

Submission on Ireland's National Implementation Plan for EU Pact on Migration and Asylum

December 2024



Founded in 1995, the Children's Rights Alliance unites over 160 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies, and services.

A.S.S.C Accompaniment Support Services for Children
Alcohol Action Ireland
Amber Women's Refuge
Amnesty International Ireland
An Cosán
Anew
Anne Sullivan Foundation
Aoibhneas
Archways
AsIam
Association of Occupational Therapists of Ireland (AOTI)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Barnardos
Barretstown
Bedford Row Family Project
BeLonG To Youth Services
Bodywhys
Breaking Through CLG
Catholic Guides of Ireland
Child Law Project
Childhood Development Initiative
Children in Hospital Ireland
Children's Books Ireland
Children's Grief Centre
ChildVision
Citywise Education
Clarecare
COPE Galway
Cork Life Centre
Cork Migrant Centre
Crann Centre
Crosscare
CyberSafeKids
Cycle Against Suicide
Dalkey School Project National School
Daughters of Charity Child and Family Service
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Doras
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dyslexia Association of Ireland
Dyspraxia/DCD Ireland
Early Childhood Ireland
Early Learning Initiative (National College of Ireland)
Educate Together
Empowerment Plus
EPIC
Extern Ireland
FASD Ireland
FamiliBase
Féach
Focus Ireland
Foróige
Gaeloideachas
Galway Traveller Movement
GIY Ireland
Good Shepherd Cork
Helium Arts
Humanist Association of Ireland
Hygiene Hub
Immigrant Council of Ireland
Inclusion Ireland
Inner City Organisations Network (ICON)
Institute of Guidance Counsellors
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICLL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals' Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation
iScoil
Jigsaw
Katharine Howard Foundation
Kerry Diocesan Youth Service (KDYS)
Kids' Own Publishing Partnership
Kinship Care
Laois Domestic Abuse Services
Leap Ireland
Let's Grow Together
LGBT Ireland
Meath Women's Refuge & Support Services
Mecpaths
Mental Health Reform
Mercy Law Resource Centre
Migrant Rights Centre Ireland
Mothers' Union
Move Ireland
Museum of Childhood Ireland
Music Generation
My Mind
My Project Minding You
National Childhood Network
National Forum of Family Resource Centres
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
Neurodiversity Ireland
New Directions
Novas
One Family
One in Four
Our Lady of Lourdes Community Services Group
Parents Plus
Pavee Point
Peter McVerry Trust
Prevention and Early Intervention Network
Psychological Society of Ireland
Rainbow Club Cork
Rainbows Ireland
Rape Crisis Network Ireland (RCNI)
Realt Beag/Ballyfermot Star
Respond
SAFE Ireland
Saoirse Domestic Violence Services
SAOL Project
School of Education UCD
Scouting Ireland
Sexual Violence Centre Cork
Simon Communities of Ireland
SIPTU
Social Care Ireland
Society of St. Vincent de Paul
SPHE Network
Sphere 17
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
StartBright Early Learning Centres
TASC
Teachers' Union of Ireland
Teach Tearnainn
Terenure College Rugby Football Club
The Ark, A Cultural Centre for Children
The Irish Red Cross
The Jack and Jill Children's Foundation
The UNESCO Child and Family Research Centre, NUI Galway
The Wheel
Transgender Equality Network Ireland
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
Variety – the Children's Charity of Ireland
Vision Ireland
Women's Aid
YMCA Dublin
Young Ballymun
Young Social Innovators
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

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Introduction

The Children's Rights Alliance unites over 160 organisations working together to make Ireland one of the best places in the world to be a child. We change the lives of all children by making sure that their rights are respected and protected in our laws, policies and services. We also provide legal information and advice to children, young people and their families through our helpline and legal advice clinics.

The Children's Rights Alliance welcomes the opportunity to make a submission to the Department of Justice as the Department is finalising the National Implementation Plan for the EU Pact on Migration and Asylum (the Pact). The Pact is a wide-ranging legal instrument that will introduce significant reforms to Ireland's asylum system. It contains the following Regulations and Directives:

- Asylum and Migration Management Regulation
- Asylum Procedure Regulation
- Return Border Procedure Regulation
- Crisis and Force Majeure Regulation
- Eurodac Regulation
- Screening Regulation
- Qualification Regulation
- Revised Reception Conditions Directive
- Union Resettlement and Humanitarian Admission Framework (Union Framework) Regulation

Ireland has opted into all the Regulations and Directives except the Screening Regulation and the Asylum Return Border Procedure Regulation but they have committed to replicating these in national law.¹

The National Implementation Plan is a critical document that will outline how Ireland plans to bring effect to the Pact. It will be important to ensure in the implementation phase from now until June 2026 that Ireland's asylum system respects and protects the fundamental rights of all international protection applicants including all children and young people. The reforms introduced to Ireland's asylum system through the Pact implementation will be far reaching and affect the day to day lives of all children and young people seeking international protection, including unaccompanied and separated children (UASC). Implementation therefore must be done in line with long established children's rights. The Pact sets out the minimum base standards for States to have in place, it does not preclude States from retaining or introducing any provisions that go over and above the minimum. In implementing the Pact, Ireland should not seek to reduce standards to the minimum standards set out.

¹ Houses of the Oireachtas, EU Migration and Asylum Pact (Houses of the Oireachtas June, 2024) 3.

Building a competent workforce that is trained in human rights, including children's rights will be very important as the reform of the asylum system takes place. Human rights experts should be present at all levels within the asylum system.

The Alliance is pleased to see throughout the Regulations and Directives in the Pact reference to Article 24(2) of the Charter of Fundamental Rights of the European Union which states that 'in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'.² This is also central to Article 3 of the UN Convention on the Rights of the Child (UNCRC).³

The UNCRC also requires States to assist all children seeking refugee status and ensure they can access the full range of convention rights including rights to health, housing, education and an adequate standard of living.⁴ Ancillary to this, States are also obligated to pay particular attention to children experiencing trauma by giving appropriate protection and the special support necessary for recovery under Article 39. These rights apply to children who enter Ireland with their families and unaccompanied and separated children seeking asylum. Article 20 recognises that States have a duty to provide care and protection to children who are separated from their families.

The Committee on the Rights of the Child is clear that equal standards of protection must be provided to every child under 18, infants and adolescents alike, and that child protection and welfare actors should take primary responsibility for children in the context of international migration.⁵ Reception conditions for those awaiting status determination must provide adequate space and privacy for children and their families.⁶

In drafting Ireland's implementation plan for the Pact, the opinion of the Irish Human Rights and Equality Commission should be sought alongside the opinion of the Ombudsman for Children's Office to ensure that any new reforms being introduced are human rights compliant. Consideration should also be given to consulting directly with children and young people, which could be done through the Participation Unit in the Department of Children, Equality, Disability, Integration and Youth.

This submission will focus on the most salient aspects of the Pact that effect children and young people and outline recommendations on how they should be implemented. These are:

- Representatives for Unaccompanied and Separated Children
- Age Assessments
- Detention of Children
- Children's Data

² Charter of Fundamental Rights of the European Union, 200/C 364/01 (18 December 2000) art 24(2).

³ UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) art 3.

⁴ Ibid art 22

⁵ Committee on the Rights of the Child and Committee on the Protection of the Rights of all Migrant Workers 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 para 3 and para 13

⁶ Ibid para 50.

- Legal Counselling and Legal Advice and Representation
- Monitoring Mechanism

Representatives for Unaccompanied and Separated Children

The Pact

Representatives for UASC are called for in a number of areas in the Pact, depending on what procedure or process they are in. The Screening Regulation states UASC must have a representative or a person trained to *safeguard the best interests and general wellbeing of the minor assigned to them*.⁷ The Screening Regulation introduces a mandatory screening procedure that will apply to all international protection applicants entering a Member State.⁸ It provides for mandatory security and identity checks, vulnerability and health checks and subsequent referral to an appropriate procedure or next step.⁹

UASC are exempt from the new Border Procedure under the Asylum Procedure Regulation unless they are a security risk.¹⁰ If they are a security risk the Asylum Procedure Regulation states that a representative or a person with the necessary skills and expertise to provisionally assist UASC in order to safeguard his or her best interests and general well-being be appointed.¹¹ The Border Procedure is a new specific procedure for people whose asylum applications has been rejected, or who received a refusal of entry.¹² The Asylum Procedure Regulation outlines different procedures and timeframes for processing asylum applications.¹³

Both the Screening Regulation¹⁴ and the Asylum Procedure Regulation¹⁵ state that the representative or other person referred to should be the same as the representative appointed under the updated Reception Conditions Directive.

Under the updated Reception Conditions Directive, the best interests of the child shall be a primary consideration for Member States when implementing its provisions.¹⁶ Where an International Protection application is made by a person who claims to be a child, representatives must be appointed to UASC, as soon as possible and no later than 15 working days from the date on which the application is made.¹⁷ In the meantime a suitable person will be appointed to provisionally act as

⁷ Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 OJEU L art 13.

⁸ Ibid art 5.

⁹ Ibid art 8.

¹⁰ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 42.

¹¹ Ibid art 23.

¹² Regulation (EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure and amending Regulation (EU) 2021/1148 OJEU art 1.

¹³ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 1.

¹⁴ Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 OJEU L art 13.

¹⁵ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 23.

¹⁶ Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) OJEU L art 26.

¹⁷ Ibid art 27.

a representative.¹⁸ It also states that representatives should have a maximum caseload of 30 UASC.¹⁹ The Directive states that in order to respond to disproportionate number of UASC applications the appointment of representatives may be delayed for ten working days and the number of unaccompanied minors per representative may be increased, up to a maximum of 50 UASC.²⁰

The Directive also states that administrative or judicial authorities are responsible to supervise the proper performance of tasks by the representatives and persons suitable to provisionally act as representatives, including by reviewing the criminal records of those appointed.²¹ The administrative or judicial authorities or other entities shall review complaints lodged by UASC against their appointed representatives or designated persons.²²

International Human Rights Law and EU Best Practice

The UNCRC requires States to ensure the protection of children who are without parental care which extends to any child, no matter the nationality or residence status, in a State.²³ The UN Committee on the Rights of the Child has noted that the appointment of a representative or guardian is a key procedural safeguard for protecting the best interests of the child, and that asylum or other procedures should only be referred to once a guardian has been appointed to the child.²⁴

The Committee has provided guidance on the role of the guardian stating that they should have expertise in the area of child care, they should ensure that the child's 'legal, social, health, psychological, material and educational needs' are looked after, and that the guardian acts as a link between the child and state agencies providing care to the child.²⁵

The European Union Agency for Fundamental Rights (FRA), recognising the need for a guardian to be appointed promptly, recommends that a time limit should be set for the appointment of a guardian, with a maximum number of cases to be assigned to any one guardian being the best way to ensure they have a reasonable caseload which allows them to perform their duties effectively.²⁶ The basis for guardianship should be set out in national law and an authority should be responsible for the system.²⁷

A key role of a guardian is to hold public authorities accountable and to ensure that 'the child's legal, social, health, psychological, material and educational needs are met'.²⁸ FRA has set out what the role of a guardian should be to support UASC when applying for International Protection as including:

¹⁸ Ibid.

¹⁹ Ibid art 27(7)

²⁰ Ibid art 27.

²¹ Ibid.

²² Ibid.

²³ UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989). Art 20.

²⁴ Committee on the Rights of the Child General Comment No. 6 (2005) regarding the treatment of unaccompanied and separated children outside of their country of origin CRC/GC/2005/6 para 21.

²⁵ Ibid para 33.

²⁶ European Union Agency for Fundamental Rights (FRA), *Guardianship Systems for Unaccompanied Children In The European Union — Developments Since 2014* (Publications Office of the European Union 2022) 58-59.

²⁷ Ibid 27.

²⁸ Ibid 7.

- safeguarding the child, including by ensuring the child receives appropriate care and services and protecting the child against all forms and risks of violence and exploitation.
- supporting children to enrol in education, access healthcare services and facilitate their participation in decisions being made about them.
- act as an advocate for the child and ensure they have access to information and legal advice as needed.²⁹

In Ireland currently, the role of a representative or guardian has, to date, been fulfilled by qualified social workers in Tusla who are CORU registered (which promotes and protects their professional independence). The National Reception Conditions Regulations specify that Tusla fulfils the role of representative with respect to the Reception Conditions.³⁰ Tusla are both the corporate parent and advocate for the children and young people in their care, including UASC, and on occasion there may be a conflict between the two roles they play. An independent representative or guardian can help overcome this challenge.

The Alliance recommends that the National Implementation Plan include provision for establishing a representative or guardianship service, modelled on the recommendations described above by FRA that will carry out the duties of the representative as laid out in the Regulations of the Pact.

The Reception Conditions Directive states that a representative should be appointed as soon as possible and no later than 15 working days (and an extra ten days in response to a disproportionate number of arrivals). Three weeks (potentially up to five weeks) is a long time to wait for a representative to be appointed. FRA states that a guardian should be applied promptly.³¹

In addition, under the Border Procedure where UASC deemed a security risk can be placed, the suitable person appointed to provisionally act as a representative (until the formal representative is appointed) does not have as many duties as a representative, for example they do not have to assist the UASC with preparation for their personal interview.³² It is important that a representative is appointed as soon as possible to ensure there are no such gaps in support for the UASC. The National Implementation Plan should clearly set out what the timeframe for appointing a representative is and state that a representative should be appointed as soon as possible.

The Receptions Conditions Directive states that representatives should have a maximum caseload of 30 UASC rising to 50 UASC in response to a disproportionate number of UASC applications. While it is important that a cap is included 30 UASC is much higher than the current maximum in many EU countries.³³ It is a lot of children for one representative to assist in line with their duties as set out above by FRA. FRA also states that a maximum number of cases to be assigned to any one guardian is the best way to ensure they have a reasonable caseload which allows them to perform their duties

²⁹ Ibid 60.

³⁰ European Communities (Reception Conditions) Regulations 2018, SI 230/2018 reg 10.

³¹ European Union Agency for Fundamental Rights (FRA), *Guardianship Systems for Unaccompanied Children In The European Union — Developments Since 2014* (Publications Office of the European Union 2022) 58-59.

³² Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 23.

³³ PICUM p26.

effectively.³⁴ The Alliance recommends that the National Implementation Plan outline that 30 UASC is an absolute maximum number of UASC a representative or the suitable person appointed to provisionally act as a representative has at any one time. A lower number could be inserted as the most appropriate number.

Data should be collected at all levels of the representative system in order to provide evidence on how the system is working. A review of how the representative system is working should take place within two years of it taking effect to assess if the system is working effectively and upholding the rights of UASC.

Recommendations

- The National Implementation Plan includes provision for establishing a representative or guardianship service, modelled on the FRA guidance, that will carry out the duties of the representative as laid out in the Regulations of the Pact. These include:
 - safeguarding the child, including by ensuring the child receives appropriate care and services and protecting the child against all forms and risks of violence and exploitation.
 - supporting children to enrol in education, access healthcare services and facilitate their participation in decisions being made about them.
 - act as an advocate for the child and ensure they have access to information and legal advice as needed.³⁵
- The National Implementation Plan clearly sets out what the timeframe for appointing a representative is and state that a representative should be appointed as soon as possible.
- The National Implementation Plan outlines that 30 UASC is an absolute maximum number of UASC a representative or the suitable person appointed to provisionally act as a representative has at any one time. A lower number could be inserted as the most appropriate number.

³⁴ European Union Agency for Fundamental Rights (FRA), *Guardianship Systems for Unaccompanied Children In The European Union — Developments Since 2014* (Publications Office of the European Union 2022) 58-59.

³⁵ Ibid 60.

Age Assessments

EU Pact

The process for age assessment, where as a result of statements by the applicant, available documentary evidence or other relevant indications there are doubts as to whether the person is a minor is outlined in the Asylum Procedure Regulation.³⁶ It states that the determining authority may undertake a multi-disciplinary assessment, including a psychosocial assessment, carried out by qualified professionals, to determine the applicant's age.³⁷ The assessment of the age shall not be based solely on the applicant's physical appearance or behaviour. For the purposes of the age assessment, documents that are available shall be considered genuine, unless there is evidence to the contrary, and statements by minors shall be taken into consideration.³⁸

It goes on to state that where there are still doubts as to the age of an applicant following the multi-disciplinary assessment, medical examinations may be used as a measure of last resort to determine the applicant's age. Any medical examination carried out shall be the least invasive possible and be performed with full respect for the individual's dignity by a medical professional with expertise in age estimation.³⁹ Where the result of the age assessment is not conclusive with regard to the applicant's age or includes an age-range below 18 years, it shall be assumed that the applicant is a minor.⁴⁰

Where medical examinations are used the authorities shall ensure that applicants, their representative or the suitable person appointed are informed, prior to the examination of their application for international protection, of the possibility that their age might be assessed by means of a medical examination.⁴¹ This must be done in a language they understand and in an child friendly and age appropriate manner. This shall include information on the method of examination, on possible consequences which the result of the medical examination might have for the examination of the application, and on the possibility and consequences of a refusal on the part of the applicant to undergo the medical examination.⁴²

All documents relating to the medical examination shall be included in the applicant's file.⁴³ A medical examination to assess the age of applicants shall only be carried out where the applicants, their parents, their representative or the suitable person appointed provisionally to act as a representative consent, after having received the information set out above.⁴⁴

³⁶ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 25.

³⁷ Ibid art 25(1).

³⁸ Ibid.

³⁹ Ibid art 25(2).

⁴⁰ Ibid.

⁴¹ Ibid art 25(4).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid art 25(5).

The refusal by the applicants, their parents, their representative or the suitable person appointed provisionally to act as a representative to have a medical examination carried out for the purposes of the age assessment shall not prevent the determining authority from taking a decision on the application for international protection. Such refusal may only be considered to be a rebuttable presumption that the applicant is not a minor.⁴⁵

International Human Rights Law and European Best Practice

The UN Committee on the Rights of the Child states that:

'To make an informed estimate of age, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such assessments should be carried out in a prompt, child-friendly, gender sensitive and culturally appropriate manner, including interviews of children and, as appropriate, accompanying adults, in a language the child understands.

Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered. The benefit of the doubt should be given to the individual being assessed.

States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes.

States should ensure that their determinations can be reviewed or appealed to a suitable independent body'.⁴⁶

The Committee has also found that authorities may violate Article 8 of the UNCRC by failing to assign evidentiary value to the person's documents, including where the person's circumstances of flights precluded them from obtaining a passport.⁴⁷ The European Court of Human Rights (ECtHR) has acknowledged that the benefit of the doubt as to the credibility of statements or documents must be given to asylum seekers in light of their vulnerability and the special situation in which they find themselves in.⁴⁸ In relation to appeals of age assessments the Council of Europe states that appeals must be child-sensitive, timely and allow for effective participation of the child.⁴⁹

⁴⁵ Ibid art 25(6).

⁴⁶ Committee on the Rights of the Child and Committee on the Protection of the Rights of all Migrant Workers 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 para 4.

⁴⁷ CRC, R.Y.S. v. Spain, Communication no. 76/2019, 4 February 2021, 8.11; CRC, R.K. v. Spain, Communication no. 27/2017, 18 September 2019, 9.5 and 9.6.

⁴⁸ ECtHR, *M.A. v. Switzerland*, Application No. 52589/13, 18 November 2014, para.55; ECtHR, *A.A. and Others v. Sweden*, Application no.34098/11, 24 July 2014, para. 73; ECtHR (GC), *F.G. v. Sweden*, no. 43611/11, 23 March 2016, para. 113.

⁴⁹ Council of Europe, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration* (CoE September 2017) para 179-180.

The Separated Children in Europe Programmes *Statement of Good Practice (SCEP Statement)* states that age assessment procedures should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age.⁵⁰ If an age assessment is thought to be necessary, the *SCEP Statement* outlines that authorities should ensure there is informed consent and the procedure should be multi-disciplinary and undertaken by independent professionals with appropriate expertise and familiarity with the child's ethnic and cultural background.⁵¹

The *SCEP Statement* also states that age assessments must balance physical, developmental, psychological, environmental and cultural factors. It goes on to state that it is important to note that age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure. When making an age assessment, the *SCEP Statement* state that authorities should ensure individuals whose age is being assessed should be given the benefit of the doubt.⁵² Examinations must never be forced or culturally inappropriate. The least invasive option must always be followed, and the individual's dignity must be respected at all times.⁵³

The *SCEP Statement* states the procedure, outcome and the consequences of the age assessment must be explained to the individual in a language that they understand, and the outcome must also be presented in writing.⁵⁴ It also states there should be a procedure to appeal against the decision and the provision of the necessary support to do so.⁵⁵

The *SCEP Statement* further states that in cases of doubt the person claiming to be less than 18 years of age should provisionally be treated as such.⁵⁶ An individual should be allowed to refuse to undergo an assessment of age where the specific procedure would be an affront to their dignity or where the procedure would be harmful to their physical or mental health.⁵⁷ A refusal to agree to the procedure must not prejudice the assessment of age or the outcome of the application for protection.⁵⁸

The Alliance is pleased to see the requirement in the Asylum Procedure Regulation that a multidisciplinary age assessment procedure is undertaken and carried out by qualified professionals. We also welcome the explicit provision that the assessment of age shall not be based solely on the applicant's physical appearance or behaviour. The Alliance further welcomes the requirement in the Regulation that if the results of the age assessment is inconclusive the person shall be assumed to be a child. These should be operationalised in the implementation of the Pact.⁵⁹

⁵⁰ Separated Children in Europe Programme, *SCEP Statement of Good Practice 4th Revised Edition* (SCEP 2009) 25.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 25.

In implementing the provisions of the Pact age assessments should only be conducted as a measure of last resort, not as standard or routine practice and only where there is a reasonable doubt regarding their age following interviews and attempts to gather documentary evidence on the individuals age as outlined by the *SCEP Statement*.⁶⁰

The Alliance is disappointed that the Pact explicitly states that the refusal of a medical examination as part of an age assessment shall mean that the individual is not a minor, which is contrary to the *SCEP Statement*. This reinforces the need for age assessments, including medical examinations to be used as an exception and as a last resort. When carrying out age assessments the least invasive option must always be followed, and the individual's privacy and dignity must be respected at all times.

In implementing the provisions of the Pact the benefit of the doubt in relation to documents should be provided to the individual as required by the UN Committee on the Rights of the Child and the ECtHR. This is to acknowledge that asylum seekers are inherently vulnerable and may not always have appropriate identification documents due to the circumstances that they find themselves in. If required, training should be provided to all professionals involved in determining age assessments on how to assess documents, including social workers.⁶¹

There is no explicit right to appeal the determination on age assessment in the Asylum Procedure Regulation. The UN Committee on the Rights of the Child⁶² and *SCEP Statement*⁶³ both state there should be that access to appeal the initial determination to an independent body, as well as the provision of the necessary support to do so. Tusla's Guidance and Assessment Framework to determine eligibility for Tusla services under the Child Care Act 1991 currently provides for an independent appeal on age assessments.⁶⁴ While the appeal is not currently taking place Tusla are working towards full implementation of the appeal provisions in the Framework.⁶⁵ The Alliance recommends the National Implementation Plan include an independent appeal on initial age assessment determinations and provisions to support the applicant to make the appeal.

Age assessments should take place in a prompt manner according to the UN Committee on the Rights of the Child. The Council of Europe also states that appeals must be timely.⁶⁶ Delay can have a detrimental knock-on effect for individuals in terms of education, employment and other supports

⁶⁰ Ibid.

⁶¹ The Committee on the Rights of the Child has stated that relevant professionals should receive training on the rights of migrant children and, in particular, the standards set by the Committee's jurisprudence and General Comments. See CRC, R.Y.S. v. Spain, Communication no. 76/2019, 17 August 2021, 9 (d).

⁶² Committee on the Rights of the Child and Committee on the Protection of the Rights of all Migrant Workers 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 para 4.

⁶³ Separated Children in Europe Programme, *SCEP Statement of Good Practice 4th Revised Edition* (SCEP 2009) 25.

⁶⁴ Tusla, the Child and Family Agency, *Procedural Guidance and Assessment Framework for the determination of eligibility for services under the Child Care Act 1991 for separated children seeking international protection* (Tusla 2023).

⁶⁵ Information received by the Children's Rights Alliance from Tusla, 21 October 2024.

⁶⁶ Council of Europe, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration* (CoE September 2017) para 179-180.

they may receive if they are considered UASC. Timely age assessments and appeals, if necessary, will minimise disruption to the young person's life.

The Reception Condition Directive states that gender and age-specific concerns and the situation of applicants with special reception needs shall be taken into consideration when providing material reception conditions.⁶⁷ It also states that minors and unaccompanied minors are more likely to have special reception needs.⁶⁸ In implementing the Pact child appropriate accommodation needs to be provided to individuals whose age is in doubt and are undergoing the age assessment process. Currently Tusla and DCEDIY are working towards opening a separate residential unit for these individuals, separate from both residential units accommodating UASC and adult IPAS centres.⁶⁹ The Alliance recommends that this model continues as part of the Pact implementation.

Recommendations

- The following important safeguards when carrying out age assessments should be included in the National Implementation Plan:
 - multidisciplinary age assessment procedure is undertaken and carried out by qualified professionals;
 - the assessment of age shall not be based solely on the applicant's physical appearance or behaviour;
 - if the results of the age assessment are inconclusive the applicant shall be assumed to be a child.
- Age assessments should only be conducted as a measure of last resort, not as standard or routine practice and only where there is a reasonable doubt regarding their age following interviews and attempts to gather documentary evidence on the individuals age as outlined by the *SCEP Statement*.
- When carrying out age assessments the least invasive option must always be followed, and the individual's privacy and dignity must be respected at all times.
- The benefit of the doubt in relation to documents should be provided to the individual as required by the UN Committee on the Rights of the Child and the ECtHR. If required training should be provided to all professionals involved in determining age assessments on how to assess documents, including social workers.
- An independent appeal on initial age assessment determinations should be included in the National Implementation Plan as well as provisions to support the applicant to make the appeal.
- To avoid disruption to the UASC and detrimental knock on effects in terms of education, employment and other supports age assessments should take place in a prompt manner according to the UN Committee on the Rights of the Child and the Council of Europe.

⁶⁷ Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) OJEU L art 20.

⁶⁸ Ibid art 24.

⁶⁹ Information received from Tusla, 21 October 2024.

- Child appropriate accommodation should be provided to individuals whose age is in doubt and are undergoing the age assessment process. The current model operated by Tusla and DECDIY of separate residential units for UASC whose age is in doubt could be continued.

Detention of children

EU Pact

The Reception Conditions Directive sets out the Pact's requirements on detention. It states that children as a rule should not be detained and that adequate alternatives to detention shall, as a rule, be used for families with children in accordance with the principle of family unity.⁷⁰ Such families shall be placed in accommodation suitable to them. It also states in exceptional circumstances, as a measure of last resort, and after detention is assessed to be in their best interests, children may be detained where the child's parent or primary caregiver is detained or in the case of UASC, where detention safeguards the child.⁷¹

The Directive states that detention should be for the shortest possible period of time and that children should never be detained in prison, or another facility used for law enforcement purposes. All efforts shall be made to release minors from detention and place them in accommodation suitable for minors.⁷² The Directive states here that the best interests of the child shall be a primary consideration.⁷³

The Directive states where minors are detained, they shall have the right to education in accordance with article 16 of the Directive, unless the provision of education is of limited value to them due to the very short period of their detention. Those minors shall also have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.⁷⁴

Where UASC are detained, the Directive states that they shall be accommodated in facilities adapted to the housing of UASC. Such facilities shall be provided with staff qualified to safeguard the rights of UASC and attend to their needs.⁷⁵ Member States shall ensure that they are accommodated separately from adults. The Directive also states that detained families with children shall be accommodated in detention facilities adapted to the needs of children.⁷⁶

International Human Rights Law and European best practices

The UN Committee on the Rights of the Child has stated that detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.⁷⁷ Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention on the Rights of the Child that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for

⁷⁰ Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) OJEU L art 13(2).

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid art 13(3).

⁷⁶ Ibid art 13(4).

⁷⁷ Committee on the Rights of the Child *General Comment No. 6 (2005) regarding the treatment of unaccompanied and separated children outside of their country of origin* CRC/GC/2005/6 para 61.

the shortest appropriate period of time.⁷⁸ The Committee states that all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.⁷⁹ In the exceptional case of detention, the Committee states that conditions of detention must be governed by the best interests of the child and that special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so.⁸⁰

The Committee also emphasises the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, even when they are detained for a short period of time or with their families.⁸¹

The Separated Children in Europe Programmes *Statement of Good Practice (SCEP Statement)* states that separated children must never be detained for reasons related to their immigration status or illegal entry.⁸² This includes, whether temporary or otherwise, detention at the border or in international zones, in detention centres, in police cells, in prisons or in any other special detention centres for young people. Judicial oversight must be exercised where it is deemed in a child's best interests to be placed in a closed centre. Detention must only be used as a measure of last resort and for the shortest appropriate period of time.⁸³

The Alliance is disappointed that detention of children including UASC, while only in exceptional circumstances, is contained in the Pact given that UN Committee on the Rights of the Child recommends detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.⁸⁴ Children should never be detained for such reasons. As such the Alliance recommends that the National Implementation Plan does not include any provision for detention of children, including UASC.

Should detention be included in the Plan it should explain how best interest of the child assessments will be used to ensure that children as a rule are not detained. It should also outline how the limits on the detention of children in the Pact will be strictly enforced in practice and how detention will remain an absolute exception only to be used as a measure of last resort and for the shortest appropriate period of time.⁸⁵ In ensuring that all efforts are made to release children from detention and place them in suitable accommodation suitable for, the acceleration of relevant processes

⁷⁸ Ibid and UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Art 37(b).

⁷⁹ Committee on the Rights of the Child *General Comment No. 6 (2005) regarding the treatment of unaccompanied and separated children outside of their country of origin* CRC/GC/2005/6 para 61.

⁸⁰ Ibid para 63.

⁸¹ Committee on the Rights of the Child and Committee on the Protection of the Rights of all Migrant Workers 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 para 9.

⁸² Separated Children in Europe Programme, *SCEP Statement of Good Practice 4th Revised Edition* (SCEP 2009) 26.

⁸³ Ibid.

⁸⁴ Committee on the Rights of the Child *General Comment No. 6 (2005) regarding the treatment of unaccompanied and separated children outside of their country of origin* CRC/GC/2005/6 para 61.

⁸⁵ Ibid and UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) Art 37(b).

should be allowed.⁸⁶ How the acceleration of relevant processes to release children from detention should be outlined in the National Implementation Plan.

A best interest of the child assessment should also take place where in exceptional cases children are detained when the child's parent or primary caregiver is detained or in the case of UASC, where detention safeguards the child. The Plan should list the alternatives to detention for families with children in accordance with the principle of family unity. Alternatives to detention should ensure they meet the material reception conditions, and special reception conditions outlined in the Reception Condition Directive for both children in families and UASC.⁸⁷

The National Implementation Plan should outline the type of facilities that will be used when UASC are detained ensuring they are staffed with appropriately qualified staff that meet their specific needs as required under the Reception Conditions Directive.⁸⁸ They also need to be accommodated separately from adults. The Plan should also outline how they will ensure that the detention facilities for families with children are adapted to the needs to children.⁸⁹

Lastly, the National Implementation Plan should explain how children when they are detained will have access to education as required under the Directive.⁹⁰ The Plan should also outline how children that are detained will practically be able to engage in leisure activities, including play and recreational activities appropriate to their age.

Defacto detention

The Asylum Border Regulation states that all applicants in border procedures are required to reside at or in proximity of the external border or in a transit zone or in other designated locations within their territory.⁹¹ UASC will not be subject to border procedure (unless they are a security risk),⁹² but families with children will be, although they will be prioritised within the new procedure.⁹³

The Regulation also states that a border procedure should not be applied, or should cease to apply, where it results in the detention of applicants in circumstances where the conditions for detaining persons and the guarantees applicable to detention as laid down in Receptions Condition Directive are not met.⁹⁴ In addition the border procedure shall cease to apply when the necessary support cannot be provided to applicants with special reception needs, including minors and when there are relevant medical reasons for not applying the border procedure, including mental health reasons.⁹⁵

⁸⁶ Committee on the Rights of the Child *General Comment No. 6 (2005) regarding the treatment of unaccompanied and separated children outside of their country of origin* CRC/GC/2005/6 para 61.

⁸⁷ Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection (recast) OJEU L arts, 19, 20, 22, 24, 26 and 27.

⁸⁸ Ibid art 13(3).

⁸⁹ Ibid art 13(4).

⁹⁰ Ibid art 16.

⁹¹ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 54.

⁹² Ibid art 42.

⁹³ Ibid 8.

⁹⁴ Ibid art 53.

⁹⁵ Ibid.

The Alliance welcomes the safeguarding here in relation to the application of the guarantees in the Receptions Conditions Directive under the border procedure. The National Implementation Plan should outline the process or steps that State needs to take when a border procedure ceases to apply.

It is concerning that families with children and UASC deemed a security risk may be subject to defacto detention as they will be required to reside at or in proximity to an external border or in a transit zone or in other designated locations within their territory.⁹⁶ De facto detention can be understood as a measure which in practice amounts to deprivation of liberty but which States do not formally qualify as such.⁹⁷ The National Implementation Plan should outline how it will ensure freedom of movement and the right to liberty when setting up the new border procedure, so that it does not in effect amount to defacto detention or deprivation of liberty.

Recommendations

- The National Implementation Plan should not include any provision for detention of children, including UASC.
- Should detention be included in the Plan it should explain how best interest of the child assessments will be used to ensure that children as a rule are not detained.
- The Plan should outline how the limits on the detention of children in the Pact will be strictly enforced in practice and how detention will remain an absolute exception only to be used as a measure of last resort and for the shortest appropriate period of time.
- How the acceleration of relevant processes to release children from detention should be outlined in the National Implementation Plan.
- A best interest of the child assessment should be included in the Plan where in exceptional cases children are detained when the child's parent or primary care-giver is detained or in the case of UASC, where detention safeguards the child.
- The Plan should list the alternatives to detention for families with children in accordance with the principle of family unity. Alternatives to detention should ensure they meet the material reception conditions and special reception conditions outlined in the Reception Condition Directive for both children in families and UASC.
- How children when they are detained will have access to education as required under the Reception Conditions Directive should be outlined. The Plan should also outline how children that are detained will practically be able to engage in leisure activities, including play and recreational activities appropriate to their age.
- The type of facilities that will be used when UASC are detained should be included in the Plan, ensuring they are staffed with appropriately qualified staff that meet their specific needs and accommodated separately from adults. The Plan should also outline how they will ensure that the detention facilities for families with children are adapted to the needs to children.

⁹⁶ Ibid art 54.

⁹⁷ Platform for International Cooperation on Undocumented Migrants, *Children's Rights in the 2024 Migration and Asylum Pact* (PICUM October 2024)

- The process or steps that State needs to take when a border procedure ceases to apply should be outlined in the National Implementation Plan.
- How freedom of movement and the right to liberty is protected when setting up the new border procedure should be outlined, to ensure that the procedure does not in effect amount to defacto detention or deprivation of liberty.

Children's Data

The Pact

The Eurodac Regulation regulates the use and storage of data collected during the security and identity checks that take place under the screening process. Biometric data (including fingerprints and facial imaging), personal information, security checks and migration status and EU Member State of origin will be recorded for all international Protection applicants, including UASC and children in families, arriving into the State under Eurodac.⁹⁸

Under the Eurodac Regulation it states that biometric data will be taken of children from the age of six by trained professionals in a child friendly and sensitive manner and in full respect of the best interests of the child and the safeguards laid down in the UNCRC.⁹⁹ It also states that in the event that there is uncertainty as to whether or not a child is under the age of six and there is no supporting proof of that child's age, it shall be considered that child to be under the age of six for the purposes of this Regulation.¹⁰⁰

A child shall be accompanied by an adult family member throughout the time when his or her biometric data are taken. A UASC shall be accompanied by a representative or, where a representative has not been designated, a person trained to safeguard the best interests of the child, throughout the time when his or her biometric data are taken.¹⁰¹

The Regulation states that no form of force shall be used against minors to ensure their compliance with the obligation to provide biometric data but where permitted by national law, and as a last resort, a proportionate degree of coercion may be used against minors to ensure their compliance.¹⁰² It further states that where a minor, in particular a UASC refuses to give their biometric data and there are reasonable grounds for believing that there are risks relating to safeguarding or protection, as assessed by an official trained specifically to take a minor's biometric data, the minor shall be referred to the competent national child protection authorities, the national referral mechanisms or both.¹⁰³

The Regulation states that data of children under the age of fourteen can be used for law enforcement purposes when the data is necessary for the purpose of the prevention, detection or

⁹⁸ Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council OJEU L art 22.

⁹⁹ Ibid art 14.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

investigation of a terrorist offence or other serious criminal offence which that child is suspected of having committed.¹⁰⁴

International Human Rights Law

Article 3 of the UNCRC states that all actions concerning children, the best interests of the child shall be a primary consideration.¹⁰⁵ The UN Committee on the Rights of the Child states that children's personal data, in particular biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, use and retention of, and access to, data. The Committees urge due diligence regarding safeguards in the development and implementation of data systems, and in the sharing of data between authorities and/or countries. States parties should implement a "firewall" and prohibit the sharing and use for immigration enforcement of the personal data collected for other purposes, such as protection, remedy, civil registration and access to services. This is necessary to uphold data protection principles and protect the rights of the child, as stipulated in the Convention on the Rights of the Child.¹⁰⁶

The Committee also states that no violence against children is justifiable; all violence against children is preventable, where violence includes both physical and mental violence.¹⁰⁷ The EU Fundamental Rights Agency states that EU Member States should never use force against children or deprive them of liberty to obtain their fingerprints. Officers should build up a relationship of trust with the child.¹⁰⁸

It is welcome to see safeguards in the Regulation on the collection of biometric data for children including that it will be carried out by trained professionals in a child friendly and sensitive manner and that a child will be accompanied by an adult family member or if a UASC a representative or a person trained to safeguard their best interests. The inclusion of the benefit of the doubt that the child is under 6 where the age of a child is uncertain or there is no supporting proof of a child's age is also positive. The National Implementation Plan should outline the details of how these safeguards will be put into practice.

The safeguards around making referrals to child protection mechanisms including national referral mechanisms are particularly welcome. The National Implementation Plan should mandate that those officials trained to take biometric data from children also receive training on how to identify child protection needs and potential victims of trafficking and exploitation.

The use of a proportionate degree of coercion to ensure a child's compliance with the collection of data, even when it is used as a last resort is of great concern. The Committee on the Rights of the Child states that no violence (both physical and mental) against children is justifiable and that

¹⁰⁴ Ibid.

¹⁰⁵ UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) art 3.

¹⁰⁶ Committee on the Rights of the Child and Committee on the Protection of the Rights of all Migrant Workers, 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 para 17.

¹⁰⁷ Committee on the Rights of the Child, General comment No. 13 (2011) on the right of the child to freedom from all forms of violence, CRC/C/GC/13 paras 3 and 4.

¹⁰⁸ European Union Agency for Fundamental Rights (FRA), *Opinion 7 on Biometrics: Fingerprinting in a child-friendly and child sensitive manner*. See: <bit.ly/3ZMnde8> accessed 3 December 2024.

children's personal data in particular biometric data should only be used for child protection purposes. Even when done with a child protection objective in mind, coercion of children in any manner or form in the context of migration related procedures, violates the best interests of the child¹⁰⁹ as mandated by the UNCRC.¹¹⁰ The best interests principle is also clearly stated in this Regulation.¹¹¹ Further FRA states that force against children should never be used to obtain their fingerprints. What is proportionate is not explained in the Regulation and in its current wording it could put children at risk of harm. In implementing the Pact, the Alliance recommends that there is no use of coercion to obtain biometric data from children.

The sharing the data of children as young as 6 years old to law enforcement officials is also concerning. The Committee on the Rights of the Child states that children's personal data, in particular biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, use and retention of, and access to, data. The Alliance recommends that data of children up until age 14 is not shared with law enforcement officials.¹¹² From age 14 data should only be shared if the child has been deemed to be a security risk.

Recommendations

- The National Implementation Plan should outline how safeguards in the Pact on the collection of biometric data will be put into practice, including that it will be carried out by trained professionals in a child friendly and sensitive manner and that a child will be accompanied by an adult family member or if a UASC a representative or a person trained to safeguard their best interests.
- The Plan mandates that those officials trained to take biometric data from children also receive training on how to identify child protection needs and potential victims of trafficking and exploitation.
- There should be no provision in the Plan for any use of coercion to obtain biometric data from children.
- Data of children up until age 14 is not shared with law enforcement officials. From age 14 data should only be shared if the child has been deemed to be a security risk.

¹⁰⁹ UNHCR, UNICEF, OHCHR, IOM, Save the Children, *Missing Children Europe at al, Joint Statement: Coercion of children to obtain fingerprints and facial images is never acceptable*. See: < <https://bit.ly/3DdGtbx> > accessed 3 December 2024.

¹¹⁰ UN Convention on the Rights of the Child, A/ RES/44/25 (20 November 1989) art 3.

¹¹¹ Regulation (EU) 2024/1358 of the European Parliament and of the Council of 14 May 2024 on the establishment of 'Eurodac' for the comparison of biometric data in order to effectively apply Regulations (EU) 2024/1351 and (EU) 2024/1350 of the European Parliament and of the Council and Council Directive 2001/55/EC and to identify illegally staying third-country nationals and stateless persons and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, amending Regulations (EU) 2018/1240 and (EU) 2019/818 of the European Parliament and of the Council and repealing Regulation (EU) No 603/2013 of the European Parliament and of the Council OJEU L art 14.

¹¹² The current law only allows the collection of fingerprints from the age of 14. See International Protection Act 2015 s19.

Legal Counselling and Legal Advice and Representation

The Pact

The provision of legal counselling and legal advice and representation is outlined in the Asylum Procedure Regulation. All applicants have a right to consult, in an effective manner, a legal adviser or other counsellor at all stages of the procedure.¹¹³ The Regulation states that applicants can request free legal counselling in their initial asylum claim. They can only request free legal assistance and representation in appeal procedures.¹¹⁴ Free legal counselling includes guidance on and explanation of the procedure(s) and assistance in lodging an asylum claim.¹¹⁵ Free legal assistance and representation in appeals procedures includes the preparation of procedural documents, the preparation of the appeal and in the event of a hearing, participation in that hearing.¹¹⁶

The Regulation also states that the provision of free legal assistance and representation in the appeal procedure may be excluded if it is considered that the appeal has no tangible prospect of success or is abusive.¹¹⁷ This applies to both adults and children.

The Regulation lists the information that should be given to asylum applicants, in a language they understand or are reasonably supposed to understand. This information includes the right to lodge an individual asylum application, the time limits and stages of the procedure that will be followed, the person's rights and obligations and the consequences of not complying with them (in particular that it may mean the application is withdrawn) and their right to legal counselling and legal assistance and representation.¹¹⁸ Information shall be provided to minors in a child-friendly manner and with the involvement of the representative or the suitable person appointed provisionally to act as a representative.¹¹⁹ States may use standardised leaflets, drafted by the EU Asylum Agency (EUAA), to convey this information.¹²⁰

The Regulation outlines how children, especially UASC, who apply for asylum are to be heard, either as part of an admissibility or a substantive interview.¹²¹ States must give children the opportunity of an interview, including where an application is made on his or her own behalf.¹²² If they find that interviewing would not be in the child's best interest, the government is required to argue why this is the case.¹²³ The interviewer should be competent to take account of the interviewee's age, vulnerability and special procedural needs, amongst others.¹²⁴ They must also have the necessary knowledge of the rights and needs of children, conduct the interview in a child-sensitive and context

¹¹³ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 15(1).

¹¹⁴ Ibid art 15(2).

¹¹⁵ Ibid art 16.

¹¹⁶ Ibid art 17.

¹¹⁷ Ibid.

¹¹⁸ Ibid art 8(2).

¹¹⁹ Ibid art 8(2).

¹²⁰ Ibid art 8(7).

¹²¹ Ibid art 11 and 12.

¹²² Ibid art 22(3).

¹²³ Ibid.

¹²⁴ Ibid art 13(7).

appropriate manner, and take into consideration the child's age and maturity.¹²⁵ The Regulation also states that asylum applicants (including children) shall be provided with an interpreter free of charge when registering and/or lodging an asylum claim as well as the personal interview whenever appropriate communication cannot be otherwise ensured.¹²⁶

When children in families are interviewed, an adult responsible for the child whether by the law or practice of State must be present. However, 'on justified grounds and only where it is in the best interests of the child, the determining authority may interview the minor without the presence of an adult responsible, provided that it ensures that the minor is assisted during the interview by a person with necessary skills and expertise in order to safeguard his or her best interests.'¹²⁷

The Regulation states that when a UASC is interviewed, they must be assisted by their representative, who must be present at the interview and must have informed and prepared them beforehand.¹²⁸ In the personal interview, the representative and the legal adviser of the UASC shall have an opportunity to ask questions or make comments within the framework set by the person conducting the interview.¹²⁹

Right to appeal

The Asylum Procedure Regulations sets out the right to appeal if an applicant's initial application for asylum is negative.¹³⁰ Appeals must be made between five and seven days from when the decision on the initial asylum application is made.¹³¹ Generally for all applicants including children in families an appeal will not have a suspensive effect,¹³² which means people could be returned to their country of origin or another third country while their appeal is ongoing. There is however a suspensive effect of appeals made by UASC which means they cannot be returned while their appeal is ongoing.¹³³

Children in families do have a mechanism by which they can ask to remain in the State while their appeal is outstanding,¹³⁴ but only have five days from the date when they were notified of their return to request this.¹³⁵ They can be provided with free legal assistance and representation, but they must request this.

International Human Rights Law

The UN Committee on the Rights of the Child states that UASC should in all cases, be given access, free of charge, to a qualified legal representative, including where the application for refugee status

¹²⁵ Ibid art 22(3).

¹²⁶ Ibid art 8(3).

¹²⁷ Ibid art 22(4).

¹²⁸ Ibid art 23(8)

¹²⁹ Ibid.

¹³⁰ Ibid art 67.

¹³¹ Ibid.

¹³² Ibid art 68.

¹³³ Ibid art 68(3).

¹³⁴ Ibid art 67(4).

¹³⁵ Ibid art 67(5a).

is processed under the normal procedures for adults.¹³⁶ It further states that minimum procedural guarantees should include that the application will be determined by a competent authority fully qualified in asylum and refugee matters. Where the age and maturity of the child permits, the opportunity for a personal interview with a qualified official should be granted before any final decision is made. Wherever the child is unable to directly communicate with the qualified official in a common language, the assistance of a qualified interpreter should be sought.¹³⁷

The *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (Guidelines) states children should have recourse to remedies to effectively exercise their rights.¹³⁸ The *Guidelines* advise that States should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice.¹³⁹ It further states that children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties,¹⁴⁰ as well as access to free legal aid.

Lawyers representing children should be trained in and knowledgeable on children's rights, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding. Lawyers should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions.¹⁴¹ The right of children to be heard in all matters that affect them should be respected and due weight should be given to the child's views and opinion in accordance with his or her age and maturity.¹⁴² Legal proceedings involving children should be dealt with in non-intimidating and child-sensitive settings.¹⁴³

Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals¹⁴⁴ and the number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.¹⁴⁵

It is very concerning that in their initial asylum claim applicants, including children and UASC, will not have free legal assistance and representation, only free legal counselling which includes guidance on and explanation of the procedure(s) and assistance in lodging an asylum claim.¹⁴⁶ The provision to exclude free legal assistance and representation in the appeal procedure if it is considered that the appeal has no tangible prospect of success or is abusive¹⁴⁷ is also concerning.

¹³⁶ Committee on the Rights of the Child *General Comment No. 6 (2005) regarding the treatment of unaccompanied and separated children outside of their country of origin* CRC/GC/2005/6 para 69.

¹³⁷ *Ibid* para 71.

¹³⁸ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (COE 2010) 26.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* 27.

¹⁴¹ *Ibid*.

¹⁴² *Ibid* 28.

¹⁴³ *Ibid* 29.

¹⁴⁴ *Ibid* 30.

¹⁴⁵ *Ibid* 31.

¹⁴⁶ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 16.

¹⁴⁷ *Ibid* art 17.

The UN Committee on the Rights of the Child is clear that UASC in all cases, be given access, free of charge, to a qualified legal representative and the Council of Europe states that access to free legal aid be given to children when accessing their right to legal counsel and representation. Ensuring that protection applicants receive proper legal assistance and representation would also contribute to quality decisions and improve the fairness and efficiency of the system.¹⁴⁸ Free legal assistance and representation should be provided for all children, including UASC for both the initial asylum claim and the appeal procedure.

It is welcome that children, especially UASC must be given the opportunity to have an interview in the determination of their asylum application, and that the onus is on the State to argue why interviewing a child would not be in their best interest.¹⁴⁹ This ensures that their right to be heard is being respected. It is also positive that the Regulation includes required safeguards when protection applications are being made by children. These include that the provision of information on their rights in the asylum application process and on the process itself is provided in a child-friendly manner,¹⁵⁰ that interviews are conducted in a child sensitive and context appropriate manner and that interpreters are provided free of charge when making a protection application as well as during the personal interview.¹⁵¹ For UASC it is important when they are interviewed their representative is present and that they have helped them prepare for the interview beforehand. These measures should be operationalised in the National Implementation Plan.

The short amount of time given to lodge an appeal to a negative initial asylum claim is very problematic. Applicants only have five to seven days from when the decision on the initial asylum application is made.¹⁵² This is not effective as it is not enough time to get legal assistance and representation, and lodge an appeal. The estimated minimum time needed for an applicant to prepare an appeal properly is at least 30 days.¹⁵³ All applicants including children and UASC should be given enough time to get legal assistance and representation and make an appeal.

While it is welcome that the Regulation allows for a suspensive effect of appeals for UASC it is very concerning that there is no suspensive effect for children in families.¹⁵⁴ This means they could be returned to their country of origin or another third country while their appeal is ongoing. They can ask to remain in the State while their appeal is outstanding, but they only have five days from the date when they were notified of their return to request this.¹⁵⁵ Given the extremely short time frame to ask to remain to stay and that obtaining legal assistance and representation is not automatic - they must request it – the risk of non-refoulement is high.

¹⁴⁸ Platform for International Cooperation on Undocumented Migrants, *Children's Rights in the 2024 Migration and Asylum Pact* (PICUM October 2024) 18.

¹⁴⁹ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU OJEU L art 22(3).

¹⁵⁰ Ibid art 8(2).

¹⁵¹ Ibid art 22(3).

¹⁵² Ibid.

¹⁵³ European Committee on Refugees and Exiles, *ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU* (ECRE October 2024) 105.

¹⁵⁴ Ibid art 68(3).

¹⁵⁵ Ibid art 68.

Recommendations

- Free and prompt legal assistance and representation should be provided for all children, including UASC for both the initial asylum claim and the appeal procedure.
- Operationalise the safeguards for children in the asylum application process including:
 - the provision of child friendly information;
 - conducting interviews in a child sensitive and context appropriate manner;
 - the provision of interpreters free of charge for the protection application and the personal interview;
 - ensuring the UASC representative is present for their interview.
- All applicants including children and UASC should be given enough time (longer than five to seven days) to get legal assistance and representation and make an appeal on an initial negative asylum decision.
- Children in families should not be returned to their country of origin or another third country while they are awaiting a decision on appeal.

Monitoring Mechanism

Each State should provide for a monitoring mechanism under the provisions of the Screening Regulation.¹⁵⁶ The purpose of the mechanism is to ensure that all activities under the Regulation are in compliance with fundamental rights.¹⁵⁷ The mechanism will monitor access to the asylum procedure, the principle of non-refoulement, the best interest of the child and the relevant rules on detention, including relevant provisions on detention in national law, during the screening.¹⁵⁸ They will have the power to issue annual recommendations.¹⁵⁹ While States should adopt relevant provisions to investigate allegations of failure to respect fundamental rights in relation to the screening procedure the mechanism will monitor the progress of such investigations.¹⁶⁰

States are encouraged to invite relevant and competent national, international and non-governmental organisations and bodies to participate in the monitoring.¹⁶¹ The mechanism must be appropriately funded¹⁶² and adequate safeguards to be put in place to ensure its independence.¹⁶³ The Regulation states that guidance on the establishment and independent functioning of the mechanism will come from the European Union Agency for Fundamental Rights (FRA).¹⁶⁴

The Alliance welcomes the inclusion of the monitoring mechanism in the Screening Regulation, particularly as it monitors compliance with the best interests of the child in the screening procedure. FRA's guidance for EU countries on setting up independent monitoring mechanisms to ensure fundamental rights are respected¹⁶⁵ should be followed when drafting the National Implementation Plan. Opinions should be sought from the Irish Human Rights and Equality Commission, the Ombudsman for Children's office and children's rights advocates on how the monitoring mechanism should be set up and operationalised. Consideration should be given to conducting a consultation with children on how the monitoring mechanism would work. The Child Participation Unit in the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) would be best placed to conduct this consultation.

Recommendations

- FRA's guidance for EU countries on setting up independent monitoring mechanisms to ensure fundamental rights are respected¹⁶⁶ is followed when drafting the National Implementation Plan.

¹⁵⁶ Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 OJEU L art 10(2).

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid art 10(4).

¹⁶³ Ibid art 10(2).

¹⁶⁴ Ibid.

¹⁶⁵ European Union Agency for Fundamental Rights (FRA), *Monitoring fundamental rights during screening and the asylum border procedure – A guide on national independent mechanisms* (Publications Office of the European Union 2024)

¹⁶⁶ Ibid.

- Opinions should be sought from the Irish Human Rights and Equality Commission, the Ombudsman for Children's office and children's rights advocates on how the monitoring mechanism should be set up and operationalised.
- Consideration should be given to conducting a consultation (through the DCEDIY Child Participation Unit) with children on how the monitoring mechanism would work.