



Guidance to respect children's rights in return policies and practices

Focus on the EU legal framework

September 2019



Produced by:

UNICEF, the UN Human Rights Office (OHCHR), the International Organization for Migration (IOM), Save the Children, the Platform for International Cooperation on Undocumented Migrants (PICUM), the European Council for Refugees and Exiles (ECRE) and Child Circle.

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Purpose of the guidance

This document provides guidance for state authorities on the design and implementation of return procedures that are child rights compliant. In particular, it sets out concrete measures necessary to ensure respect for the rights of every child, including children in families, when implementing return legislation and policy in Europe, in line with international law obligations, in particular the UN Convention on the Rights of the Child (CRC), the EU Charter of Fundamental Rights, and the EU Return Directive¹ where applicable. It is aimed at those designing and implementing return procedures.

The guidance has been developed through a process of consultations, first among United Nations agencies and civil society experts on migration and children's rights, and then with EU agencies, the European Commission and member state representatives. It aims to serve as the basis for dialogue with state authorities in the context of EU return procedures from EU member states, complementing the 2017 revised Return Handbook.²

The best interests of the child shall be a primary consideration in all actions concerning them. The precondition to any return of a child – whether unaccompanied, separated or within a family - is that their best interests have been examined and return is found to be in their best interests. This requires specific procedures to be implemented in every decision-making process that could lead to the return of a child.

Consequently, this guidance addresses how to design these procedures, what factors should be considered, possible outcomes and how to implement a decision when return is found to be in the best interests of the child. It does not address how to implement the decision when an alternative durable solution is found to be in the best interests of the child as a result of the procedure.

- 1 Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("Return Directive").
- 2 European Commission (2017) [Return Handbook](#); European Commission, Recommendation of 16.11.2017 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks C(2017) 6505 final.

Legal and policy context

This guidance is based upon the existing legal and policy framework and guidance, including the EU Return Directive and the revised Return Handbook.³ It also takes account of recommendations and actions in the 2010 – 2014 EU Action Plan on unaccompanied minors,⁴ and Commission Communication on the protection of children in migration of 12 April 2017.⁵

The guidance is anchored in international human rights law and standards, including the United Nations Convention on the Rights of the Child (CRC), and the authoritative guidance on implementation of the CRC by the Committee on the Rights of the Child, including its General Comments (in particular 6, 12, 13, 14, 22 and 23), as well as the guidance of other relevant human rights treaty bodies and United Nations special procedures mandate holders.

The guidance in this document is further informed by direct evidence, reports and tools provided by the Council of Europe Committee on the Prevention of Torture, UNICEF,⁶ UNHCR,⁷ IOM⁸, OHCHR,⁹ Save the Children, ECRE¹⁰ and PICUM,¹¹ among others, reflecting on the implementation and impacts of EU and Member State return policies and practices on children and families (see Annex for useful resources).

This initiative aims to contribute to ongoing legal and policy developments related to return, and seeks to ensure respect for child rights in this context.¹² The involved organisations are ready to constructively engage in a dialogue with authorities and other key stakeholders on how to implement the procedures set out in this document in different national contexts.

3 Ibid.

4 European Commission (2010) Communication from the Commission to the European Parliament and the Council: Action Plan on Unaccompanied Minors.

5 European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration.

6 See for example: UNICEF (2015) Children's rights in return policy and practice in Europe - A discussion paper on the return of unaccompanied and separated children to institutional reception or family.

7 See for example: UNHCR/UNICEF (2014) Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe.

8 See for example: IOM (2015) Addressing the Needs of Unaccompanied Minors (UAMs) in Greece; IOM (2016) Egyptian Unaccompanied Migrant Children: A case study on irregular migration; IOM (2019, forthcoming) IOM Handbook Protection and Assistance for Migrants vulnerable to Violence, Exploitation and Abuse.

9 See for example: OHCHR (2014) Recommended Principles and Guidelines on Human Rights at International Borders; Global Migration Group (2018) Principles and Guidelines, supported by practical guidance, on the protection of the human rights of migrants in vulnerable situations

10 See for example ECRE and Save the Children EU Office (2011) Comparative Study on Practices in the Field of Return of Minors

11 See for example: PICUM (2018) Manual on regularisations for children, young people and families; PICUM (2017) Untold Stories: Immigration Detention and Deportation; PICUM (2016) Hear Our Voices: Undocumented Children and Young People Share their Stories; PICUM (2015) Position paper on EU Return Directive; PICUM (2015) Protecting undocumented children-Promising policies and practices from governments.

12 The participating organisations have major concerns about recent policy developments in the area of return. See for example, OHCHR et al (2017) Joint press release: New European Union returns policies put children at risk.

Scope of the guidance and key terms

The guidance deals with the minimum standards and procedures to be followed whenever a child or family¹³ is identified by immigration authorities as irregularly present on the territory, and whenever immigration authorities withdraw or decide not to renew an existing residence permit, or issue a final negative decision on an application for a residence permit, including for international protection. Where specific procedural safeguards are necessary due to the child being unaccompanied or separated, or because they are accompanied by parents or other primary caregivers, this is stated. Otherwise, the same basic standards apply for all children, irrespective of whether they are unaccompanied, separated or with their families.

The development and application of proper procedures in this complex field is frequently hampered by divergent use, or interpretation, of key terms.

Consequently, this section defines terms which are central to this guidance, while noting other terms that are frequently used in this field.

A number of terms are used in accordance with their definition in the Return Directive, as follows:

➤ **Voluntary departure:** compliance with an obligation to leave the territory on the basis of a return decision/removal order issued to a third country national irregularly staying on the EU territory.

➤ **Removal:** the enforcement of an obligation to return in accordance with a return decision/removal order issued to a third country national irregularly staying on the EU territory.¹⁴

Other terms are used in accordance with their definition in binding international law and related guidance:

➤ **Child:** any person under the age of 18.

➤ **Unaccompanied child:** a child who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so.¹⁵

➤ **Separated child:** a child who has been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives.¹⁶

➤ **Voluntary return:** situations where a child or family decides to depart the country voluntarily in order to return to their country of origin or another country in accordance with their rights.

➤ **Voluntary return and reintegration programmes:** programmes that are composed of information and assistance pre-return, including organisation and costs of travel, with or without reintegration support post-return.¹⁷ Any consent given to voluntary

13 Family is used here to include the primary caregiver even if they are not a family member. Committee on the Rights of the Child General Comment No. 14 defines the term “parents” in a broad sense to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom (art.5).

14 European Commission (2017) [Return Handbook](#).

15 Committee on the Rights of the Child (2005) General Comment No 6, para 7.

16 Committee on the Rights of the Child (2005) General Comment No 6, para 8.

17 As per the [Framework on Assisted Voluntary Return and Reintegration](#) (IOM, 2018), IOM typically uses the term “Assisted Voluntary Return and Reintegration” to refer to voluntary return and reintegration programmes, whether or not implemented by IOM.

return and reintegration programmes must be fully informed and given free of any physical or mental coercion, consistent with the principle of voluntariness.¹⁸ This means that the person must not be subject to human rights violations intended to force compliance, including violence or ill-treatment, an actual or implied threat of indefinite or arbitrary detention, or detention in inadequate conditions.

➤ **Best interests of the child principle:** within the meaning of Article 3 of the UN CRC: Article 3 places an obligation on the public and the private spheres, courts of law, administrative authorities and legislative bodies to ensure that the best interests of the child are assessed and taken as a primary consideration in all actions affecting children. The right of the child to have their best interests taken into account as a primary consideration is a substantive right, an interpretative legal principle and a rule of procedure, and it applies to children both as individuals and as a group. The purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the CRC, and the holistic development of the child. The UN Committee on the Rights of the Child further describes its content and scope of application, in General Comment no. 14 for all children, and in Joint General Comment no. 22 specifically for children in the context of international migration. The Committee also refers to “best interests-assessments” and “best-interests determinations”, as does the Commission Communication on protecting children in migration of 12 April. The latter term has been used by some

stakeholders in this field to focus on durable solutions for unaccompanied and separated children in particular, rather than all children. To avoid confusion, this guidance refers to a procedure to *examine* the best interests of the child, and the necessary components of said procedure, to clearly address the situation of both children with their primary caregivers and children who are unaccompanied or separated from their primary caregivers, without defining or re-defining those terms.

➤ **A durable solution:** used here to mean one that protects the long-term best interests and welfare of the child and is sustainable and secure from that perspective. The outcome should ensure that the child is able to develop into adulthood, in an environment which will meet their needs and fulfil their rights as defined by the CRC and will not put the child at risk of persecution or serious harm. When assessing possible solutions for a child, States have a responsibility to investigate the implications of the options under consideration.¹⁹

➤ **International protection:** used within the meaning of the EU Common European Asylum System (CEAS) instruments, namely: “refugee status and subsidiary protection status”.²⁰

➤ **Child protection:** used here to mean safeguarding children from harm. Harm includes violence, abuse, exploitation and neglect. The goal of child protection is to promote, protect and fulfil children’s rights to protection from abuse, neglect, exploitation and

18 See Principle 6 in Global Migration Group (2018) Principles and Guidelines, supported by practical guidance, on the protection of the human rights of migrants in vulnerable situations: “Any migrant who is asked to consent to a voluntary return process must be fully and meaningfully informed of the choice they make, having access to up-to-date, accurate and objective information, including in relation to the place and the circumstances to which they will be returning.” For more on the principle of voluntariness, and free, prior, and informed consent (FPIC), see OHCHR (2018) Background paper to the Expert on Protecting the human rights of migrants in the context of return, 6 March 2018. The AVR Framework on Assisted Voluntary Return and Reintegration (IOM 2018) refers to voluntariness as follows: “In the context of assisted voluntary return and reintegration, voluntariness is assumed to exist if two conditions apply: (a) freedom of choice, which is defined by the absence of physical or psychological pressure to enrol in an assisted voluntary return and reintegration programme; and (b) an informed decision which requires the availability of timely, unbiased and reliable information upon which to base the decision”.

19 There is no universally recognised legal definition of a ‘durable solution’. This definition used here is drawn from the definition of a ‘comprehensive, secure and sustainable solution’ as defined by the Committee on the Rights of the Child in Joint General Comment No. 22 (para 32(j)). Previously in General Comment No. 6 (para 84), the Committee describes a durable solution for unaccompanied and separated children as addressing all their protection needs, taking into account the child’s view and, wherever possible, leading to overcoming the situation of a child being unaccompanied or separated. In both cases, the objectives, context and options are the same, so the participating organisations consider both terms synonymous. ‘Durable solutions’ is used for the purpose of this document, as durable solutions are also referred to in EU law and policy in relation to children in migration (e.g. EU Anti-Trafficking Directive, European Commission Communication on the protection of children in migration).

20 International protection also derives from international refugee law and international human rights law.

violence as expressed in the UN CRC and other international treaties and conventions, as well as national laws. In the case of migrant children, this involves protecting them by responding to their specific needs and the risks they face. This includes: protecting and advocating against all forms of discrimination; preventing and responding to abuse, neglect, violence and exploitation; ensuring immediate access to appropriate services; and ensuring durable solutions in the child's best interests.

- **A child rights approach:** defined by the Committee on the rights of the Child²¹ as the establishment and championing of children's rights, their dignity, life, survival, well-being, health, development, participation and non-discrimination, as a rights-bearing person in government policies concerning

children. It requires a paradigm shift away from approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders entitled to non-negotiable rights to protection. A child rights approach is one which furthers the realization of the rights of all children as set out in the CRC by developing the capacity of duty bearers to meet their obligations and the capacity of rights holders to claim their rights.

- **A guardian:** an independent person who safeguards an unaccompanied and separated child's best interests and general well-being, and to this effect complements the limited legal capacity of the child. The guardian acts as a statutory representative of the child in all proceedings in the same way that a parent represents a child.²²

21 Committee on the Rights of the Child (2011) General Comment No 13, para 59.

22 Definition as per Fundamental Rights Agency (2014) Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking. See also Committee on the Rights of the Child (2005), General Comment No. 6, para. 33.

Introduction:

When does the question of return of children arise and how are their best interests considered?

Issues relating to the possible return of children to their country of origin²³ arise when a child, a family with children, or a parent or primary caregiver of a child is identified by immigration authorities as being irregularly present in the jurisdiction of a Member State. They can also come to the fore when a child or family receives a final negative decision on an application for international protection, or a refusal of renewal or withdrawal of a residence permit.

The Return Directive addresses procedures and rights for those who are identified as irregularly present,²⁴ and requires Member States to issue either a residence permit or a return decision. It also requires Member States to take due account of the best interests of the child, family life and health status of the third country national concerned, as well as to respect the principle of non-refoulement. Some EU Member States have provisions which preclude children from being considered as ‘irregularly’ residing or being removed and/or which provide grounds to regularise their status on the basis of their childhood.²⁵

When deciding on the entry, residence and/or return of third country nationals, including stateless persons pursuant to Article 1(1) of the 1954 Convention on the Status of Stateless Persons, Member State authorities must do so in line with international human rights obligations, including, in particular, the principle of non-refoulement. Most notably, international law prohibits States from removing people from their jurisdiction to a place where they would be at risk of serious human rights violations, including persecution, torture, ill-treatment or other irreparable harm, or of further transfer to a third State where there would be a real risk of such violations.²⁶

When taking decisions, Member States must also comply with their national, regional and international child rights obligations, in particular as set forth in the UN Convention on the Rights of the Child and the EU Charter of Fundamental Rights, as well as the Treaty on European Union which places the protection of children’s rights firmly within the principles of the EU. In particular, Member States will need to consider the best interests of the child – as a primary consideration

23 On a case by case basis, country of origin can also mean country of habitual residence, which is generally understood as a country where the migrant has permanent residence and access to livelihood opportunities.

24 The Return Directive uses the term “illegally staying”. “Illegal stay” is defined as the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.

25 For example, in France, there is legally no “undocumented child” as there is no requirement for people under 18 to have a residence permit. In Italy, unaccompanied children are not considered “undocumented” or “irregular” and cannot be pushed back. They can be deported only for reasons related to public order and state security following a decision of a Minors’ Court. In any other case, deportation of unaccompanied children is forbidden. Italian law provides for all children to be granted a residence permit on the basis of being a child, although this is not accessible in practice for the children of undocumented migrants. Children of undocumented parents have the right to follow them if the latter are deported, based on a careful consideration of their personal situation. For information on regularisation possibilities, see PICUM (2018) [Executive summary and policy recommendations of PICUM manual on regularisation for children, young people and families](#).

26 Convention against Torture, Art 3; International Covenant on Civil and Political Rights, Art 7; Committee against Torture (2017) General Comment No 4, para 29(o); Committee on the Rights of the Child (2017) Joint General Comment No 22, para 45; Committee on the Rights of the Child (2005) General Comment No 6, para 27; Human Rights Committee (2004) General Comment No 31, para 12.

– before taking any decision affecting them and when working to implement those decisions. The UN Committee on the Rights of the Child has made clear that considerations such as those relating to general migration control cannot override best interests considerations, and recommended that States implement this through law, policy and practice.²⁷ Article 24 of the Fundamental Rights Charter requires that “Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity” and 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.”

These child rights standards apply to both cases involving unaccompanied and separated children and cases involving or impacting children within families. When children are determined to be travelling with their parents or caregivers – in other words, when they are satisfactorily identified by a competent body as not being unaccompanied or separated – the child should nonetheless be treated as an individual rights holder. The child should be treated as having an individual case for consideration in asylum and migration status procedures, while at the same time respecting and protecting the rights of the individual child within the family, their right to private and family life, and the rights of parents or caregivers, unless an evaluation shows that the child is not safe within the family. The State has an obligation to undertake a specific procedures to examine the best interests of the child to ensure that the decisions the state makes respect the best interests of the child, especially in decisions on the right to remain on the territory and/or removal or return to the country of origin. This means, in the case of a family,

Member States need to consider the situation of each child when making decisions concerning the return of the family, including the return or removal of one of a child’s parents or primary caregivers.

As recognised, inter alia, in the EU Action Plan on Unaccompanied Minors (2010-2014), the EU Anti-Trafficking Directive and the Communication on the protection of children in migration, considering the best interests of the child in the case of migrant and refugee children is key to pursue a durable solution for them. The European Commission has stated that:

“Durable solutions are crucial to establish normality and stability for all children in the long term. The identification of durable solutions should look at all options... It is essential that a thorough best interests determination be carried out in all cases... Member States should establish procedures and processes to help identify durable solutions on an individual basis, and clearly set out the roles and duties of those involved in the assessment, in order to avoid that children are left for prolonged periods of time in limbo as regards their legal status.”²⁸

Durable solutions may involve settling and (further) integrating in the country of current residence, returning to and reintegrating in the country of origin, or moving to and integrating in a third country (usually for family reunification purposes). Consequently, the identification of a durable solution should be based on a comprehensive approach, after having reviewed the different possible options to identify which would best safeguard the best interests of the individual child. One element of this approach may include utilising medium-term options (e.g. study permits to safeguard the child’s best interests with a view to a durable solution).

27 Committee on the Rights of the Child (2017) General Comment No. 22, para. 33; Committee on the rights of the child (2012) Report from the 2012 Day of General Discussion on the rights of children in the context of international migration; Committee on the Rights of the Child (2005) General Comment No. 6, para. 85. See also Global Migration Group (2018) Principles and Guidelines, supported by practical guidance, on the protection of the human rights of migrants in vulnerable situations, Principle 6, Guideline 6.

28 European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration. Similar language also included in European Commission (2017) Return Handbook, p 45 et seq.

Identifying and implementing durable solutions: Summary overview

Member States should have procedures in place to identify durable solutions for children based on a consideration of their best interests, whether they are within a family or an unaccompanied or separated child, as soon as possible after their identification. See Section 1.

This guidance sets out such a procedure, indicating the formal and specific safeguards that should be incorporated to ensure that the best interests of children are properly examined before any decision on return. The extent of certain steps will depend on the complexity and individual circumstances of the case.

Because the durable solution will have fundamental long-term consequences for the child, it should be based on a documented procedure to examine the best interests of the child, with procedural safeguards. This is also recognised in the Communication on the protection of children in migration.²⁹

If return is identified as being in the child's best interests, specific and appropriate implementation measures should be in place. See Section 2.

In such cases, an appropriate period for voluntary departure with assistance must always be provided, and given preference over removal. Only where voluntary departure does not occur as provided for, can removal be considered as a measure of last resort, when it is clearly in the best interests of the child. In such cases, procedural and operational safeguards must be followed and ensured before deciding whether to proceed with removal, and during the operationalisation of such a decision. Depending on the child's individual situation, this may result in an extension of the period of voluntary departure or an alternative durable solution.

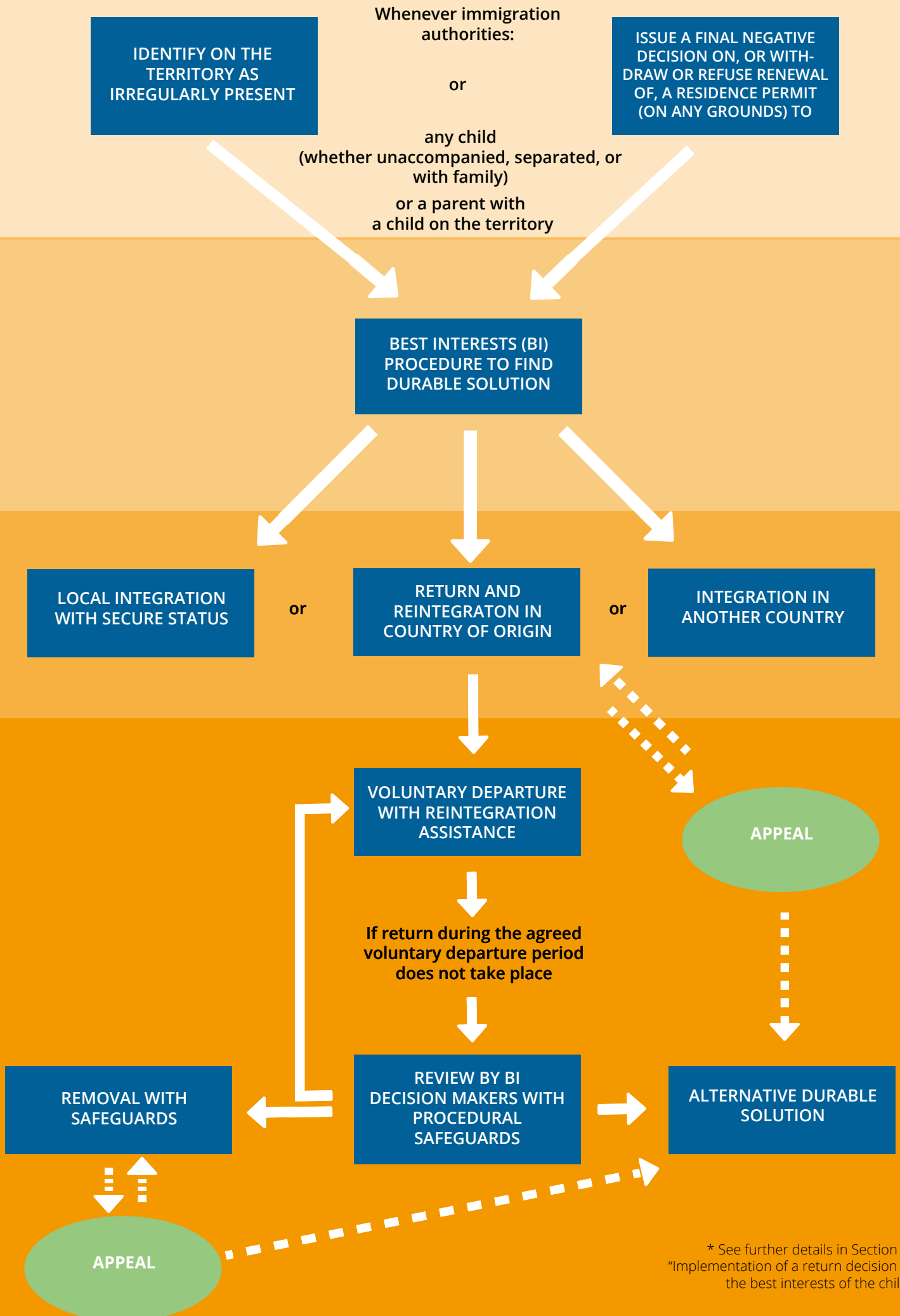
Rights-based and dignified return and sustainable reintegration are also best implemented through a sound programmatic framework ensuring a continuum of care for the returnee throughout all stages of the return and reintegration process. Relevant elements include the provision of adequate information on conditions in countries of origin prior to departure, appropriate transfer of care and custodial arrangements for unaccompanied and separated children, and return and reintegration assistance for all children and their families. See Section 2.

At all stages of the procedure, it should be possible for the child and/or family to avail themselves of existing procedures to determine and resolve residence status, including international protection procedures, statelessness determination procedures, and other procedures that provide status. It should also be possible for families to voluntarily return including through voluntary return programmes.³⁰

29 European Commission (2017) [Communication from the Commission to the European Parliament and the Council: The protection of children in migration](#).

30 This should include a suspension of return or removal procedures to ensure that the family can participate in voluntary return programmes. The examination of the best interests of the child in the implementation of voluntary return programmes is not discussed in this guidance, however, many of the considerations in that process would be similar.

FLOWCHART: STEPS FOR THE PROCEDURE AND IMPLEMENTATION WHEN RETURN IS A DURABLE SOLUTION IN THE BEST INTERESTS OF THE CHILD



* See further details in Section 2: "Implementation of a return decision in the best interests of the child"

The following are crucial from the outset of the procedure:

- ✓ Anyone claiming to be a child should be treated as such (unless and until - if necessary - a multi-disciplinary and non-invasive age assessment finds them to be an adult)
- ✓ Child-friendly information.

It should always be possible - at any time during the process - for the child and/or family to apply for residence status under other mechanisms (including international protection procedures) or participate in assisted voluntary return and reintegration (AVRR) programmes.

Essential characteristics of the best interests procedure to find a durable solution:

- ✓ Aims to identify a durable solution (considering all options)
- ✓ Formal, individual procedure examining all aspects of the child's situation
- ✓ Independent and impartial - decision-makers with no conflict of interests with rights of the child
- ✓ Multi-disciplinary (child protection actors, legal representative, parents, guardian, others as needed)
- ✓ Views of the child duly heard and considered throughout
- ✓ Child-friendly information, counselling, support
- ✓ Legal assistance
- ✓ Documentation during the procedure (no enforcement actions against the child or family members) and access to services
- ✓ Whichever durable solution, discussion and development of plan
- ✓ Leads to reasoned, documented decision with right to appeal with suspensive effect.

The decision must result in the necessary steps to implement the identified durable solution for the child:

- ✓ Integration or reintegration in another country would usually be for family reunification purposes.

If return is found to be in the best interests of the child, it must be implemented through voluntary departure with reintegration assistance. Essential measures at this stage include:

- ✓ Support and counselling
- ✓ Timing and other aspects of return as consensual as possible (with plenty of time to prepare and ensuring uninterrupted access to education)
- ✓ Assistance and cooperation with relevant actors to ensure the conditions for return as a durable solution in the best interests of the child are met.*

If return during the agreed voluntary departure period does not take place - in order to proceed in the best interests of the child - the review should consider:

- Why voluntary departure period failed
- Any changes to circumstances underlying the decision that return is in best interests
- Views of the child and other actors
- Whether the essential safeguards are in place to consider removal.

If the decision-makers consider removal as a measure of last resort, they need to assess and ensure that both the essential operational safeguards, and the stipulated return and reintegration conditions and assistance, are available and in place. Some of the essential operational safeguards include:

- ✓ Information, preparation, support and assistance
- ✓ No immigration detention
- ✓ No force or physical restraints
- ✓ No family separation
- ✓ Several other measures.*

1. Developing the best-interests procedure for the identification of durable solutions

A documented, individual and robust procedure to examine the best interests of the child must precede and inform any decision to issue a return decision/order to leave the territory for an unaccompanied or separated child or family with children. It also applies to the implementation of this decision at all stages. The procedure therefore applies to situations where immigration authorities identify on the territory as irregularly present, decide to withdraw or not renew an existing residence permit, or issue a final negative decision on an application for a residence permit (on any grounds, including international protection) to, any child - whether unaccompanied, separated or with family - or to a parent or primary caregiver of a child on the territory.³¹ The procedure must also be implemented in decisions that could lead to the return or removal of one of the child's caregivers, as removal of a parent may amount to arbitrary or unlawful interference with the child's family life.³²

Return decisions/orders to leave the territory already issued without an examination of a child's best interests should be reviewed, according to the procedure set out, at the latest before initiating any further return procedures.

This section addresses:

1.1 Designing the procedure

1.2 Factors to be considered in the procedure

1.3 Potential outcomes of the procedure

1.1 Designing the procedure

Member States should ensure that all national asylum and immigration proceedings include, or are directly informed by, a procedure for examining the best interests of any child involved, and duly consider the results of the procedure as a primary consideration. Where the best interests of the child as they relate to a claim for international protection or another status have been examined, and the claim fails, the best interests of the child more broadly remain to be examined for all actions and decisions that will have impact on the child, either as continuation of the same procedure or through a subsequent, separate procedure.

31 This guidance has been developed considering procedures for children anywhere on the territory of a State, including hotspots and detention centres, and, where applicable (but not exclusively), where the Return Directive is being implemented. Much is equally relevant in border procedures which may result in children being refused access to the territory without a return decision being issued per se, but further adaptation to the practical situation and legal framework in operation at physical border entry points is required and not the specific focus on this document.

32 See e.g. Committee on the Rights of the Child (2017) Joint General Comment No 22, paras 28-29.

The ultimate purpose of examining the child's best interests should be to ensure the full and effective enjoyment of all the rights recognized in the UN CRC,³³ notably their safety, including respect for the principle of non-refoulement, and the holistic development of the child.³⁴ This involves considering the various elements that are relevant for the child's best interests, and if necessary, balancing them against each other to find the appropriate outcome with regards to the purpose of the procedure.³⁵ The procedure must also ensure appropriate procedural safeguards at all stages. As noted by the European Commission, "robust determination of the child's best interests, in the identification of the most appropriate durable solution for him or her, should entail extra procedural safeguards, given the huge impact this decision has on a child's future."³⁶

Considerations for all children:

Treatment as a child and benefit of the doubt

- Anyone claiming to be a child should be the subject of such a procedure, unless and until – if necessary due to substantiated and serious doubts about claimed age,³⁷ and in line with international standards - a multi-disciplinary and non-invasive age assessment respectful of children's rights and carried out in a gender-sensitive and culturally appropriate manner,

finds them to be an adult. For more guidance on age assessment, including applying the benefit of doubt in different scenarios, please see EASO Practical guide on age assessment.³⁸

- The child and family should be immediately provided with information about the procedure, in a language and manner they can understand.
- The procedure should begin without delay.

Best interests as a primary consideration

- The best interests of any child involved must be a primary consideration in any decision.³⁹
- Where there is a conflict between the best interests of the child and the interests of other children, family members or the public, authorities and decision-makers have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have their best interests taken as a primary consideration means that the child's interests have high priority and are not just one of several considerations.⁴⁰ Therefore, a larger weight must be attached to what serves the child best. Considerations such as those relating to general migration control cannot override best-interests considerations.⁴¹

33 The Committee on the Rights of the Child has pointed out that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention. It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the 'child's best interests' and no right could be compromised by a negative interpretation of the child's best interests." Committee on the Rights of the Child (2013) General Comment No 14, para 4.

34 See e.g. Spanish case: Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso, Sección 4, Sentencia Administrativo Nº 257/2008, Rec 614/2007, published on 29 February 2008. The Tribunal overruled a ruling suspending the precautionary suspension of the return of an unaccompanied child to Morocco. The Tribunal pointed to the abundant documentation provided by the child's lawyer demonstrating his excellent integration path (studies, language learning, sports activities, friends). The Tribunal highlighted that returning the child to Morocco would infringe on his personal development, especially as there was no evidence that his relatives in Morocco could take care of him, since his father had recently died and his mother lacked the financial resources to support his other siblings.

35 See Committee on the Rights of the Child (2013) General Comment No 14, paras 48-51 and 80-84.

36 European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration (2017), p 14. The European Commission has also underlined the need to step up key measures in this regard, notably in relation to access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessments.

37 European Asylum Support Office (2018) Practical Guide on age assessment.

38 European Asylum Support Office (2018) Practical Guide on age assessment. See also Fundamental Rights Agency (2014) Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking and Committee on the Rights of the Child (2017) Joint General Comment No. 23, paras. 3-4.

39 See also ECHR – Case No 1638/03, Maslov v. Austria, para. 82 and s.; ECHR – Case No 27945/10, Sarkozi and Mahran v. Austria, para. 64; CJEU – Case C-648/11 MA and others, para. 57.

40 See Committee on the Rights of the Child (2013) General Comment No 14, para 39. See also ECHR – Case No 55597/09 Nunez v. Norway, para. 78 and s.; ECHR – Case No 27945/10, Sarkozi and Mahran v. Austria, para. 64; CJEU – Case C-165/14 Rendón Marín.

41 See Committee on Rights of the Child (2005) General Comment No 6, para 86.

- To decide what is in the best interests of the child requires a systematic consideration of the individual circumstances of the child, unaccompanied, separated or within families, including age, sex, level of maturity, whether the child belongs to a minority group, disability, and the social and cultural context in which the child or children find themselves.⁴²
- It entails considering the situation of the child as a whole, including the identity of the child; preservation of the family environment; care, protection and safety of the child; the child's situation of vulnerability; and the child's rights to health and to education.⁴³ More on the elements to be considered can be found below - see Section 1.2.
- It entails considering all the options, to find a durable solution in line with the child's best interests. The durable solution may lie in the country carrying out the assessment, the country of origin or a third country. Possibilities to access a residence status and/or reunite with family members in the country where the child is present,⁴⁴ a third country,⁴⁵ or the country of origin, must be considered and provided as appropriate in accordance with the best interests of the individual child.⁴⁶
- When in the course of the procedure to determine the best interests of the child, the child or family expresses a wish to apply, or information emerges that indicates that the child or family might be eligible for international protection or resolution of status on other grounds as provided for by national law, the actors carrying out the procedure shall ensure appropriate referral.

Examining the best interests is a documented and multi-disciplinary procedure

- A documented procedure is a prerequisite when making significant decisions that will have a fundamental impact on a child's development⁴⁷.
- The best-interests procedure must be carried out in a multidisciplinary way by trained actors.⁴⁸ The range of actors and the nature of the steps involved will vary depending on the complexity of the case.
- Child rights and protection actors, including the authorities responsible for child protection and welfare should have a guiding role (if they are not the responsible authority),⁴⁹ and should always be meaningfully involved in the best-interests

42 See Committee on the Rights of the Child (2013) General Comment No 14, para 48; Committee on the Rights of the Child (2017) General Comment No 22, para 31.

43 See Committee on the Rights of the Child (2013) General Comment No 14, paras 55-79.

44 See e.g. ECHR – Case no. 31465/96, Şen v Netherlands; ECHR – Case no. 60665/00, Tuquabo-Tekele v. The Netherlands; ECHR – Case no 38058/09, Osman v. Denmark; and the Canadian case: Ek v Canada (Minister of Citizenship and Immigration) [2003] FCJ No 680. The Federal Court held that the immigration officer had erred in its conclusion that a child should be returned to Cambodia in order to be reunited with her parents and family. The Court considered that the officer had “almost completely failed to analyse what hardship would be faced by [the child] if she were forced to leave Canada”, giving only “cursory mention to her establishment in Canada and her wishes” and “[n]o real consideration ... to her schooling or the bond she had with her aunt, uncle and cousins whom the evidence reveals are her current family”.

45 See e.g. ECHR- Case no. 13178/03, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium.

46 As recommended by the European Commission, “Member States should seek to ensure availability of status determination procedures and resolution of residence status for children who will not be returned, in particular for those who have resided in the country for a certain period of time.” European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration, p 12.

47 See UNICEF/ UNHCR (2014) Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, p 40. See also Committee on the Rights of the Child (2017) Joint General Comment No 22, para 31.

48 European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration, p 14-16; Committee on the Rights of the Child (2017) Joint General Comment No 22, paras 32(c) and 36.

49 The guidance from the Committee on the Rights of the Child is that “The best-interests assessment should be carried out by actors independent of the migration authorities in a multidisciplinary way, including a meaningful participation of authorities responsible for child protection and welfare and other relevant actors, such as parents, guardians and legal representatives, as well as the child” and that “Best-interest determination procedures should be guided by child protection authorities within child protection systems.” (Joint General Comment no. 22, para. 32(c) and (j)).

procedure. All actors involved in this multi-disciplinary procedure shall give primary consideration to the best interests of the child, give appropriate weight to fulfilling the rights of the child, and be impartial with no potential conflicts of interest with the protection of the child's rights.⁵⁰

- The process must include a meaningful participation of the child, the child's parents or primary caregivers, the child or family's legal representatives, the guardian for unaccompanied and separated children, and any other relevant expert(s) as may be appropriate.
- Factors to consider are explored further in Section 1.2 below and require the actors involved in the procedure to carry out proactive efforts to gather information,⁵¹ as well as through discussion with the child, parents or primary caregivers, guardian and lawyer.

Views of the child should be heard throughout

- The views of the child should be heard throughout the process – including through interviews and consultations with the child by trained professionals – and properly taken into account in determining the child's best interests.⁵² The degree to which the child is heard and listened to, will not only ensure a more well-rounded and sustainable decision with respect to the child, but will also potentially empower the child in taking ownership of their future development into adulthood.⁵³
- Consideration of the child's views should include ongoing child-friendly information⁵⁴ and appropriate counselling and support through discussions with the child on options, concerns, needs and understanding of the process and outcomes.

50 See Committee on the Rights of the Child (2017) Joint General Comment No 22, para. 28.

51 See e.g. ECHR- Case no. 13178/03, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium: The Court considered that, having been informed at the outset that the mother of the unaccompanied child was in a third country (Canada); "the Belgian authorities should have made detailed enquiries of their Canadian counterparts in order to clarify the position and bring about the reunification of mother and daughter".

52 See Art 12 CRC, as well as Committee on the Rights of the Child (2017) Joint General Comment No 22, para 34 et seq; Committee on the Rights of the Child (2017) Joint General Comment No 23, para 15; European Commission (2017) Return Handbook, pp 44-45 and in particular p 56: "The minor's right to be heard in return procedures involving or affecting them must be respected... either directly or through a representative or an appropriate body... and due weight must be given to the minors' views, in accordance with their age and maturity and taking into account any communication difficulties they may have, in order to make their participation meaningful. To ensure in practice the respect of the right of the minor to be heard, the measures adopted by Member States should be guided by the following key principles: - expressing views is a choice and not an obligation; - the right to be heard should not be subject to any age limits or other arbitrary restrictions, either in law or in practice; - a minor should be heard in an environment that is appropriate to his/her needs; - the means used to give effect to the right to be heard should be adapted to the level of understanding and ability to communicate and should take into account the circumstances of the case; - in full consideration of the need to protect minors from harm, a minor should not be interviewed more often than necessary; - facilitating the expression of views may require special measures for a minor in particularly vulnerable situations, including the provision of interpretation and translation services". See also, UNICEF/UNHCR (2014) Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe, p 31.

53 See e.g. the Spanish case Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso, Sección 3, Sentencia Administrativo Nº 291/2009, Rec 1523/2008, published on 10 March 2009. The Tribunal ruled that, in the context of the return of an unaccompanied child, that the child had the right to be heard during the repatriation procedure and that the hearing ought to have been carried out with full respect for procedural guarantees. Hearing the child is an essential part of the returns procedure, since the allegations that the child can make regarding his/her removal can be decisive on whether or not a return decision is adopted. The omission of the hearing process produces a material, real and effective, and not merely formal, violation of the right to defence, since it deprived him of the instruments that the legal system makes available to him for the defence of his rights.

54 The European Commission insists that "children need to be informed – in a child-sensitive and age- and context- appropriate manner – on their rights, on procedures and on services available for their protection." European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration p 14. The same is emphasized in European Commission (2017) Return Handbook, p 30. See also Committee on the Rights of the Child (2017) Joint General Comment No 22, para 35.

- States should ensure that children have access to free and quality legal advice and representation⁵⁵ at all stages of the procedure (including any appeals) and that immigration authorities, lawyers and judges involved receive specific training on child rights and child-friendly interviewing.⁵⁶
 - Determining what durable solution is in the best interests of the child should include discussion with the child and family, or guardian in the case of unaccompanied children, of their options. This requires that children and families receive advance notice of meetings and have access to legal counselling/representation and to an interpreter, as well as access to the documentation considered by the actors conducting the procedure when this does not undermine child protection.
 - Whether settlement, return or moving to another country are being considered, possibilities, available support and (re)integration plans should be contemplated, discussed and developed with the child and family, or guardian in the case of unaccompanied children. The plan should include targeted and longer-term measures relating to schooling, training and employment opportunities; access to appropriate health care; family life; accommodation; effective access to justice; protection against all forms of violence; care; and (re-)introduction into the community.⁵⁷
- The decision**
- The decision from the best-interests procedure should identify the best interests of the child, the durable solution required and how it should be implemented. As detailed above, the decision should be made in an independent and impartial way.⁵⁸
 - The nature of the decision will also vary depending on the national context and state authority primarily responsible, but the decision must result in the necessary steps to implement the identified durable solution for the child.
 - The procedure to determine the best interests of the child should be documented, and lead to a fully reasoned, written decision that is subject to review, taking into consideration any changes to the child's situation. Factors to consider are explored further below in Section 1.2.

55 See Article 47.3 of the Charter of Fundamental Rights of the European Union, which provides that legal aid will be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. See also Committee on the Rights of the Child (2017) Joint General Comment No 22, para 32(c). See also Committee on the Rights of the Child (2017) Joint General Comment No 23, para 16 and General Comment no 5, para 24. ECHR case law on Article 13 is also relevant; while it does not guarantee access to legal assistance, applicants must be able to take advantage of available remedies in practice, and in a number of cases, the refusal to grant a lawyer has contributed to a violation of Article 13 (see e.g. ECHR – Case no. no. 30471/08, *Abdolkhani and Karimnia v. Turquie*; case no. 22414/93, *Chahal v. United Kingdom*. Moreover, Article 18 of the Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings reads that: “Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer”. This provision, although applying only to criminal law procedures, is relevant due to the fact that several MS consider irregular entry or stay as a crime under their national jurisdictions.

56 See e.g. the Spanish case; Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso, Sección 1, Sentencia Administrativo N° 1529/2008, Rec 818/2008, published on 02 de October de 2008. The Tribunal identified a series of procedural violations in the context of a return order issued to an unaccompanied child, mostly with relation to right to legal assistance. It found that the effectiveness of this guarantee cannot be inferred from the mere reading of the decision in question, which only contains a mere quotation of legal precepts without explanation of its content. Moreover, the child was not duly assisted in the administrative procedure in which the return order was decided, since it cannot be described as legitimate assistance, the intervention of the public entity that exercised its guardianship, as it had interests opposed to those of the minor.

57 For more information see ECRE and Save the Children (2011) Comparative Study on Practices in the Field of Return of Minors, p 187.

58 See Committee on the Rights of the Child (2017) Joint General Comment No 22, para 32 (c) and (j).

- The right to appeal⁵⁹ (access to an appeals/review mechanism) a decision with suspensive effect in front of an independent body must be ensured, with continued quality, free legal assistance and representation. Access to effective judicial remedies must also be ensured.⁶⁰
- Children should not be separated from their parents or primary caregivers during the procedure, through the removal of a parent or primary caregiver.⁶³
- Children and families should be provided with documentation indicating they are in an ongoing procedure and not subject to apprehension.

Status and basic needs of the child during the procedure

- At no point should children ever be detained for immigration-related purposes, irrespective of their migration status or that of their parents or primary caregivers. Immigration-related detention is never in their best interests.⁶¹ In the best interests of the child, parents or primary caregivers should not be detained either. Where families are concerned, appropriate non-custodial care and accommodation arrangements that enable children and their families to live together in communities should be implemented.⁶²
- Children should be ensured access to education, health care and other services.⁶⁴ Individual needs of children should also be met, including those that might arise from their age, sexual orientation and gender identities and expression, religion, any disability or particular health needs.

Additional safeguards for unaccompanied and separated children:

- An independent and qualified guardian with the necessary expertise and training to ensure that the best interests of the child are taken into consideration shall be assigned by the State and

59 European Commission (2017) *Return Handbook*, p 61 explains how on the basis of the Fundamental Rights Charter, ECHR and Return Directive, “The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as referred to in Article 12(1), before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.” p61.

60 See Committee on the Rights of the Child (2017) Joint General Comment No 23, para 14-15 and General Comment no 5, para 24. See also CJEU – *Case C-181/16, Sadikou Gnandi v. Belgium*. In addition, ECHR case law on Article 13 holds that if recourse is only available before an administrative authority, the powers and procedural guarantees the administrative authority possesses are relevant in determining whether the remedy is effective (*Case no. 9248/81, Leander v. Sweden*), it must meet the requisite standards of independence (*Case no. 35394/97, Khan v. United Kingdom*), and be able to render decisions with binding effects (*Case no. 22414/93, Chahal v. United Kingdom*). Whether or not carried out by a judicial or an administrative authority, the review of the decision must be a full judicial review and not only a review on the grounds of irrationality or perversity of the decision or on grounds which do not allow for a review of the claim under the ECHR.

61 See e.g. ECHR – *Case no. 25794/13 and 28151/13, Abdullahi Elmi and Aweys Abubakar v Malta*. The applicants although minors were detained in a detention facility where they were mixed with adults. The detention lasted until the Maltese government determined (in a process that took 8 months) that they were minors. Moreover, the harsh conditions in the detention facilities amounted to inhuman or degrading treatment. The ECtHR moreover highlighted the fact that a child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of prohibited immigrant, as children have specific needs due to their age and lack of independence. See also ECtHR (2018) *Factsheet – Unaccompanied migrant minors in detention*; ECtHR (2018) *Factsheet – Accompanied migrant minors in detention*. In recent years several international bodies and agencies have also issued public positions against child detention, for more information see e.g. UNHCR (2017) *UNHCR's position regarding the detention of refugee and migrant children in the migration context*; Global Migration Group (2018) *Principles and Guidelines, supported by practical guidance, on the protection of the human rights of migrants in vulnerable situations*, principle 8.4; The Inter-Agency Working Group (IAWG) to End Child Immigration Detention (2016) *Summary of normative standards and recommendations on ending child immigration detention*.

62 Committee on the Rights of the Child (2017) Joint general comment No 23, paras 5-13. See also UN Human Rights Council (2012) *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, para 40; UN Human Rights Council (2015) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, para 80.

63 UN Human Rights Council (2015) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, para 80.

64 *Id.*, paras 54-60; Return Directive, Art 14; European Commission (2017) *Return Handbook*, pp 63-64; the Commission also recommends that member states “ensure that all children have timely access to healthcare (including preventive care) and psychosocial support, as well as to inclusive formal education, regardless of the status of the child and/or of his/her parents”, see European Commission (2017) *Communication from the Commission to the European Parliament and the Council: The protection of children in migration*, p 9.

assist the child⁶⁵. To that end, the guardian shall be involved in the procedure to find a durable solution for the child in their best interests.

Additional safeguards for children with their families

- In keeping with the principles of family life and the best interests of the child, families should be kept together unless the child's safety would be at risk. This includes implementing non-custodial community-based alternatives to detention for the whole family and protecting family members from removal while the procedure is ongoing.

1.2 Factors to be considered in the procedure

Considerations for all children:

- In-depth information should be collected in the course of the process about the child and where the child will have a safe and protective environment which will enable the child to fulfil their needs and rights and develop into adulthood. Elements such as sexual orientation and gender identities and expression, physical, sensory or intellectual disability, belonging to a minority/ethnic group, religion and beliefs, cultural identity, as well as other personal characteristics which can lead to discrimination or particular needs or risks, should also be taken into account.^{66, 67}
- The procedure should incorporate consideration of the child's individual needs, the child's views, how to support their development and survival, the family situation (e.g. where caregivers are, the quality of the relationships between the child and caregivers), appropriate care arrangements, the child's level of integration in the country of residence (e.g. the length of residence, social network, their language skills, enrolment in school, vocational training, etc.), the duration of the child's absence from the country of origin, the child's nationality or lack of nationality, the child's right to preserve their identity, the environment in relation to safety, access to education and services including health care in the country of origin, plans for the child's sustainable return and reintegration and the availability of appropriate cooperation with relevant actors necessary to ensure continuity of care and that conditions would actually be effectively accessible and in place in country of origin, and in line with UN CRC General Comments No. 6 and 14. It also requires assessing the risk of irreparable harm to the child should he/she be returned, in line with States' non-refoulement obligations.⁶⁸
- Return cannot be justified as in the best interests of the child solely on the basis of family unity (e.g. because it would return an unaccompanied or separated child to their parent(s) or primary caregivers in the country of origin or because the parent(s) or primary caregiver(s) has/have an order to leave the territory), without a proper examination of the individual child's best interests in a documented process.⁶⁹
- The child's nationality is an important consideration as it can affect the prospects of them moving to another country, particularly if the child is stateless. The child may have come to Europe as a stateless person or may have been born stateless in Europe. It is possible that stateless children have not been identified as such in the course of

65 See FRA (2014) [Guardianship for children deprived of parental care](#), p 26 et seq. See also ECHR – Case no. 8687-08, [Rahimi v. Greece](#).

66 See e.g. Swedish case: [Migration Court of Appeal MIG 2017:6](#), 17 March 2017. The issue for the court was whether a 17-year-old boy, a Hazara Afghan citizen who had lived since a little child in Iran, was entitled to some form of protective status. The Court found that the boy was entitled to subsidiary protection with reference to the facts that he lacked a network in Afghanistan, and the risks he would face of violence and other abuse constituted inhuman and degrading treatment.

67 UNICEF (2015) [Methodology Guidance on Child Notice](#).

68 Committee on the Rights of the Child (2005) General Comment No 6, para 27; (2017) General Comment no 22, para 46.

69 See the Swiss case: [JICRA 2005/6](#). "The best interests of the child represent an aspect to be taken into account when assessing the reasonableness of the execution of expulsion... Difficulties in (re)integration possibilities in the home country due to advanced assimilation of the child in Switzerland can lead to the determination of the unreasonableness of the deportation execution of the whole family.... it is unreasonable for a family with a 10-year-old child born in Switzerland to be deported."

the various immigration procedures.⁷⁰ They may be erroneously registered as nationals of their country of birth, presumed country of origin, or as persons of 'undetermined nationality' or a similar category. A child's lack of nationality is likely to render their return to the country of origin or birth impossible. In addition, children who were born stateless in Europe may be entitled to acquire the nationality of the country of birth, as per article 7(2) of the CRC, the 1961 Convention on the Reduction of Statelessness and national legislation in many countries.⁷¹ Stateless children who migrated to the EU should be able to enjoy their basic rights as per the 1954 Convention relating to the Status of Stateless Persons.

Additional considerations for unaccompanied and separated children:

- When the child is unaccompanied or separated, authorities must assess the care and custodial arrangements that would be in place upon return to ensure that they would be adequate and appropriate for the individual child.⁷²
- Family tracing should only be done by qualified actors, following a best-interests assessment to ensure restoring contact would not be contrary to a child's best interests, and with the child's informed consent (or in certain circumstances, an individual with parental authority).⁷³ Where family has been traced, to decide whether family reunification is in the child's best interests, it is necessary for child protection actors to assess, whenever possible through a family assessment, whether the family is willing and able to receive the child and provide suitable immediate and long-term care, and take into consideration both the child's and the family's views on reunification.
- Where tracing is unsuccessful or where family reunification is found not to be in the child's best interests, the procedure must consider the quality and suitability of alternative care arrangements in the short, medium and long term. Return should never cause children to become homeless. Community-based care solutions should be prioritised. The use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the child concerned and in their best interests.⁷⁴ Large residential care facilities (institutions) are not an adequate care arrangement for children.⁷⁵
- Where family tracing was found to be in the child's best interests but was not successful during the initial process, authorities should support children that wish family tracing efforts to continue, while taking into account the child's best interests.

70 This is also acknowledged by the European Commission in (2017) [Communication from the Commission to the European Parliament and the Council: The protection of children in migration](#), "[c]hildren who are stateless, due for example to birth to stateless parents or due to gender discrimination in nationality laws in their mother's country of nationality, may be difficult to identify as such, and hence delay their status determination in the European Union."

71 UNHCR (2012) [Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness](#).

72 See e.g the Swiss case: JICRA 1998/13, for further information see: Département fédéral de justice et police DFJP, Manuel Asile et retour. "The well-being of the child constitutes a weighty element in the enforceability of removal... the TAF (Administrative Tribunal) specified that compliance with the principle of the best interests of the child implied, in particular, taking into account the particular elements linked to the minor's personality and living conditions: age, degree of maturity, degree of dependence, the nature of his or her relations with support persons, the resources of these persons, educational or pre-vocational training, the degree of integration in relation to the duration of the stay in Switzerland and the opportunities and risks of resettlement in the country of origin or provenance. Furthermore, the TAF stresses the need to make a realistic assessment of the situation in which the minor applicant would find himself if returned to his country of origin or provenance. It should not only be noted that in the country in question live the relatives or other relatives, or even that there are third parties or infrastructures to accommodate and supervise the person concerned, but also to determine concretely if the latter can actually be placed back in his familiar environment, respectively - if this solution is not possible or is not compatible with the child's best interests - whether he or she can be accommodated and supervised elsewhere."

73 European Commission (2017) [Return Handbook](#), section 10.

74 European Commission (2017) [Return Handbook](#), section 10.2: "It is recommended that the return to adequate reception facilities should not be seen as a durable solution and should preferably be accompanied by flanking reintegration and education measures".

75 For more information on alternative care of children, including definition of alternative care, standards and criteria for determining the suitability of residential care see UN General Assembly (2010) [Guidelines for the Alternative Care of Children](#), in particular paras 21, 23, 29, 123, and 154.

As noted above, actors carrying out the procedure should make proactive efforts to gather country of origin information⁷⁶, for example through a social assessment in the country of residence and/ or country of origin, conducted by qualified and impartial agencies. They should seek out expertise on the situation of children in the country of origin, such as conditions for accessing education and health services, or risks of discrimination, violence or detention of family members on return. Child-specific country of origin information is crucial.⁷⁷ Specific information will be required in certain cases, for example where there are specific health-related needs. In some cases of unaccompanied children, a family assessment in a third country may be required.⁷⁸

1.3 Outcomes of the procedure

➤ When, as a result of the procedure to determine a child's best interests, a decision is taken that local integration/settlement is in the child's best interests, the child should be provided with a secure, long-

term/settled residence status and families should be kept together in the country of residence (unless there are safety/child protection concerns related to the family).⁷⁹ Family unity should be a primary consideration and parents or primary caregivers should not be removed without their children.⁸⁰

➤ When a decision is taken to return and reintegrate the child in the country of origin based on the child's best interests, or reunification with family is found to be in the best interests of the child, an individual plan for the child's sustainable reintegration should be discussed, developed and implemented together with the child and family, and guardian in the case of unaccompanied children. This should include any necessary assistance to ensure that the conditions upon which return, or moving to a third country for family reunification, was identified as a durable solution will be met in practice, including financial support, legal assistance, and access to education and social services. Continued assistance from the child or family's legal representative, and guardian should be ensured.

76 UNICEF (2015) *Methodology Guidance on Child Notice*.

77 Ibid.

78 IOM (2014) *Procedures and Good Practices on Family Assessment and Assisted Voluntary Return and Reintegration for Unaccompanied Minors*.

79 See CJEU – *Case C-413/99 Baumbast*. The children, one of them a third-country national, were given residence permits to continue their education in the member state under EU law on free movement of workers, even though their father was no longer working in the member state. Based on family unity, their mother, a third-country national who was the children's primary carer, was given a residence permit to reside with their children.

80 See e.g. CJEU – *Case C-82/16 K.A. and Others*. The individuals submitted applications for a residence permit, on the basis of their status as the parent of a minor Belgian child. Those applications were not examined on the ground that the individuals concerned were persons who were subject to an entry ban that remained in force. In this regard, the referring court referred several questions to the CJEU for a preliminary ruling, which found that in the case of children, the competent authorities must take primary account of the right to respect for family life (Article 7 CFR EU) and the obligation to take into consideration the best interests of the child (Article 24(2) CFR EU). Account must be taken of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium. Co-habitation is not a prerequisite but it is one of the relevant factors to be taken into account; CJEU – *Case C-165/14 Rendón Marín*, see para. 51: "Enjoyment by a child who is a minor of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence"; CJEU – *Case C-133/15 Chavez-Vilchez*; CJEU – *Case C-34/09 Zambrano*; CJEU – *Case C-200/02 Zhu and Chen*; see also ECtHR – *Case No. 12738/10 Jeunesse v. the Netherlands*, see para. 109: "national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicability, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it". See also Committee for the Elimination of Racial Discrimination General Recommendation No. 30, which calls on States to avoid expulsions of non-citizens, and especially long-term residents, where to do so would result in disproportionate interference with the right to family life (para. 28).

2. Implementation of a return decision in the best interests of the child

If return is identified as being in the child's best interests, specific and appropriate implementation measures should be put in place. This section addresses voluntary departure (2.1 below) and essential safeguards before proceeding with removal if voluntary departure does not occur (2.2 below).

2.1 Voluntary Departure

If a decision is taken that return is in the best interests of the child following the procedure, the decision should be implemented through arranging a voluntary departure, with appropriate assistance to ensure that the conditions identified as making return the durable solution in the best interests of the child are met. Programmatic frameworks aiming at creating a continuum of care should be developed to support effective implementation while specifically taking into account the following:

Considerations for all children:

- › Every child and family member should be given enough time and support to prepare themselves for return. This includes accurate information on options and processes, as well as possibilities to receive psycho-social counselling and other support (the range of support provided to children and families participating in voluntary return and reintegration programmes should be available) in a language and manner that all family members actually understand.
- › Children should be ensured access to free, quality legal representation at all stages of the return process.⁸¹ Effective remedies, including effective access to appeal procedures with suspensive effect and judicial remedies, should be available.⁸²

- › The individual reintegration plan⁸³ should be planned in consultation with the child, family, and guardian for unaccompanied children, prior to the return.
- › Voluntary departure periods should be set in discussion with the child, family and guardian, and based on an individual assessment to ensure conditions identified for return to be in the best interests of the child will be in place. This includes, in particular, setting the departure period in a way that enables children to have uninterrupted access to education. At a minimum, this means arranging departure when the current school term and any examinations have been completed, when enrolment in an appropriate school has been organised for the following term. It may mean delaying departure until the end of the school year.⁸⁴
- › It is important to assist, if needed, to ensure school reports and certification are received, as well as all other relevant documentation (health records, birth certification etc.), and otherwise adequate time is given to prepare mentally and physically. Facilitate birth registration and certification in case the child's birth has not been registered previously.
- › All actors implementing voluntary departure processes involving children should be trained in child rights and child protection,⁸⁵ and have knowledge about the general situation of children in the country of origin; this information could be derived from child specific country of origin information reports. Child protection and welfare officers that are independent from immigration authorities should be involved, if they are not the responsible authority.

81 See *supra* note 55 on legal assistance.

82 See *supra* note 60 on effective remedy.

83 See Committee on the Rights of the Child (2017) Joint General Comment No 22, para 32(k).

84 European Commission (2017) *Return Handbook*, p 35, notes that extensions of the period for voluntary departure until the end of the semester or of the school year, or for up to one school year, may be granted provided that this is in the child's best interests and that all relevant circumstances of the case are duly taken into account.

85 European Commission (2017) *Communication from the Commission to the European Parliament and the Council: The protection of children in migration*, pp 14-16; Committee on the Rights of the Child (2017) Joint General Comment No 22 (2017), paras 32(c) and 36.

- Relevant agencies in the country from which the child departs should collaborate with relevant agencies in the country of origin, including child protection and social welfare authorities and civil society organisations, to confirm that any stipulated return and reintegration conditions and assistance are ready and in place.⁸⁶ This must include:
 - immediate access to appropriate accommodation, support for basic needs and health care including psycho-social care where needed and other public services as relevant in the country of origin.
 - following and adapting as necessary the individual care plan for the child's sustainable reintegration: support for swift school enrolment, financial and social support, targeted measures to protect the child against all forms of violence and to ensure access to justice.
- Adequate reception, care and reintegration measures can be facilitated through the development of transnational mechanisms⁸⁷ between the EU and third countries which focus in particular on cooperation between child rights and protection actors on issues such as restoring family contacts, transferring custodial responsibility and exploring return and reintegration where it is in the best interests of the child.
- Appropriate care and accommodation and access to public services, including health care, should be ensured at all times during the return procedure.
- Returning and receiving States should respectively establish independent and multidisciplinary mechanisms to monitor the situation of the child and their inclusion in social protection and child protection systems, including an assessment of the reintegration assistance received, for a given period of time upon return (at least one year and recommended for two years).
- Entry-bans should not be imposed on children and accompanying adult family members.

Additional safeguards in cases of unaccompanied children:

- The child's guardian should be fully involved in assisting the child during the return process.
- In cases of family reunification, efforts to promote restoring family links prior to return should continue to be fostered.
- Care and custodial arrangements considered in the best interests procedure and return decision, as necessary for return in the best interests of the child, should be confirmed and arranged in advance.⁸⁸
- Formal procedures have to be in place to transfer care and custodial responsibilities of the child to the person or authority exercising such responsibilities in the country of origin, including family members.
- The guardian or another actor chosen by the child should accompany the child to the destination and ensure adequate handover/transfer of custodial responsibility. Arrangements should be made to receive the child at the airport or at final destination, including by the parent(s) or primary caregiver(s) where possible and in the best interests of the child.

86 As recommended by the European Commission, "it is important to ensure that children who will be returned are given prompt access to appropriate (re)integration measures." European Commission (2017) *Return Handbook*, section 10.2; European Commission (2017) *Communication from the Commission to the European Parliament and the Council: The protection of children in migration*, p 13. See also Committee on the Rights of the Child (2017) Joint general comment No 22, para 32(k) which states that "If determined that it is in the best interests of the child to be returned, an individual plan should be prepared, together with the child where possible, for his or her sustainable reintegration. The Committees stress that countries of origin, transit, destination and return should develop comprehensive frameworks with dedicated resources for the implementation of policies and comprehensive inter-institutional coordination mechanisms. Such frameworks should ensure, in cases of children returning to their countries of origin or third countries, their effective reintegration through a rights-based approach, including immediate protection measures and long-term solutions, in particular effective access to education, health, psychosocial support, family life, social inclusion, access to justice and protection from all forms of violence."

87 See for example IOM France, [TACT Project model](#).

88 See e.g. ECHR- [Case no. 13178/03, Mubilanzila Mayeka and Kaniki Mitunga v. Belgium](#).

2.2 Essential safeguards before proceeding with removal if voluntary departure does not occur

The Return Directive foresees removal as an option in cases where the voluntary departure has not occurred within the set time period. Removal should be considered only as a measure of last resort when it is clearly in the best interests of the child. **In such cases, in addition to the application of safeguards developed in section 1, the following procedural and operational safeguards must be in place and followed in order to ensure children are only returned in accordance with their best interests.**

- Where a voluntary departure has not occurred in the set time period, in relation to the return of a child or a child within a family, a decision concerning next steps should be taken by the body/ decision-makers who undertook the 'best interests' procedure leading to the return decision, through a documented procedure.
- Taking into account the individual circumstances of the child concerned, the body will consider:
 - a) whether a new period for voluntary departure should be set/ the period for voluntary departure should be prolonged;
 - b) if any changes in the circumstances underlying the decision that return is a durable solution in the child's best interests have occurred, undertaking any additional information gathering required to identify and assess those changes, including as regards the sustainability of return, the well-being of the child, and actual availability of stipulated conditions. Where it appears that return is no longer in the best interests of the child, a different durable solution should be identified having regard to the best interests of the child.
 - c) whether to proceed with removal - as a measure of last resort and with all the necessary safeguards listed in the next section, in order to ensure that the return of children is in accordance with their best interests.
- In order to take a decision which of the above next steps is appropriate, the body will:
 - consider why the voluntary departure did not take place;
 - hear and take into due consideration the views of the child in accordance with their age and maturity, the family and other relevant actors, including their lawyer, and the guardian in the case of unaccompanied children;
 - assess whether the safeguards and measures necessary to proceed with removal - in order that return remains the durable solution in the best interests of the child - are in place.
- Any decision concerning the return of a child should be reasoned and documented, including the decision to proceed with removal where voluntary departure cannot be carried out, regardless of the reason for the voluntary departure not occurring in the set time period.
- If voluntary departure is not possible due to inability, even with assistance, to acquire necessary travel documentation, an alternative durable solution will likely be necessary.
- Children and their family members should be provided information in a language and manner they actually understand.
- In the event of a removal being ordered, measures to ensure that relevant safeguards are met must be taken, including appropriate support and assistance.
- Effective access to free, quality legal assistance and representation throughout the above- mentioned procedures⁸⁹ and an effective remedy with suspensive effect, as well as access to a judicial remedy, should be available.⁹⁰
- Entry-bans should not be imposed on children (Article 11 of the Return Directive should read in conjunction with Article 5 on the best interests of the child).

89 See *supra* note 55 on legal assistance.

90 See *supra* note 60 on effective remedies.

Operational safeguards

There are numerous reports of human rights violations, including arbitrary detention, child detention and violence during the course of removals.⁹¹ An enforced return, in other words one in which the child or the family does not voluntarily participate, is likely to be experienced by the child in a harmful way. Therefore, for removal to be carried out in a way where return remains a durable solution in the best interests of the child, all possible measures that prevent child rights violations and can reduce harm to children must be taken.⁹² Essential measures include the following:

- All actors implementing removal processes involving children should be trained and have knowledge about children's rights, in particular about the principle of the best interests of the child and its operationalisation, and the general situation of children, including child-specific risks in the country of origin. Independent child protection and welfare officers should also be involved.
- Clear information on the removal decision and all practical arrangements should be provided to children and their families, in a language and manner that they can understand.
- Best efforts should be made to schedule removals in consultation with children and their families, and based on an individual assessment to ensure conditions identified for return to be in the best interests of the child will be in place. This includes, in particular, scheduling the removal in a way that enables children to have uninterrupted access to education. At a minimum, this means arranging departure when the current school term and any examinations have been completed, when enrolment in an appropriate school has been organised for the following term. It may mean delaying departure until the end of the school year.

In case not acquired during the voluntary departure period, school reports and certification as well as other relevant documentation should be organised (health records, birth certification etc.). Until the date of the removal, children should be ensured access to public services, including education, health care and psycho-social counselling.

- Any stipulated return and reintegration conditions and assistance should be confirmed as ready and in place, and not contingent on the child or family requesting it on arrival, with relevant agencies in the country of origin, including child protection authorities and civil society organisations. This must include:
 - immediate access to appropriate accommodation, support for basic needs and health care including psycho-social care where needed.
 - following and adapting as necessary the individual care plan for the child's sustainable reintegration: support for swift school enrolment, financial and social support, targeted measures to protect the child against all forms of violence and to ensure access to justice.
- Removals must not involve arrests in the middle of the night, or interventions at or near educational, health, shelter, religious or other premises.⁹³ They should be carried out at a time and place that ensures the welfare and safeguarding of children, and operational plans should include reasoning on how the time, date and place of removal chosen is necessary, proportionate, justified and in the child's best interests.
- Removal procedures should afford children and their families adequate time to physically prepare their departure and journey.

91 See e.g. Verena Knaus et. Al (2012) Silent Harm: A report assessing the situation of repatriated children's psycho-social health, UNICEF Kosovo in cooperation with Kosovo Health Foundation; Save the Children (2018) From Europe to Afghanistan, experiences of child returnees.

92 Frontex, Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex, Art 4.1.

93 As per guidance of the EU Fundamental Rights Agency ("Apprehension of migrants in an irregular situation – fundamental rights considerations"), also in European Commission (2017) Return Handbook; European Commission against Racism and Intolerance (ECRI) (General Policy Recommendation No. 16), and others.

- Any removal operation involving children should include a specialist in child protection among the escorts. All escorts in removal procedures should be in civilian clothing, identifiable, and also be trained in child rights and child protection.⁹⁴
- Specific needs of children during the journey should be considered and provided for, such as the right to play, breast-feeding etc.
- Removal should not involve the use of force or physical restraints or other forms of coercion against children or their family members.⁹⁵ Children should also not witness the use of force or physical restraints against other adults.
- Families should not be separated at any point during the removal process, as a rule.⁹⁶
- Separate waiting areas, embarkation and seating should be arranged for children and families.
- Children and families shall not be detained or separated by immigration detention at any point during the process due to their status or that of their parents or primary caregivers. Non-custodial community-based alternatives should be used for the whole family.⁹⁷
- A well-equipped medical professional should be present and identifiable at all times during removals and have the necessary medical equipment, including in transit, in the waiting area before departure, in flight and on arrival. Inclusion of other specialists as needed, such as social workers and psychologists to accompany children, should be considered.
- Independent monitoring based on objective and transparent criteria should be in place throughout removal operations, from pre-departure to reception in the country of origin.⁹⁸ Existing human rights monitoring bodies may be able to take on this role in line with good practice.
- Complaints mechanisms which are adapted, accessible and effective for children, should be in place and all allegations of human rights violations during removal processes should be promptly and impartially investigated. Information about complaints mechanisms should be provided. Effective remedies shall be available for those violations.
- Arrangements should be made for independent monitoring of the situation of the child in the country of origin for a given period of time (at least one year).

94 European Commission (2017) Communication from the Commission to the European Parliament and the Council: The protection of children in migration, p 14-16; Committee on the Rights of the Child (2017) Joint General Comment No 22, paras 32(c) and 36; see also European Commission (2017) Return Handbook section 7.1, quoting Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EU on skills, training and code of conduct for escorts, related to all removals by air (not specifically related to children); Frontex (2016) Guide for Joint Return Operations coordinated by Frontex.

95 It may be justified, in some instances, to restrain a child or family members to prevent them from harming themselves or others, but all efforts should be taken in the design of the operation to reduce any risks of this occurring. If there are concerns that a family member will react violently to their removal, efforts should be made to investigate and address the reasons for this when considering whether removal can be carried out with the safeguards to ensure it is still in the best interests of the child. See also Global Migration Group (2018) Principles and Guidelines, supported by practical guidance, on the protection of the human rights of migrants in vulnerable situations, Guideline 9.18 on the use of force.

96 In certain instances, during the course of a removal, it may be in the best interests of the child to be temporarily separated from a parent or other family member, to protect the child. See previous footnote - measures must be taken to avoid such a situation from arising. Any decision on temporary separation should be made by the child protection specialist and carried out by them in the manner they deem will minimise stress for the child.

97 For more information, see UNHCR (2017) UNHCR's position regarding the detention of refugee and migrant children in the migration context; UNHCR (2015) Options Paper 1: Options for governments on care arrangements and alternatives to detention for children and families; International Detention Coalition (2012) Captured Childhood: Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and Irregular migrant children affected by Immigration detention.

98 Return Directive, Art 8.6; European Commission (2017) Return Handbook, section 8..

3. Children's data.

Use of personal data of children in return procedures

Further developing EU information systems, including facilitating interoperability and systematic exchange of information, form a key part of the developing EU returns policy. The main information systems concerned are Eurodac, the Schengen Information System (SIS), the Visa Information System (VIS), the Entry-Exit System (EES), the European Travel Information and Authorisation System (ETIAS), and the European Criminal Records Information System (ECRIS). Several of these information systems include children's personal data.

The registration of children can - if accompanied by appropriate measures on collection, use, retention and access to personal data - have a positive impact on child protection outcomes. For example, it can support authorities to trace unaccompanied children when they go missing or disengage from services with a view to assessing their whereabouts and safety.

- The collection, use and retention of, and access to, personal data must be undertaken in full compliance with data protection legislation and standards, the principles of legitimate purpose, necessity and proportionality.
- As with all actions concerning children, the principle of the best interests of the child should always be a primary consideration in the collection and use of the biometric and other personal data of children.
- In this context, any mental or physical coercion, and any use of force, must be avoided in all instances. This was also highlighted by the European Data

Protection Supervisor (EDPS) in the context of the proposed reform of the Eurodac Regulation, who observed that using coercive measures to obtain fingerprints and facial images raises concerns in terms of human dignity and constitutes an interference with the right to privacy since it has a direct impact on the integrity of the body.⁹⁹ Compliance with the obligation to provide biometric and personal data should instead be primarily obtained through provision of information and effective counselling.

- Age-appropriate techniques must be employed to help children understand the purpose of collecting biometric data.
- Due diligence should be exercised regarding safeguards in the development and implementation of data systems, and in the sharing of data between databases, authorities and countries. Only law enforcement personnel charged with identifying and protecting missing children and victims of trafficking should have access to children's personal data collected for migration governance, registration and protection; this data should not be used to detect irregular migrants and enforce returns.
- A "firewall" should be in place to 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 UN CRC.¹⁰⁰

99 European Data Protection Supervisor (2016) [Opinion on the First reform package of the Common European Asylum System](#), p 14; see also Save the Children (2018) [Joint Statement: Coercion of children to obtain fingerprints and facial images is never acceptable](#).

100 Committee on the Rights of the Child (2017) Joint General Comment No 22; See also ECRI (2016) [General Policy Recommendation N°16 on safeguarding irregularly present migrants from discrimination](#).

4. Ageing out. Protection needs do not end on a child's 18th birthday

The transition into adulthood is a period of identity formation and emotional development, which does not take place overnight when turning 18 years old. It can be a vulnerable period for development for any young person, even without uncertainties over migration status.

Further, current practice frequently dictates that protection on the basis of children's rights ends at 18 years of age. For children in migration, particularly those who have been provided with temporary protection until 18, those whose applications for international protection are still pending, and those irregularly residing on EU territory, this can result in a significant loss of rights. From one day to the other, a child goes from being a child with a set of associated rights, to an adult. In practice, this may mean losing their right to access education, losing their residence permit, and being subject to detention and removal. For children in care, this can mean losing their accommodation and support services.

This transition can leave the young person even more vulnerable than when they were under 18. Knowing that they will face this uncertain and precarious situation on turning 18 also negatively impacts the children's well-being while they are children, during this important period of psycho-social development.

A number of measures should be taken both to limit the challenges that young people face during this transitional period and provide them with necessary support.

- ▶ If it is found that it is in the best interests of a child to remain and settle in the country of residence, they should be provided a *secure*, long-term or "settled" residence status.

- ▶ If the child turns 18 during the course of the procedure, the procedure must be completed with the same safeguards, and the durable solution found to be in the best interests of the child implemented according to the procedure set out.
- ▶ The period of coming of age should be acknowledged and addressed through the extension of some safeguards and services. Support services should not abruptly end but foresee a transitional period of 'after-care', with practitioners trained to deal with youth. This transitional period must begin after the child turns 18 years old and cannot be used to curtail safeguards, care and services for children before they turn 18, as is occurring in some countries.¹⁰¹
- ▶ Young people should be duly prepared, in particular, they should continue to be provided with timely information about their status and options, in a language and manner they can actually understand, as well as free, quality legal counselling.
- ▶ In cases where children have only been granted a temporary residence status, States should ensure that their status enables them to complete any ongoing education or training after they turn 18, and there are clear and accessible options to easily transition into another status. The status should not abruptly end at age 18.
- ▶ States should provide avenues for young adults to continue residence, or apply for different residence and work permits on grounds such as length of residence, family and social links, level of integration, educational enrolment, employment, etc. This should go beyond standard work and study permit schemes, which are unattainable for some young migrants who have had limited education, in recognition of their residence and integration in the country and potential vulnerabilities at this time.

¹⁰¹ See UK case: *KA (Afghanistan) & Ors v Secretary of State for the Home Department*, 25 July 2012: "There is no 'bright line' or dateline which when crossed by the appellants reaching 18 years of age means that the risks to children suddenly disappear." Indeed, the Tribunal states that at the age of 19, due to the sponsor's ongoing vulnerability, the need for family reunification is greater than ever. For further information see Colin Yeo (2018) *Boys to men: how to prepare asylum appeals for young Afghans*.

ANNEX 1 – Major References

➤ EASO:

- *Practical Guide on Age Assessment*, 2nd ed, 2018.
- *Practical Guide on Family Tracing*, March 2016.

➤ ECRE and Save the Children, *Comparative Study on Practices in the Field of Return of Minors*, HOME/2009/RFXX/PR/1002, December 2011.

➤ European Commission, *Communication from the Commission to the European Parliament and the Council: The protection of children in migration*, COM(2017) 211 final, 12 April 2017.

➤ FRA, *Apprehension of migrants in an irregular situation – fundamental rights considerations*, 9 October 2012.

➤ Frontex, *Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex*.

➤ Human Rights Council,

- *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, A/HRC/28/68, 5 March 2015.
- *Report of the Special Rapporteur on the human rights of migrants*, François Crépeau - *Detention of migrants in an irregular situation*, A/HRC/20/24, 2 April 2012.

➤ IRC, UNHCR and UNICEF, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, July 2017.

➤ IOM,

- *A framework for Assisted Voluntary Return and Reintegration* (2018)
- *IOM Handbook Protection and Assistance for Migrants vulnerable to Violence, Exploitation and Abuse* (2019, forthcoming)

➤ Kalverboer, M, Beltman, D, van Os, C, & Zijlstra, E, "The best interests of the child in cases of migration: Assessing and determining the best interests of the child in migration procedures" in *International Journal of Children's Rights* (2017) 25[1] pp 114-139.

➤ OHCHR,

- OHCHR/Global Migration Group, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations*, 2018.
- *Principles and Guidelines on human rights at international borders*, 23 October 2014
- *Principles and Guidelines on migrants in transit*, A/HRC/31/35

➤ Parliamentary Assembly of the Council of Europe (PACE)

- *Resolution 2136: Harmonising the protection of unaccompanied minors in Europe*, 2016.
- *Resolution 1996: Migrant children: what rights at 18?*, 2014.
- *Resolution 1810: Unaccompanied children in Europe: issues of arrival, stay and return*, 2011.

➤ United Nations Committee of the Rights of the Child:

- *Joint General Comment No. 4 of the CMW and No. 23 of the CRC in the context of International Migration: States parties' obligations in particular with respect to countries of transit and destination*, CRC/C/GC/23, 18 April 2011.
- *Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration: General principles*, CRC/C/GC/22, 16 November 2017.
- *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.
- *General comment No. 13 (2011) - The right of the child to freedom from all forms of violence*, CRC/C/GC/13, 18 April 2011.
- *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 01 Sep 2005.

➤ UNHCR and UNICEF, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014.

➤ UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018.

