need to have the necessary knowledge and skills on the rights of the child and child-friendly justice.<sup>99</sup>

### 5.2.1 Voluntary departure

Although the spirit and the logic of the Return Directive expressly prefers and encourages voluntary departure over forced return (removal),<sup>100</sup> it contains no explicit provision on the modalities and procedures for the voluntary departure of unaccompanied children. Article 7, which lays down the general rules on voluntary departure, contains only one reference to “children attending school” as a factor to be taken into consideration when extending the period of voluntary departure beyond 30 days. Article 10 (2) – which is examined in-depth in Section 5.2.2 – only applies to situations where the unaccompanied child subject to a return decision will be forced to return (‘removal’), and not to situations where the child leaves the Member State voluntarily. The European Commission, however, recommends extending its application to cases of voluntary departure.<sup>101</sup>

Nonetheless, under the general provisions of the directive giving preference to voluntary departure (recital (10) and Article 7), and with the aim of giving *effet utile* to its rules, voluntary departure is also a natural, and the least intrusive, option for unaccompanied children who are obliged to leave the EU.

Figure 9: Possible scenarios in case of a return decision concerning an unaccompanied child



Source: FRA, 2019

98 European Commission, COM(2017) 211 final, p. 12; UNICEF (2016), p. 4.

99 See also UNICEF (2016), p. 3.

100 Recital (10); Art. 7 of the directive; echoed equally in the Return Handbook, p. 30. See also Lutz, F. & Mananashvili, S. (2016), pp. 680, 694.

101 Return Handbook, p. 47.

### Prioritising voluntary departure

The CJEU has repeatedly underlined the preference for voluntary departure over removal. It has noted that the priority given to voluntary departure “seeks, inter alia, to ensure that the fundamental rights of [the returnees] are observed in the implementation of a return decision [...]. In accordance with Article 79 (2) [of the TFEU], the objective of Directive 2008/115 is, as is apparent from [...] the preamble thereto, to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.”\* This is even more so the case for unaccompanied children.

\* *CJEU, C-554/13, Z. Zh. v. Staatssecretaris voor Veiligheid en Justitie and Staatssecretaris voor Veiligheid en Justitie v. I. O.*, 11 June 2015, para. 47.

Voluntary compliance with a return decision is generally considered to be a more dignified, safer and more cost-effective option than forced return (removal). Member States’ obligation to duly consider the best interests of the child in all return-related actions, as well as the guidance offered by the Return Handbook, provide further orientation regarding the use of voluntary departure for such children. Also, the Return Directive needs to be harmoniously interpreted with international human rights obligations binding on all Member States (Article 1), including the CRC, a body of law that helps unfold more detailed obligations and safeguards in this respect.

As described in Section 2, and similar to the scenarios discussed in Section 5.2.2, national authorities must assess the family situation, as well as the overall situation and reception conditions in the country of return, before proceeding with the implementation of voluntary departure, in accordance with the overarching requirement to take into due account the best interests of the child.<sup>102</sup> The latter principle also implies that the unaccompanied child’s guardian needs to be fully involved in assisting the child during the whole process of voluntary departure, in each step. As part of this duty, arrangements should be made to receive the child at the final destination, particularly by the parents and primary caregivers. In line with the right to be heard, Member States should provide the returning child with a possibility to specify individual

<sup>102</sup> Return Handbook, p. 47. See also Lutz, F. & Mananashvili, S. (2016), p. 707.

circumstances and to take his or her needs into account. For instance, in order to let children finish the school year, setting a prolonged period for voluntary departure until the end of the semester or the school year should be granted if it is in the best interests of the child.<sup>103</sup> Equally important is making sure that all actors involved in preparing the voluntary departure of the child concerned are adequately trained in child protection and regarding the specific needs of migrant children.<sup>104</sup>

Sustainability of return, even if voluntary, is invariably key, and calls for targeted and genuine reintegration measures. In a similar vein, the CRC Committee and the CMW Committee have called on States to prepare individual reintegration plans, together with the child where possible, to support the child’s sustainable and smooth reintegration into the society of the home country.<sup>105</sup> Developing transnational mechanisms between EU Member States and third countries can support the implementation of reintegration measures,<sup>106</sup> with a particular focus on the cooperation between child rights and child protection actors – both within and beyond governmental structures. As one option, the cooperation mechanism set up by the 1996 Hague Convention on Child Protection offers such an institutionalised channel of communication and cooperation with those third countries which are parties to it. This inter-institutional cooperation needs to be a precondition to any return. The returning State should demonstrate that measures to ensure the effective reintegration of the child, taken in cooperation with the authorities of the third country concerned, are already in place and functional.

### 5.2.2 Removal

In EU law, ‘removal’ means “the enforcement of the obligation to return, namely the physical transportation out of the Member State”.<sup>107</sup> It may be carried out by land, sea or air, using commercial means of transport (e.g. commercial flights,

<sup>103</sup> Return Handbook, pp. 31-32.

<sup>104</sup> UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Committee on the Rights of the Child, *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, para. 36.

<sup>105</sup> *Ibid.*, para. 32 (k).

<sup>106</sup> See for instance the [Transnational Action \(TACT\)](#), which assisted victims of trafficking in human beings to return to select priority countries (Albania, Morocco and Ukraine). The project was implemented by IOM France between May 2015 and October 2016.

<sup>107</sup> Return Directive Art. 3 (5).



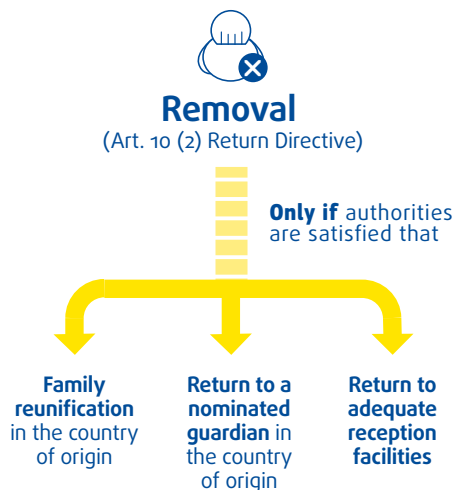
ferryboats) or by arranging special means of transport (e.g. chartered flights).

The Return Directive specifically deals with some aspects of the removal of unaccompanied children. Article 10 (2) lays down specific safeguards restricting EU Member States’ freedom to forcibly return unaccompanied children, with a view to preserving the best interests of the child.

### Return Directive on removal of unaccompanied children

Article 10 (2) of the directive sets forth that, before removing an unaccompanied child from the territory of a Member State, the authorities of that Member State must be satisfied that the child will be returned to 1) a member of his or her family; 2) a nominated guardian; or 3) adequate reception facilities in the State of return. Figure 10 illustrates these possible scenarios.

**Figure 10: Preconditions for removal of an unaccompanied child under the Return Directive**



Source: FRA, 2019

Article 10 (2) only covers situations where the unaccompanied child is ‘removed’ from the territory of a Member State. It is thus formally not applicable to cases where such a child is leaving voluntarily.<sup>108</sup>

Article 10 (2) needs to be harmoniously interpreted with Article 5 and recital (22) of the Return Directive, calling on authorities to give primary consideration to the best interests of the child throughout

the whole return process. This overarching principle is equally applicable in this phase. It must guide all actions leading to the removal of an unaccompanied child.

Situations in which the removal of an unaccompanied child, as opposed to voluntary departure, would be in the child’s best interests are difficult to imagine. Where the child disagrees with a best interest determination that concludes that return is the best durable solution, the child must receive adequate support to understand the situation and the available options. In most cases in which return to the country of origin is in the child’s best interests, effective counselling should enable the child to take a free and informed decision to return voluntarily, without resorting to forced return.<sup>109</sup> The forced return (removal) of an unaccompanied child will thus be limited to exceptional situations where other factors outweigh the best interests of the child. In this context, three Member States that do provide for issuing return decisions to unaccompanied children expressly forbid the forced return of such children – only voluntary departure is permitted.<sup>110</sup>

This section analyses in more detail the three scenarios laid down in Article 10 (2) of the Return Directive as preconditions to carrying out the removal of unaccompanied children. It also looks at the fundamental rights standards and safeguards to adhere to in the process of removal operations involving unaccompanied children. In all these scenarios, using the cooperation channels between authorities under the 1996 Hague Convention on Child Protection could also ensure that return takes place under safe conditions. The protective measures under this convention may facilitate a transition without disruption between the guardian appointed in the Member State concerned and the responsible adult in the third country of return.<sup>111</sup>

#### a) Reuniting the child with family members in the country of origin

Respect for family life is a fundamental right granted by Article 7 of the Charter and enshrined in a number of other human rights instruments.<sup>112</sup> In the migration context, it can be realised, among others, by reuniting a family in its country of origin. Returning the child to family members (family reunification),

<sup>109</sup> See also International Organization for Migration (2018), pp. 6, 8-9.

<sup>110</sup> Belgium, Latvia and Lithuania. See European Migration Network (2018), Section 4.1.3.

<sup>111</sup> European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs (2017), p. 25.

<sup>112</sup> On the universal level, see the Universal Declaration of Human Rights (Art. 12, 16 (3)); the International Covenant on Civil and Political Rights (Art. 17, 23 (1)) and the CRC (Art. 8-9). In Europe, see the European Convention on Human Rights (Art. 8).

<sup>108</sup> Lutz, F. & Mananashvili, S. (2016), p. 707.

where it is in the best interests of the child, is the preferred option under international human rights law.<sup>113</sup> This preference is also reflected in the EU Return Handbook.<sup>114</sup> However, as outlined in Section 3, family reunification in the country of origin is not in the best interests of the child and should, therefore, not be pursued where there is a “reasonable” risk that such return would lead to the violation of the child’s fundamental rights.<sup>115</sup> In such a scenario – and where the risks cannot be addressed in the country of origin – measures for family reunification or to promote family unity should be put place in the host Member State.<sup>116</sup> Article 10 (1) of the CRC requires that applications by the child’s parents to enter a State Party for the purpose of family reunification needs to be dealt with by States Parties in a “positive, humane and expeditious manner”.

As a first step towards successful family reunification, Member States need to undertake efforts to establish the child’s identity and nationality. This should occur as early as possible, ideally before determining the durable solution. Equally important is starting family tracing, with the child’s consent, as soon as possible, involving the appointed guardian and/or a representative of the child protection authorities<sup>117</sup> – provided this is in the best interests of the child and would not endanger those involved.<sup>118</sup>

Mechanisms for family tracing in most Member States rely on the International Committee of the

Red Cross (ICRC) as a key actor. The ICRC has developed a useful tool: “Trace the Face.”<sup>119</sup> The tool is in line with the General Data Protection Regulation (Regulation (EU) 2016/679).<sup>120</sup> Persons looking for family members can upload their own photo (but not photos of family members) into the system. Children aged 15 and up can upload their photo with the consent of their legal representative. Only the photo is placed online, without any indication of the name, the place or the family member the person is looking for. UNHCR was consulted to ensure maximum safety; the photos cannot be downloaded. The ICRC established an additional tool in its internal networks, with photos of children under the age of 15. This database can only be accessed by Red Cross offices. Another option is using the ICRC’s regular family-tracing system. The main task of the Red Cross Tracing Service is to help re-establish contacts between close relatives separated as a result of war, armed conflict, natural disasters, and social or political circumstances. The Tracing Services of the different national Red Cross societies are guided by the Central Tracing Agency, which is a part of the ICRC.<sup>121</sup> Existing regional initiatives have also been used to assist Member States in family tracing. For instance, under the EU Return Liaison Officers programme (EURLO),<sup>122</sup> liaison officers appointed in selected third countries of destination may assist with family tracing. Similarly, the service providers (e.g. NGOs) operating within the European Reintegration Network programme (ERIN)<sup>123</sup> are also mandated, in certain third countries, to provide assistance with family tracing in relation to unaccompanied children.<sup>124</sup>

As recommended by the European Commission, further measures can contribute to speedy and successful family tracing. Accordingly, the competent national authorities should work in close cooperation with consular services, immigration liaison officers, child protection bodies, international organisations and NGOs in the country of return, making full use of existing cross-border cooperation channels and mechanisms.<sup>125</sup> It is also imperative to highlight that child-sensitive, gender-sensitive and age appropriate methods have to be used for gathering information, which is necessary to undertake tracing.

113 In interpreting Art. 9 of the CRC, see e.g. UN, CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 81.

114 Return Handbook, p. 47.

115 UN, CRC Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 82; UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of a Child, *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, para. 35.

116 UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of a Child, *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, para. 35.

117 Return Handbook, p. 47.

118 UN General Assembly (2010), *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly*, A/RES/64/142, 24 February 2010, para. 146.

119 See the [ICRC’s dedicated website](#).

120 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), OJ L 119, 4.5.2016, pp. 1-88.

121 FRA (2016).

122 See the European Commission’s [webpage on the return liaison officers’ network](#).

123 See the European Commission’s [webpage on ERIN](#).

124 European Migration Network (2018), Section 4.2.2.

125 Return Handbook, p. 47. See also GMG & OHCHR (2018), Principle 6 (7).





During the whole tracing process, the unaccompanied child's right to a confidential service and privacy must be respected.<sup>126</sup>

b) *Returning the child to a nominated guardian in the country of origin*

Where family reunification is not possible or family tracing was unsuccessful, but return remains in the child's best interests, secure and concrete care and custodial arrangements in advance are a precondition to return.<sup>127</sup>

As the European Commission acknowledged, return to a nominated guardian, instead of family members, can only be an acceptable alternative under certain conditions. When assessing whether returning a child to a nominated guardian in his/her home country is in the child's best interests, competent authorities, including child protection services, must gain a good understanding of the guardianship legislation and practice in the destination country, taking into account the principle of proportionality.<sup>128</sup> A smooth transfer of guardianship in the Member State to a guardianship in the country of return should be achieved, facilitated by the identification of a contact person who will be on hand in the destination country to effect transfer to the new guardian.<sup>129</sup>

The European Commission recommends that Member States' authorities put in place appropriate and tailor-made reintegration measures targeting unaccompanied children who return to a nominated guardian in their country of origin.<sup>130</sup> Such measures should include the provision of accurate information about the new life and the possibility to receive psycho-social counselling and support.<sup>131</sup> According to the European Commission's proposal on the new Asylum and Migration Fund (2021-2027), return outcomes are more sustainable if they are

supported by efforts for reintegration.<sup>132</sup> Such measures, taking into consideration gender specificities, should be available both before departure and after arrival in the country of return.

c) *Returning the child to adequate reception facilities in the country of origin*

According to the EU Return Handbook, returning an unaccompanied child to reception facilities in his/her country of origin is not the preferred option. It is subject to a set of preconditions and safeguards.<sup>133</sup> UNICEF clearly discourages this practice, considering it as only a last resort and not as an adequate form of long-term care for returned children.<sup>134</sup> IOM is of the same view, emphasising that a child-welfare institution should be the last option, to be taken only if it is part of an agreed plan to reunite with family members in a timely fashion, or there are exceptional reasons for believing such return to be in the child's best interest.<sup>135</sup> In practice, Member States have rarely used this option because such a reception facility could only seldom be identified.<sup>136</sup>

To fully respect Article 20 of the CRC – which refers to 'placement in suitable institutions' – the 'adequate' nature of reception facilities in the country of return needs to be thoroughly assessed by the competent authorities on a case-by-case basis, taking into account the individual circumstances and age of the unaccompanied child to be returned. The term 'adequate' implies that such reception facilities should comply with child-specific standards and do not leave children vulnerable to abuse and exploitation. Weak legal and administrative child-protection frameworks, poor accountability structures, and limited institutional capacity in the country of return can put the child at risk of human rights abuses.

Mere reception by the (border) police in the country of origin, without any envisaged follow-up or flanking measures, cannot be considered as adequate reception.<sup>137</sup> To be 'adequate', it must be a proper child-protection facility, fully embedded

126 UN General Assembly (2010), *Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly, A/RES/64/142*, 24 February 2010, para. 164. See also: European Council on Refugees and Exiles & Save the Children (2011), p. 173.

127 UN, Committee on the Rights of a Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/ GC/2005/6, 1 September 2005, para. 85.

128 Lutz, F. & Mananashvili, S. (2016), p. 707.

129 European Council on Refugees and Exiles & Save the Children (2011), p. 81.

130 Return Handbook, p. 47; Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, para. 13 (c).

131 UNICEF (2016), p. 3.

132 European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund*, COM(2018) 471 final, Strasbourg, 12.06.2018, Explanatory Memorandum and recitals (20) and (23).

133 Return Handbook, p. 47.

134 UNICEF (2016), p. 3.

135 International Organization for Migration (2019), *Handbook on Protection and Assistance for Migrants Vulnerable to Violence, Exploitation and Abuse*, Geneva, 2019 [forthcoming].

136 European Migration Network (2018), Sections 4.1.3 and 4.2.2.

137 Return Handbook, p. 47; see also Lutz, F. & Mananashvili, S. (2016), p. 707. Yet, this was the practice of Greek authorities returning Albanian children to Albania in 2012. See UN, Report of the Special Rapporteur on the human rights of migrants, *Addendum (Mission to Albania)*, A/HRC/20/24/Add.1, 10 April 2012, paras. 43-45.

in the national child-protection system. A facility established under an EU project, which is not fully embedded in the national childcare system, would not suffice. For instance, two children homes (called 'return houses') had been set up by the Dutch government in the Democratic Republic of Congo and Angola (the facilities were named 'Don Bosco' and 'Mulemba'). However, UNICEF Netherlands documented in 2012 that no child was in fact returned to the Don Bosco shelter and that only one child was returned to the Mulemba house, remaining there only for a few days, while five others were picked up at the airport by supposed family members.<sup>138</sup> This raises serious concerns about the protection of those children. The Council of Europe's Commissioner for Human Rights also voiced strong concerns about the use of these return houses soon after their establishment.<sup>139</sup> It also remained unclear to what extent these return houses formed part of the local child-protection system or whether they were simply functioning outside of that system.<sup>140</sup>

Such reception facilities can leave children vulnerable to abuse and exploitation. The dangers can arise from weak legal and administrative frameworks, poor accountability structures, or limited institutional capacity. Another challenge is that, once unaccompanied children return, they may have "no ties whatsoever in the 'home' countries to which they are sent" and may not speak the local language.<sup>141</sup>

Before returning the child to institutional (alternative) care, the European Commission recommends that Member States pay particular attention to the availability of appropriate housing, access to healthcare and education in the country of return.<sup>142</sup> Reintegration can best take place where there is sufficient and functioning child-protection infrastructure in the country of origin, which is another factor to consider in this regard.

Furthermore, the UN Guidelines on the Alternative Care for Children argue for an overall deinstitutionalisation strategy, leading to their progressive elimination.<sup>143</sup> Given that return to reception facilities can hardly be seen as a durable solution, Member States are encouraged to explore other forms of alternative care in line with these guidelines. In any event, return of an unaccompanied child to institutionalised care should always be accompanied by appropriate and targeted reintegration measures. In light of applicable international standards, these

should include the preparation of a plan for sustainable reintegration and continued evaluation in case of each returning child, covering a number of targeted measures, such as effective access to justice, education, healthcare, family life, and protection against all forms of violence.<sup>144</sup> For this purpose, particular priority should be attached to developing better cooperation with third countries of origin.<sup>145</sup>

### 5.2.3 Carrying out removals in a child-appropriate way

Should any of the options under Article 10 (2) ultimately be chosen, return-enforcing authorities are obliged to carry out removal operations in a safe, child-appropriate and gender-sensitive manner, as required by General Comment No. 6 of the CRC Committee (para. 87). As a matter of principle, joint return operations carried out through charter flights at a national level or coordinated by the European Coast and Border Guard Agency should not include unaccompanied children, as these are not suitable for this category of vulnerable persons. Children would be exposed to a setting that could be traumatising for them – for example, due to having to witness the use of force and means of restraint against other returnees.

When return-enforcing authorities proceed with the removal of an unaccompanied child, they must duly take into account the child's best interests in this process, in full compliance with Article 24 (2) of the Charter and Article 5 (a) of the Return Directive. During removal operations, all possible measures that prevent child's rights violations and reduce harm to the children have to be taken. As a general safeguard, the child's guardian needs to be fully involved in assisting the child during the whole removal process, through all its stages. This requires that the guardian travel with the child to the country of destination, until the hand-over.

At the very outset, the removed child must be clearly informed about all practical arrangements, in a child-friendly and child-sensitive manner, communicated in a language that the child can understand. It is equally important to make best efforts to schedule removal at a time that ensures the welfare of the children, preferably in consultation with them – for example, there should be no removals during the middle of the night. Similarly, authorities should arrange separate waiting areas, embarkation and seating for the children.<sup>146</sup> Special needs of children during the journey should be catered to.

138 UNICEF Netherlands (2012), pp. 47-49.

139 Hammarberg, T. (2010).

140 UNICEF Netherlands (2012), p. 49.

141 Kanstroon, D. (2017), p. 61.

142 Return Handbook, p. 47.

143 UN (2010), *Guidelines for the Alternative Care of Children*, Resolution of the General Assembly, A/RES/64/142, 24 February 2010, para. 23.

144 GMG & OHCHR (2018), Principle 6 (8).

145 European Commission, COM(2017) 211 final, p. 17.

146 UNICEF, OHCHR, IOM, Save the Children, PICUM, ECRE & Child Circle (2019) [forthcoming].



These include the possibility to play and to receive adequate food and drinks.

The joint reading of Articles 5 (a) and 8 of the Return Directive, interpreted harmoniously with Article 24 (2) of the Charter, virtually precludes – except for very exceptional circumstances – the use of force and coercive measures against children, including unaccompanied children, during the enforcement of removals. Such measures of constraint may disproportionately affect the fundamental rights of the child and may cause long-term physical and psychological harm.<sup>147</sup> Children should not witness the use of coercive measures against adults, either.

All actors implementing removal operations involving children need to be trained on the rights of the child, including the best interests of the child principle and its operationalisation. This duty also applies to escorts. Unaccompanied children should travel together with their guardian. Given the heightened vulnerability of unaccompanied children and the higher risk of fundamental rights violations, independent forced-return monitoring mechanisms<sup>148</sup> should always be in place throughout the removal operation, from pre-departure to hand-over. This should be paired with accessible, independent and child-friendly complaint mechanisms.<sup>149</sup>

### 5.3 Postponement of removal

Even if return is found to reflect the best interests of the child, and thus an unaccompanied child is issued a return decision, immigration authorities might decide, and in certain cases are obliged, to postpone the removal for a number of reasons, taking into account specific circumstances of the individual case (Article 9 of the Return Directive). This can be the case, for instance, when more time is needed to counsel the child and to discuss options for voluntary departure. A comprehensive, *ex post facto* best interest determination – after the first return

decision when obstacles to return have ceased to exist – with the active involvement of the guardian and child-protection services, can lead to postponement of removal. Further reasons include legal impediments – for example, if the prohibition of *refoulement* has not yet been sufficiently taken into account or judicial review with suspensory effect is ongoing. In addition, there may be practical barriers that prevent the child’s actual removal at that moment in time, such as health issues, mental capacity, lack of cooperation, or technical reasons.

The Return Directive lays down minimum fundamental rights guarantees for people whose removal is formally postponed. These apply to unaccompanied children, as well. They need to get written confirmation of their situation and be granted basic rights.<sup>150</sup> These basic safeguards include providing emergency health care and essential treatment of illness; access to a basic education system, although this is subject to the length of their stay; and taking into account the children’s special needs.<sup>151</sup> The latter essentially means granting the child the rights stemming from the CRC. As a further core safeguard, imposing pre-removal detention is by default not permitted in case of postponement of removal. This is because there is no longer a ‘reasonable prospect of removal’, which is the *conditio sine qua non* of placing an individual into return-related detention under Article 15 (1) and (4) of the Return Directive, as also confirmed by the CJEU.<sup>152</sup>

In case removal is postponed for a prolonged period of time, the repeated assessment of the child’s best interests might yield the child’s regularisation. This is particularly the case if the reasons for postponement are not related to uncooperative behaviour, and the child’s level of integration into the host society and other socio-economic rights considerations dictate such an outcome – for example, to let the child finish school or vocational training, or to prevent the child from being separated from the foster family in the Member State concerned, among others.

147 UNICEF (2016), p. 3.

148 This is an obligation under Art. 8 (6) of the Return Directive.

149 Council of Europe, Committee of Ministers (2010), Sub-section I. E, para. 3; and Section IV, paras. 1 and 75.

150 Return Directive, Art. 14 and recital (12).

151 *Ibid.*, Art. 14 (1) (b)-(d).

152 CJEU, C-357/09, *Said Shamilovich Kadzoev (Huchbarov)*, 30 November 2009, paras. 58-71; CJEU, C-146/14 PPU, *Bashir Mohamed Ali Mahdi*, 5 June 2014, paras. 59-60.

## 6. Oversight and post-return monitoring

### 6.1 Integration in the EU Member State where the child is physically present

Once an unaccompanied child is granted the right to stay in a Member State as a durable solution after their best interests have carefully been assessed, protection measures should not stop. The guardian should remain responsible for the child until the appropriate court appoints a permanent legal guardian for the child, as provided for by national law. Authorities should also ensure that the unaccompanied child receives whatever documents are necessary according to the legal system of the Member State concerned for the child to legally reside and access services there.<sup>153</sup>

With a view to providing adequate oversight, child-protection authorities should take full responsibility for ensuring the well-being of the child. This implies, among other things, for the child to enjoy all rights enshrined in the CRC, such as access to adequate accommodation, education, vocational training, healthcare and other child-specific support – on equal footing with children who are nationals of that Member State. In some Member States, such support can be extended even beyond the age of 18 years; thus child protection measures do not automatically stop with the child aging out.<sup>154</sup> Transitioning to adulthood takes time. The guardian and child-protection services should, where needed, continue to support the young adult to help facilitate that transition, just like parents do for their children.

### 6.2 Post-return monitoring in the country of return

If return has been found to be in the best interests of the child and has been implemented, monitoring the child's reintegration into the society of the country of return is key, to make sure return does not lead to child rights violations. Such follow-up action helps determine the effectiveness of the provision of assistance, the child's experience with the assistance received, and the sustainability of their reintegration process. Post-return monitoring, complemented by regular evaluations of the child's

situation, can significantly contribute to sustainable return and re-integration.

'Sustainability' as a concept has not, as of yet, been defined as a legal term in international law. To date, only three UN treaty bodies used the term 'sustainable return' in their concluding observations addressed to particular States – and not in this context, but in relation to the return of refugees and internally displaced persons.<sup>155</sup> The European Commission's proposal on the new Asylum and Migration Fund (2021-2027) also underscores sustainability as a key indicator to measure successful return, stating that "return outcomes are more sustainable if they are supported by efforts for reintegration."<sup>156</sup> Successful reintegration of migrants in their countries of origin is an essential element contributing to the sustainability of the return.

To this end, the GMG/OHCHR Guidelines and Principles on the human rights protection of vulnerable migrants equally encourage States to put in place long-term independent reporting mechanisms to monitor, after the migrants return, the risk and occurrence of human rights violations.<sup>157</sup> This resonates with the last report of the former UN Special Rapporteur on the human rights of migrants, entitled "2035 agenda for facilitating human mobility". It proposed, among others, the setting up of post-return monitoring systems in the countries of destination, with a view to ensuring respect for human rights of returnees after arrival; and to ensure that such monitoring is part of every readmission agreement.<sup>158</sup> The EU Action Plan on Unaccompanied Children (2010-2014), which still remains a key point of reference, also envisaged prioritising the funding of projects that provide for post-return monitoring and follow up, especially in the case of child victims of trafficking in human beings who have returned

<sup>153</sup> FRA & European Commission (2019), pp. 87-88.

<sup>154</sup> European Migration Network (2018), sub-section 2.6 (transition to adulthood).

<sup>155</sup> These were the UN Committee on the Elimination of All Forms of Racial Discrimination in 2009 (CERD/C/HRV/CO/8) and 2010 (CERD/C/BIH/CO/7-8); the UN Committee on Economic, Social and Cultural rights in 2008 (E/C.12/NPL/CO/2 and E/C.12/UNK/CO/1) and 2012 (E/C.12/BIH/CO/2); as well as the UN Human Rights Committee in 2012 (CCPR/C/BIH/CO/2).

<sup>156</sup> European Commission (2018), *Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund*, COM(2018) 471 final, Strasbourg, 12.06.2018, Explanatory Memorandum and recitals (20) and (23).

<sup>157</sup> GMG & OHCHR (2018), Principle 6 (8).

<sup>158</sup> UN (2017), *Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility*, A/HRC/35/25, 28 April 2017, pp. 14-15 (Goal 3).



to their home countries.<sup>159</sup> The former guardian in the host (EU) country could be made part of the cooperation framework between child-protection authorities of both countries concerned.

Effective post-return monitoring should cover both the conditions and circumstances of the return process, as well as the situation and individual circumstances in the children's home country after arrival. It should also look at how the child's situation evolves in the longer term. Independent oversight and human rights monitoring better guarantee compliance with international human rights and EU law. In addition, these mechanisms can provide valuable information that can be used for reporting in the country of origin and serve as a feedback channel to the competent authorities of the Member State concerned for a better formulation of the return-related decision-making processes. Such feedback helps make return measures evidence-based and informed by the experience of returnees on the ground. All this can contribute to making the necessary adjustments to Member States' return policies with respect to unaccompanied children, having regard to their vulnerability in particular, with a view to fully aligning these policies with children's rights and the obligation to pursue their best interests. The cooperation mechanism established under the 1996 Hague Convention on Child Protection, via the system of Central Authorities, can be used as an institutionalised avenue for feedback and exchange of information in the context of post-return monitoring.

## Promising practice

### Post-return monitoring in Pakistan

In connection with the European Parliament's approval of the EU-Pakistan readmission agreement in 2010, the European Commission committed to implementing post-return monitoring of returnees to Pakistan, including children. This has been envisaged in cooperation with international organisations working in the field (e.g. with UNICEF\* and IOM), "in order to gather to the extent possible the available information about the situation of persons readmitted to Pakistan (both Pakistani and where applicable third country nationals)".\*\* Similar initiatives could be considered in at least those third countries with which the EU has concluded remission agreements.\*\*\*

\* UNICEF monitors the situation of children who have returned to their country of origin and uses these findings to provide feedback to both the government in the countries of origin and to governments of the countries that implemented the returns (see UNICEF (2016), p. 4).

\*\* European Commission (2010), *Commission Declaration annexed to the European Parliament legislative resolution of 21 September 2010 on the draft Council decision on the conclusion of the Agreement between the European Union and the Islamic Republic of Pakistan on the readmission of persons residing without authorisation (05942/2010 – C7-0264/2009 – 2009/0036(NLE))*, OJ C 50E, 21.2.2012, pp. 62-63.

\*\*\* For an overview of the 17 bilateral EU-level readmission agreements that are in force, see the European Commission's webpage on return and readmission.

159 European Commission (2010), *Communication from the Commission to the European Parliament and the Council – Action Plan on Unaccompanied Minors (2010 – 2014)*, COM(2010)213 final, Brussels, 6.5.2010, p. 13.

## Conclusions

Unaccompanied children who do not meet the conditions for entry, stay and residence in the EU may be subject to procedures laid down in the Return Directive. Such procedures implicate a number of fundamental rights concerns, particularly from a child rights perspective.

When considering the return of an unaccompanied child in an irregular situation, immigration law enforcement authorities are obliged to give primary consideration to the child's best interests. To assess what is in the best interests of the child, Member States should establish and operate dedicated best interest assessment procedures, which should be essentially entrusted to child-protection services. For this, child-protection services should work in close cooperation with immigration authorities and with the child's guardian. Working in close collaboration with child-protection institutions would provide immigration law enforcement with the appropriate analytical framework and would allow them to gradually familiarise themselves with the necessary child-protection requirements, for the benefit of children. Giving primary consideration to the child's best interests is an overarching requirement, stemming from EU law and international law. It applies throughout all immigration procedures and actions related to children.

The identification of durable solutions for unaccompanied children should involve looking at all options. These do not only include return to the country of origin, but also granting them the right to stay in the Member State concerned. When return is found to be in the best interests of the child, return-related measures need to be fundamental-rights compliant and give due regard to the unaccompanied child's best interests.

Children for whom return has been found to be in their best interests should always receive effective

counselling so that they make use of all voluntary return options. They should also benefit from assisted voluntary return (and reintegration) programmes.

Forced return (removal) must be an option of last resort, only applicable in the strictly circumscribed situations set out in the Return Directive and with all fundamental rights safeguards applied, including those flowing from the Charter.

Removal operations must be carried out in a safe, child-appropriate and gender-sensitive manner. Joint return operations through charter flights, regardless of whether they are organised at a national level or coordinated by the European Coast and Border Guard Agency, should not include unaccompanied children. These operations are not suitable for this category of vulnerable persons. They can be traumatising for the children, who may have to witness the use of force and means of restraint against adult returnees, without having the support of their parents to deal with such experiences.

When an unaccompanied child is granted the right to stay in a Member State, protection measures and support should continue to ensure the continuous oversight of the child's situation and development. In the same vein, where return has been found to be in an unaccompanied child's best interests, post-return monitoring significantly contributes to sustainable return and re-integration of the child. Effective post-return monitoring should cover both the conditions and circumstances of the return process as well as the situation and individual circumstances in the child's home country after arrival. The 1996 Hague Convention on Child Protection offers tools and options for orderly international cooperation regarding the implementation of protective solutions with cross-border elements.



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