

GENERAL PRINCIPLES AND BASIC INSTRUMENTS ON PROTECTING CHILD'S RIGHTS IN THE INTERNATIONAL AND EUROPEAN CONTEXT IN JUSTICE SETTINGS

INTRODUCTION

- Introduction of trainer, background and experience
- When we think of children involved in justice proceedings, there are a wide variety of different scenarios:
 - They include criminal, civil and administrative proceedings, ranging from, for example, a child accused of assault to a child involved in a family case triggered by parental separation;
 - They can be in a range of settings, including courts, before administrative bodies, or in mediation settings, for example, an asylum seeking child before an asylum officer in an office or a child providing evidence in a case involving a court, a judge and jury, lawyers for other parties and a defendant.
 - The children may be involved as plaintiffs, applicants, suspects, victims, witnesses or subjects of family law proceedings.
- We will not look at each of these diverse situations individually but instead focus on what they have in common, which is the need to ensure that:
 - Justice proceedings are adapted to ensure that children can properly access and participate in these proceedings and
 - Justice proceedings properly take account of the situation and views of the child and this is reflected in their outcomes.
- This may sound straightforward. But:
 - Recent research from the EU Fundamental Rights Agency into child friendly justice shows a number of recurring obstacles to achieving child friendly justice across the EU.
 - It draws from the perspectives of professionals on child friendly justice, and examines the perspectives of judges, prosecutors, lawyers, court staff, psychologists, social workers and police officers who are in daily contact with children going through judicial proceedings. (FRA will publish a second part to the study which will draw on the perspectives of children.)
 - They report various shortcomings, including insufficient support for children when participating in proceedings. The adoption of concrete measures to avoid intimidating settings, for example, ensuring that a child is not directly confronting a defendant in court, is not yet a common practice. The study does highlight some good practices. In general, it illustrates the need to further strengthen child friendly justice and to learn from good practices in each other's jurisdictions.
- A key element of this seminar is that it brings participants together from different countries, as well as bringing different professionals together. This should allow for a rich exchange of experience and reflection, not only on what child friendly justice is, but also on how to address shortcomings and practical obstacles to its achievement by the actors centrally involved.
- This first session provides the building blocks for understanding the legal framework that promotes the rights of children and the international and EU resources that can help both in

individual cases and in building better child friendly processes as a whole. There are very important other regional instruments, in particular, the European Convention on Human Rights and the Guidelines on child friendly justice developed by the Council of Europe. These will be explored in more detail in other sessions in this seminar.

- Part One provides an introduction to the general legal principles which apply in the area of child rights, in particular the UN Convention on the Rights of the Child. Some of you will already be familiar with these principles and indeed the aim here is not to provide a comprehensive training into child rights. [question on level of familiarity?] The key focus of this session is to identify the implications of a rights based approach to children's involvement in justice proceedings. In other words, what kinds of issues should be addressed when we are concerned with children's rights in justice proceedings?
- We will in particular look at what actors are or should be involved and how actors may need to cooperate with each other to ensure that children's rights are fulfilled, with due regard for confidentiality and respecting the children's best interests. This is often a particularly interesting area in which to compare different perspectives, or different national practices, about the roles of actors. It is a key issue in child friendly justice, which must be embedded in the overall and continuing obligations of the State for the child, before, during and after the process. For example, where children are in particularly vulnerable circumstances, the child protection system as a whole will play an important part in ensuring the justice process works properly.
- Part Two looks at the role of the EU in promoting and fulfilling these principles, as well as how the EU supports actors involved in justice proceedings. We will look at the different ways in which the EU does so, including as a law-maker and as a source of practical tools and guidance and research.
- Indeed this capacity building seminar is very timely when one looks at the EU agenda. Recent EU legislation in the field such as the EU Anti-Trafficking Directive obliges Member States to introduce specific safeguards to fulfil children's rights. There are also a range of practical measures of support such as EU funding for capacity building, including for this seminar.
- EU law and policy framework provide a means for exchange of good practice between professionals in different countries and allows us to draw on common resources to implement EU obligations nationally.
- After the introductory session, there will be a workshop where we break into smaller groups to explore scenarios which require us to draw down on this general introduction. Each workshop should involve different professionals, from judges, lawyers to civil servants and social workers, each of whom play different roles in child justice proceedings. The aim is to discuss specific aspects of a particular case, including:
 - what child rights are central to the case,
 - what actors might be involved in the process and
 - how what international and regional law and resources are available to support decision making in the case.

- The scenario and a resource sheet for working through the scenario are part of the pack you received in advance. This should allow us a rich exchange between the perspectives of the different professionals and the different countries involved.

In short, this introduction aims to:

- (a) Ensure familiarity with the general principles of child rights and to understand the implications of a rights based approach to justice.
- (b) Explore the practical side of achieving child friendly justice through a multi-disciplinary approach
- (c) Ensure awareness of EU acquis and resources that may be particularly relevant in this field, including law, guidance, studies and projects;
- (d) Facilitate exchange of different national experiences as well as the perspectives of different professionals concerned with children in justice.

The session should leave you equipped:

- (a) **Better to address individual cases in your professional roles.** For example, as a decision-maker, you are better placed to consider what issues, and what sources of information, should be involved to consider the best interests of the child when making a decision concerning a child. You should also better recognise the role of other actors and whether they are being discharged properly to fulfil the rights of the child. For example, as a lawyer for a child who has been trafficked, you will know to consider whether the child has received necessary support services before providing testimony;
- (b) **Better to work with other professionals so as to ensure fuller respect for the rights of children.** For example, it may be that police, social workers and lawyers should have case management meetings to expedite the procedure and avoid secondary victimisation, in the case of an abused child. It may be that different courts should be able to communicate with each other about proceedings related to the same child that are before each of them.
- (c) **Better to contribute to and build a more child friendly justice system in ways that are open to you, and drawing on common EU resources.** This might involve being inspired by good examples in other jurisdictions such as those mentioned in the FRA report, for example, training practices such as that in Austria, where judges and prosecutors are required to spend time working in a child welfare institution prior to taking their posts to broaden their experience beyond the judicial sector.

An overarching goal of the seminar is that it should provide you with the interest and the means to continue deepening your knowledge and experience of child friendly justice in an active and practical way.

It should also provide an opportunity and stimulus to continue exchanging perspectives with other professionals involved in cases concerning children, and with colleagues from other countries engaged in the field.

PART ONE: INTRODUCTION TO CHILD RIGHTS

What we will address:

- (a) Child Rights in the Context of Child Friendly Justice

In this part of the session, we will look at:

- Sources of child rights and in particular the UN Convention of the Rights of the Child.
- Scope of the UN CRC
- Spotlight on the Best Interests' Principle & the Child's Right to be Heard

(b) The Actors in Child Friendly Justice & Achieving a Multi-disciplinary & Inter-agency Approach

In this part of the session, we will overview:

- the actors involved in child-friendly justice;
- their roles, qualifications, skills and tools;
- the different ways they may need to cooperate.

(a) Child Rights in the Context of Child Friendly Justice

- Before we review the legal framework, let's consider first the concept of childhood which informed the establishment of specific rights for children.
- How actors approach the concept of childhood may vary depending on cultural issues, individual attitudes and practices.

A. Autonomy: in contrast with adults, a child does not have full autonomy. However, it is interesting to think about different dimensions of autonomy which may occur at different times and indeed these may be recognised in different ways in different countries: such as ability to marry, leave the parental home, care for themselves.

B. Agency: is a key element to consider; some see children as having essentially a passive place in society, where they are guided into their roles, and some see children as having an active role in society. The scope of parental authority in a child's life may differ from country to country, and the reach of family life.

C. Development: childhood is also uniformly recognised as involving an intense state of development in terms of cognitive, psychological, physical dimensions. Attitudes to how States should support, or not hinder, a child's development may differ.

- In applying children's rights, actors bring with them their own conceptions of childhood and its various dimensions. It is important to recognise this and sometimes challenge, or broaden, our own conceptions of childhood.
- This can be particularly true in justice settings where legal professionals may be tempted to treat a child essentially as a passive object of proceedings, because of their complexity, rather than taking specific and effective steps to inform them and support them throughout the process. Another area where differences in concepts of childhood may be evident is when a decision-maker looks to establish the best interests of the child. The principle has sometimes been called "a convenient cloak for paternalistic bias" but recent guidance aims to show how it must root in a comprehensive assessment of the child's circumstances and a careful weighing of different factors.

Sources of Child Rights

- The starting point when considering the rights of the child is the UN Convention on the Rights of the Child of 1989 (UN CRC), its optional protocols and relevant recent guidance on the Convention.
- The UN CRC is a Convention with solid credentials, being the most signed and ratified of the international conventions.
- In the European context, reference must also be made to key regional measures, in particular, those emerging from the Council of Europe which as we have said will be addressed in a later session. This includes the Council of Europe's guidelines in the area. These Guidelines are one of the most comprehensive documents in the field.
- Moreover, through a series of recently adopted legislative instruments, the EU legal framework plays a significant role in strengthening standards throughout Europe through its binding legislative instruments and supporting policy and funding. We will return to this in Part Two of this session.

UN Convention on the Rights of the Child

- The UN CRC (along with its two Optional Protocols on the Sale of Children, Child Prostitution, and Child Pornography and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict) is relatively comprehensive, covering a whole range of civil and political rights, economic, social and cultural rights, as well as protection rights.
- The adoption of the UN CRC marked a firm recognition of the child not only as an object of the law, but also as an active subject on which rights are bestowed.
- What is clear in the UN CRC is that, children have many of the human rights of adults, there are also rights that are relevant specifically to children including right to development, education, special labour rights.
- The UN CRC has been described as bringing together elements of human development and human rights approaches, as it aims to ensure the optimum development of children as well as observance of their rights.
- The rights it establishes are often general in their nature. Sometimes they are qualified in some way. For example "with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation". But many of them are clear and unambiguous, including the rights of the child to protection from violence.

International Bodies Monitoring the UN CRC

- A UN Committee on the Rights of the Child has also been established and comprises independent experts who monitor implementation of the UN CRC.

- It is the body to which States must periodically report on implementation of the Convention nationally. These reports and shadow reports from NGOs and other stakeholders, as well as the conclusions of the UN CRC on the reports, have been used before the courts as evidence on the situation of child rights' compliance.
- The Committee also provides guidance on interpretation of the UN CRC and of particular relevance to children in justice settings are:
 - General Comment No 12 the right of the child to be heard;
 - General Comment No 10 on children's rights in juvenile justice and
 - General Comment No14 on the right of the child to have his or her best interests taken as a primary consideration.
- In addition, the Committee hosts annual days of general discussion of important themes, for example, on juvenile justice in 1995 and the right of children to be heard in 2006.
- A recent development of considerable importance is the adoption of a further Optional Protocol to the Convention on the Rights of the Child on a communications procedure to the UN CRC, establishing a new complaints mechanism for children directly to the Committee.

Scope of the UN CRC

- Let us examine the overall scope of the UN Convention on the Child, emphasising some elements which have a particular relevance when considering child friendly justice procedures.
- The rights under the UN CRC can be delineated into eight "clusters" of provisions which are also used in reporting to the UN Committee on the Rights of the Child as follows:
- **(1) Definition of a child:** the UN CRC defines a child as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.
 - States typically have laws which define a child's capacity to act independently in certain matters by reference to different age thresholds (such as the age of sexual consent, ability to marry, drink alcohol, age of criminal responsibility).
 - In general, regardless of capacity rules, children should benefit from their general rights as children until they are eighteen, including in justice settings.
 - Assessing the age of a child can be an important issue in the instance of an individual who has no documentation, for example, a child who has been trafficked into Europe.
- **(2) General principles:** there are four general principles set out in the UN CRC and they inform the application of all other UN CRC rights.
- They include:
 - (a) the principle of non- discrimination;
 - (b) the best interests of the child as a primary consideration in all actions in their regard;
 - (c) respect for the views of the child; and

(d) the right of the child to life, survival and development.

- The principle of non-discrimination means that all UN CRC rights apply to all children within the jurisdiction and must apply without discrimination, regardless of their status. Consequently, access to and participation in justice must be promoted for all groups of children, including groups which may have the most difficult in accessing justice, for example, children with disabilities or children from third countries.
 - Moreover justice proceedings must respect a child's life, survival and development, rather than hindering it. As an illustration, procedures concerning children involved in sexual abuse or trafficking cases must avoid secondary victimisation of the child, through procedures for providing testimony that are adapted to the child's situation, for example, video recording.
 - In a moment, we will explore in more detail the implications for child friendly justice of the best interests' principle and the right to be heard more fully. These principles are central throughout the experience of a child in any justice system.
- **(3) Civil freedoms** which include the right to identity, birth registration, freedom of thought, conscience and religion; birth registration for example is an issue that may prove problematic in some contexts, leaving children statelessness and without the ability to benefit from key rights such as access to health and welfare services. It may be that such children can only access such rights through a child rights claim.
 - **(4) Family and alternative care:** the UN CRC supports the family environment and addresses the way in which the State should intervene if the family environment is not working; the principles it contains are central to family law cases, including restoring or ensuring family contact in cross border cases;
 - **(5) access to health and welfare services:** as an example, in the field of children in migrant families with an irregular status, there are cases concerning access to housing and medical care;
 - **(6) access to education, leisure and cultural activities** (which will also be relevant to conditions for children in criminal or administrative detention);
 - **(7) special protection measures**, i.e. children in emergency situations, refugee children, children involved in juvenile justice, exploitation and minority groups.

More specifically in relation to children in juvenile justice, the UN CRC provides that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age” and also contains rules in relation to the deprivation of the liberty of a child.

- **(8) General measures of implementation of the UN CRC.** These provisions underline that States are obliged to adopt laws, but also adopt policies, and dedicate resources to ensure the fulfilment of children's rights.

General Comment No 5 on General measures of Implementation for the Convention on the Rights of the Child emphasises the importance of the justiciability of the UN CRC. It notes that, “for rights to have meaning there must be effective remedies”, reinforcing the need for justice processes adapted for children.

Spotlight on the Best Interests of the Child and the Right to be Heard

- We will now look more closely at two key principles which are central to the design and daily operation of child friendly justice processes.

The best interests of the child

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Article 3 (1) of the UN CRC

- The principle contains of a number of elements, some of them more obvious in their application than others. Article 3 has been the subject of much discussion and dispute over the years. A new General Comment has been adopted by the UN Committee on the Rights of the Child (General Comment No 14), intended to generate a deeper and more widespread understanding of the provision.
- The term “all actions” ensures that the best interests of the child are to be a consideration in individual cases involving children or affecting children. It also means that the best interests of the child has to be taken into consideration in relation to general law and policymaking; and a part of this is how systems, including justice systems, are designed. For example, the Committee underlines in General Comment No 10 that protecting the child’s best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.
- The term “a primary consideration” means that the best interests is not the only factor to be considered, although there are some circumstances where the best interests is established to be a determining or paramount factor, for example, in cases dealing with the separation of a child from his or her parents (Article 9 of the UN CRC). However, it is also clear that the best interests of a child is not simply one factor amongst others. It should be given precedence when considered alongside other factors, and other considerations must be sufficiently serious to displace it.
- As emphasised in General Comment No 14, the best interests principle has a number of dimensions, including:
 - as a principle of interpretation in relation to any legal measures applicable to a child;
 - requiring certain procedural safeguards, in particular that the rights should be properly considered, including through the provision of any necessary support to the child, such as representation, and
 - having substantive implications within a case, in that it can, in and of itself, be a basis on which to make a decision.
- More broadly when a child is in a justice process, at every stage, the guiding principle should be what action and what outcome fulfils the best interests of the child.

- General Comment No 14, which states that “the flexibility of the concept of the child’s best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation.” Nonetheless, the Comment emphasises that “the full application of the concept of the child’s best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity”.
- A key question is how to examine the best interests. Typically, this requires a comprehensive assessment of the child’s situation, and this relies on having the right kind of information available from the right sources. It may also require expert review or indeed a multi-disciplinary assessment. Moreover, “An important part of this is discovering the child’s own views”, as Lady Hale noted in a landmark UK Supreme Court Case, “children can sometimes surprise one”.
- Beyond the child’s views, General Comment No 14 cites a range of other factors which should be taken into consideration, including:

- *The child's identity*

As General Comment No 14 notes “Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.”

- *Preservation of the family environment and maintaining relations*

General Comment no 14 notes that “the family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children “. It emphasises that “Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child”.

- *Care, protection and safety of the child*

General Comment No 14 notes that “When assessing and determining the best interests of a child or children in general, the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3, para. 2) should be taken into consideration.” It underlines the fact that the term “protection and care” must be read in a broad sense, since their objective is not stated in limited or negative terms (such as “to protect the child from harm”), but rather in relation to the comprehensive ideal of ensuring the child’s “well-being” and development.

- *Situation of vulnerability*

General Comment no 14 highlights the fact that an important element to consider is the child’s situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc. It notes that the purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those

covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others.

- *The child's right to health*

The child's right to health (art. 24) and his or her health condition are central in assessing the child's best interest.

- *The child's right to education*

It is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge.

In conclusion, General Comment No 14 emphasises that the basic best-interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases.

Right to be heard

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

"For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." (Article 12)

- The right of the child to be heard was a key development of the UN CRC. Children are to be viewed as active participants in proceedings. This principle is at the heart of child friendly justice and this seminar contains a full session on the right to be heard.
- At this stage, let us simply note that General Comment No 12 notes in a forthright way that "this obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child".
- General Comment No 12 provides detailed guidance on a wide array of aspects of this right in justice settings. It addresses family law settings, juvenile justice, refugee children and immigration setting amongst others. It serves as a practical guide examining different moments and different aspects of the justice setting. For example, it notes that "a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age." It goes on to indicate that "[p]articular attention needs to be paid to the provision and delivery of child friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms."
- The Council of Europe Guidelines on Child Friendly Justice provides detailed guidance on child friendly guidance and starts with the principle of participation, followed by the best interests of the child. It also underscores respect for dignity and protection from discrimination. It emphasises that the rule of law principle should apply fully to children as it does to adults. It identifies general

elements of child friendly justice including information and advice, protection of privacy and family life, safety and deprivation of liberty. It emphasises the importance of interdisciplinary training for all professionals working with and for children and calls for lay a particular emphasis on a multi-disciplinary approach. We will explore these points more fully in other sessions.

(b) The Actors Involved in Child Friendly Justice and Achieving a Multi-Disciplinary Approach

- As much as we need to know about the legal principles that should apply to achieving child friendly justice, from a practical perspective, it is also vitally important to understand what actors should be involved – and how - to ensure that these principles are translated into reality.

The Actors: Who Should be Involved?

- In traditional justice settings for adults, there are several key actors typically directly involved with the case, in particular lawyers and judges. In relation to children we may need to consider how to involve a different or broader range of actors, including both actors directly involved in the specific proceedings who have special skills to engage with children or specialist knowledge of children's issues, as well as actors more generally involved in the circumstances of the individual child who can contribute to the general assessment of the child's best interests or who will contribute to the implementation a decision in a manner that fulfils the best interests of the child.
- More specifically, it includes actors who:
 - provide information to children on justice processes (for example, NGOs providing information on access to justice),
 - provide support throughout a process (sometimes family, a person of support or an appointed guardian),
 - provide legal representation (ideally via a lawyer who should be knowledgeable on children's rights),
 - Engage with specially adapted processes for children who are providing evidence or statements (specially trained interviewers, social workers).
 - Have expertise on the child's circumstances because they are engaged with their lives (social workers, education and health professionals, family members).
 - Have particular expertise as regards children (for example experts in forced marriage or experts in FGM) or clinical child psychologists who can help solicit and interpret information from children.
- General Comment no 14 of the UN CRC notes that "In case of separation, the State must guarantee that the situation of the child and his or her family has been assessed, where possible, by a multidisciplinary team of well-trained professionals with appropriate judicial involvement, in conformity with article 9 of the Convention, ensuring that no other option can fulfil the child's best interests."
- Equally, as stated in the explanatory memorandum of the Council of Europe Guidelines "a multidisciplinary approach to children in conflict with the law is particularly needed. The existing and growing understanding of children's psychology, needs, behaviour and development is not always sufficiently shared with professionals in the law enforcement areas."

Authority, Qualifications, Skills & Tools – What Should Be Put in Place

- Some actors may need specific authority to act in particular ways and may need specific skills or tools to engage with the child. For example, in some jurisdictions, a guardian will need to be appointed and empowered to instruct a lawyer on behalf of a child.
- Expert qualifications in a specific field may be necessary, for example, a clinical child psychologist may be needed to provide a fuller understanding of the testimony of a child, in a child sexual abuse case, in particular where it involves younger children
- An actor may need to have specialised skills to address the situation of a child. As an example, an asylum officer may need to have training to be able to elicit and understand information provided by a child that may have suffered traumatic experiences. This can be vital as the child may be the only source of information in some cases.
- Specialised tools may be required to allow actors follow adapted processes in cases involving children; in some cases, resources such as checklists of specific issues to be covered or guidance to interviewing children, for example, in civil cases have been developed.

Multi-disciplinary Inter-Agency Cooperation

The different actors, and indeed different decision making bodies where the same child is involved in several cases, may need to cooperate to achieve certain things.

Cooperation is vital but not a simple task and needs to respect fully the different obligations of each actor, fully respect confidentiality obligations, and be established through appropriate protocols or other formal means.

The benefits of cooperation between actors may include *inter alia*:

- *reducing complexity in processes;*
- *reducing polarisation of perspectives;*
- *avoiding fragmentation of information;*
- *facilitating specialisation;*
- *facilitating communication to children and input from children.*

Examples of cooperation can be explored further in the FRA report.

These include:

- Case management between actors: involve the right actors efficiently and effectively and interact with the child in a proper way. It will help if these issues are considered in a practical way and are planned at the outset of the justice proceedings. Depending on the type of proceeding, and how actors are resourced, it may be the judge or the lawyer, the guardian, the prosecutor or some other actor who takes on a central role. This is something to reflect on together in the coming days, as we consider specific skills, processes and tools.
- Protocols in judicial proceedings to promote information sharing in the UK between the Family Court and the Immigration and Asylum Tribunal and criminal courts and the Family Court.
- Co-location of services such as law enforcement, prosecution, health professionals, psychologists, social workers when addressing children victims of violence so as to make the process as child friendly as possible, e.g. Children's Houses in Scandinavia
- Joint training of different professionals such as legal professionals and social professionals

CONCLUSIONS & BEGINNING OF GROUP DISCUSSION

In conclusion, it is useful to summarise features of a rights based approach generally and in particular in justice settings. Justice proceedings involving children can and indeed must be tailored to allow children to bring claims, to contribute evidence and views where relevant and to have their rights as children fully reflected in determinations.

1. Most fundamentally, rights are universal and imply obligations on duty bearers, and entitlements for children as rights holders. This contrasts with a more classical needs-based approach to children's issues, where a more discretionary welfare provision is based on an identification of the child's needs. In other words, we need to think about the child as an active agent with rights. This is true for all children, including those for whom access to justice may be particularly challenging, for example disabled children.

2. This notion of obligations and entitlements demands a careful consideration of the implication of UN CRC provisions in relation to children, in every situation. It can have an impact on the procedural safeguards that must be in place, but also the information that must be assessed and how and the interplay of child rights with other legal provisions in the decision itself.

3. It is crucial to involve the right actors, with the right authority, role, skills and tools in delivering child friendly justice.

A final word, increasingly regional courts are holding national systems to account for failures to address children's rights. We will see examples of this in the next session. So, in conclusion, the term "child friendly" should not be taken to suggest that adapting the justice process so that it responds adequately to the needs of children is merely a discretionary exercise.

KEY EU LAW AND RESOURCES AVAILABLE TO SUPPORT ITS IMPLEMENTATION & APPLICATION

INTRODUCTION

- As we will see, much of the EU law that is concerned with child friendly justice provides general obligations which need to be implemented at national level.
- This means of course that applying the law in specific cases will often start with the national implementing law.
- However the underlying principles of EU law continue to inform the interpretation of national laws and how they should be applied. National provisions can be challenged for failure to implement EU obligations.
- This session will focus on the EU obligations. We will not be examining the national implementation of the directives involved. You may find it useful after the seminar to examine the implementing acts in your countries.
- Nor will we examine individual EU directives in detail. Rather we will take a more cross cutting approach and overview the type of child friendly justice obligations that the growing body of relevant directives includes.
- We will also see that jurisprudence from the European Courts should contribute greatly to more widespread recognition that justice processes need to be tailored to the needs and rights of children, even in areas where those rights “compete” with other powerful concerns of the State. The case law suggests a developing tendency in the Court to look more closely at the child rights issues at the heart of a situation.
- Focussing on the common EU framework permits actors potentially to translate good practices from other countries, as well as for regional actors to create common tools such as guidance or training which can apply across Europe. It is useful to be alert to the opportunities to leverage regional resources nationally, particularly at a time when resources are under pressure. In this regard, for example, we will point to important reference material and guidance on the implementation of certain EU Directives.

This session aims to:

1. Ensure awareness of sources of EU law & policy on child rights
2. Identify the types of EU obligations relevant to child friendly justice
3. Highlight recent regional jurisprudence from the European Court of Justice and the European Court of Human Rights.
4. Ensure awareness of EU resources that may be particularly relevant to your work in this field, including guidance, studies and projects

1. CHILD RIGHTS AT EU LEVEL

- As a first step, we will overview the policy areas in which the EU plays a role as regards children and then go on to examine the different types of action which the EU can take. After understanding where and how it can act generally, we will focus on specific safeguards EU law establishes for child friendly justice.

1.1 *In what areas does the EU play a role which affects children?*

- The European Union is founded on a division of powers between the European Union and the Member States, with policy areas of exclusive competence for the EU, policy areas of shared competence between the EU and Member States and policy areas reserved for Member State action, but where the EU may play a role in coordinating, supporting or supplementing national policies such as education and health.
- Some of the areas in which the EU shares competence with the Member States directly concerns children, including justice and home affairs issues. This can include issues which arise when EU citizens move from one Member State to another, such as cross border parental disputes. It includes issues of serious crime with a cross border dimension such as child sexual abuse and trafficking. It covers the establishment of common victims' rights and as well as common rights of children suspected or accused of crime. The common European international protection regime creates common standards as regards asylum and subsidiary protection as well as measures addressing irregular migration.
- For many years, the European Court of Justice has recognised that all EU actions must respect fundamental rights and in this regard, has noted that due account should be given to the UN Convention on the Rights of the Child.
- More recently, the Treaty of Lisbon introduced an objective for the EU to promote and fulfil children's rights. This step did not in itself create any general competence for the EU to deal with the situation of children but it increased the visibility and political prioritisation of children's rights in those fields where the EU has competence to act.
- Moreover the Charter of Fundamental Rights of the European Union, which is legally binding since the entry into force of the Treaty of Lisbon, inter alia guarantees the protection of children's rights by EU institutions, as well as by EU Member States when they implement EU law. Article 24 is focused on the rights of children and provides inter alia that:
 1. 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.
 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- The Lisbon Treaty also provided a basis for a stronger EU legal framework in key areas where children find themselves involved in justice systems. As an example, prior to the Lisbon Treaty, the EU had been permitted to adopt so-called Framework Decisions in the area of trafficking of human beings and sexual abuse of children, but not EU Directives. Unlike Directives, Framework Decisions were not capable of direct effect, nor could the European Commission pursue Member States for failure to implement Framework Directives properly. Post the adoption of the Lisbon Treaty, the EU was able to adopt Directives in both fields.

1.2 What types of action may the EU take?

Depending on the policy area involved, the EU can take a range of different actions, including law, policy, practical measures of support and funding.

(a) EU law

- EU law takes a number of different forms, including primary law (the EU Treaties) and secondary law (EU regulations, directives and decisions). We have just looked at some of the primary law provisions. EU secondary law generally takes three forms: decisions, regulations and directives.
- Decisions are typically taken by the Commission in relation to individual acts or bodies, for example, competition case decisions by the Commission in relation to the transactions of particular companies.
- Regulations become law in all Member States the moment they come into force, without the need for any national implementing measures, and they automatically override conflicting domestic provisions.
- As mentioned above, Directives require Member States to achieve a certain result while leaving them discretion as to how to achieve the result. This recognises the different legal and technical ways in which national systems are set up and the need to choose the appropriate means within those systems to fulfil the general EU legal obligation.

EU law that is most directly relevant to child friendly justice and which has taken the form of Directives includes: [suggest inclusion of hyperlinks and titles which explain what the instruments do rather than their formal and often long titles]

- Brussels II bis Regulation on conflict of law issues in family law between Member States; in particular those related to divorce, child custody and international child abduction.
- Victims Directive,
- Trafficking Directive
- Sexual Abuse Directive
- International Protection instruments
- Return Directive
- Proposal in relation to safeguards for child suspects and children accused of crime (draft legislation)

(b) EU policy

- EU policy documents typically set out a framework for EU action in a particular field, by reference to particular principles and key objectives. These are important channels through which institutional and EU agency resources are focussed on particular outcomes and they may also invite stakeholder engagement. These policy frameworks can help inform and shape EU law and its implementation and can prove useful in practice interpreting how it should be applied.
- In February 2011, the European Commission adopted the EU Agenda for the rights of the child which reaffirmed the commitment of all EU institutions and all EU Member States to promote, protect and fulfil the rights of the child in all relevant EU policies.
- The EU Agenda underlines that the standards and principles of the UN Convention on the rights of the child will guide EU policies and actions that have an impact on the rights of the

child. It also identified a number of concrete priorities on which the EU would focus including child-friendly justice and the protection of children in vulnerable situations. The role of EU law in this field was noted, as well as the role of non-legislative measures. The need for better data on the situation of children in justice across Europe was also emphasised. The EU Agenda also included a commitment to promote the use of the Council of Europe Guidelines of 17 November 2010 on child-friendly justice, and to take them into account when proposing legal instruments in the field of civil and criminal justice.

- Much of the EU agenda focussed on activities that were to be undertaken between 2010 and 2015; however it can be expected that child friendly justice will continue to be a priority given the range of EU competences in the area.
- Other EU policy frameworks have also been very pertinent to children in particular contexts, including the EU Action Plan on Unaccompanied Minors (2010-2014). The latter included a range of actions that are relevant to child friendly justice in immigration and asylum contexts, including the appointment of guardians. The Commission has also been exploring the adoption of a Communication on integrated child protection systems, with a reflection paper on the topic adopted for the annual EU Child Rights Forum in 2015. The Reflection Paper contains a series of principles, starting with the right of the child to be involved in decisions that involve them, “with measures to empower children to protect themselves and their peers and to claim their rights”.

(c) EU Practical Measures of Support

- The EU has a wide portfolio of activities which are intended to serve as practical measures of support to achieving its goals, and these are often identified in the policy framework. They include research, action plans, guidance and project funding.
- They may be undertaken by EU agencies, in particular the Fundamental Rights Agency (“FRA”), the European Asylum Support Office (“EASO”) and Frontex as well as Europol in the area of crime control. Again, these should be viewed as resources for actors in the field of child friendly justice, whether that be policy makers or practitioners.

Some illustrations of practical measures in the area of child friendly justice

- The Commission regularly hosts meetings allowing for and exchange of national experiences, including both expert meetings on thematic issues and so-called contact committee bringing together national authorities involved in implementing EU measures. It is from this context that Guidance on a particular directive often emerges, such as the Guidance on the Victim’s Directive, which we will look at in a moment.
- The EU agencies, including the Fundamental Rights Agency, the European Asylum Support Office (EASO), Europol and Eurojust, all play a very practical operational role supporting the implementation of EU law.
- Examples include:
 - Work of the EU agencies:
 - FRA (e.g. Child Friendly Justice research; Handbook on Guardians for Children Deprived of Parental Care)
 - EASO (e.g. Interviewing Children Training Modules; Age Assessment)
 - Frontex (e.g. Training for Border Guards)
 - EU funded projects
 - Training & Clinics
 - Tools (e.g. CONNECT)

- As an example, the EU-funded CONNECT Project included a tool developed from the UK context which sets out standards to ensure that unaccompanied children can participate in procedures concerning them.
- It deals concretely with the following situation: “an unaccompanied migrant child may have to engage with a wide range of legal procedures, courts and tribunals after his or her arrival in a country of destination. These may include a criminal court, if he or she is a victim of human trafficking, sexual abuse or labour exploitation. In the alternative, he or she may have been wrongly charged with a criminal offence connected with his or her entry into the country or his or her exploitation as a victim of human trafficking. He or she may also have to take legal action in order to dispute an assertion that he or she is over 18, if he or she has been placed in unsuitable accommodation or has not been recognised as victims of human trafficking. Or he or she may be a party to family proceedings because child protection concerns have arisen about his or her previous treatment by a parent or relative. At the same time, he or she may have been refused asylum or other international protection and be appealing against that decision. Some unaccompanied migrant children may also be seeking compensation from the relevant court or tribunal for false imprisonment, assault or exploitation as a victim of human trafficking.”
- It underlines the fact that “The failure on the part of different actors to understand that they are part of this wider child protection system and that they should co-operate with each other in order to ascertain the particular need of unaccompanied migrant children may ultimately lead to the wrong decision being made in legal and judicial proceedings to the detriment of individual unaccompanied migrant children.”
- The UK tool sets out standards which actors, particularly in the decision making procedures, should observe. These include standards concerning the exchange of information and evidence by all actors, reliance on expert evidence, special measures during court procedures, professional accreditation and supervision.

In our conclusions, we will look at some more specific EU guidance and reference material.

2. TYPES OF EU LEGISLATIVE PROVISIONS RELEVANT TO CHILD FRIENDLY JUSTICE

We will now review the kinds of provisions that are contained in EU legislative instruments that directly concern child friendly justice.

This recent wave of legislation from the EU on matters including asylum, trafficking, child sexual abuse and exploitation and victim’s rights all contain specific safeguards particularly relevant to children falling within the procedures concerned. The following examples illustrate the range of mechanisms deployed.

DEFINITION OF CHILD & OFFENCES AGAINST CHILDREN/CHILD SPECIFIC GROUNDS FOR INTERNATIONAL PROTECTION

Better definitions to inform the application of the law

- Introduction of a definition of a minor: The introduction of a definition of a minor in the international protection measures, in line with the UN CRC, as a person under 18 years of age, ensures clarity and the general application of safeguards for children to all persons under 18.

Provisions recognising the need for age assessment procedures:

- The EU Asylum Procedures Directive introduces a measure on age assessment procedure. As noted before, determining age can trigger the application of specific safeguards for children, including representation.
- The EU trafficking Directive also contains a provision providing for the application of the benefit of doubt in favour of the individual where age is uncertain:
Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.

Definitions of offences relating to children/grounds for child claims

- The EU Anti-Trafficking Directive contains a specific definition of child trafficking which contrasts with that of adults. More specifically it provides that:
The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.
The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.
When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.
- The Sexual Abuse Directive harmonises around twenty criminal offences against children.
- In the context of international protection, the Asylum Qualifications Directive speaks of acts of persecution as including acts of a child specific nature. In line with the UNHCR Child Asylum Claims Guidelines, this means that decision-makers should both so-called “child-related manifestations of persecution”. This refers to actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. It also means that decision makers need to take into account that children may also be subjected to specific forms of persecution that are influenced by their age, lack of maturity or vulnerability (“child specific persecution”). The fact that the refugee claimant is a child may be a central factor in the harm inflicted or feared. This may be because the alleged persecution only applies to, or disproportionately affects, children or because specific child rights may be infringed. This may include under-age recruitment, child trafficking and female genital mutilation.

BEST INTERESTS’ PRINCIPLE

Factors To Be Assessed

- The “first generation” of legislative instruments contained references to the application of the best interests’ principle, but often appeared to be paying lip service to the principle (through a short reference, sometimes in the recitals).

- More recent EU instruments, including the recast EU Asylum Reception and Procedures instruments, are notable for the fact that they indicate the factors which should be taken into account when assessing the best interests of the child.

Outcomes Which Are Specifically Relevant For Children Taking Into Account Their Best Interests

- Although the EU Trafficking Directive was not generally intended to deal with the immigration status of trafficked persons, in relation to unaccompanied trafficked children, it did establish provisions in relation to more long term solutions for the situation of unaccompanied children.
- More specifically, it addresses durable solutions, noting in the recitals that *“a decision on the future of each unaccompanied child victim should be taken within the shortest possible period of time with a view to finding durable solutions based on an individual assessment of the best interests of the child, which should be a primary consideration. A durable solution could be return and reintegration into the country of origin or the country of return, integration into the host society, granting of international protection status or granting of other status in accordance with national law of the Member States.”* The Directive obliges Member States to establish measures for identifying durable solutions.

RIGHT TO INFORMATION & RIGHT TO BE HEARD

Child specific information:

- An example of new information requirements is the information leaflet for children that should be provided to explain in which country their asylum claim will be heard. (Dublin Regulation)

Access by children to procedures

- Ensuring children have better access to proceedings is a precondition to child friendly justice and the new provisions in the EU Asylum Procedures Directive have been introduced to address when and how children can make applications. This compares well with the original Asylum Procedures Directive in which children were virtually invisible, except for some provisions on unaccompanied children.

Right of child to be heard

- Special interview procedures are contained in the Trafficking Directive, the Sexual Abuse Directive and the Directive on victims. These recognise that great care needs to be paid to how information is elicited from children and evaluated.
- Under the Brussels IIa Regulation, failure to respect a child’s right to be heard is a ground for not recognising judgements in matters of parental responsibility.

Access to redress

- The Victim’s Directive contains the provision that a victim is entitled to obtain a decision on compensation by the offender within a reasonable time in the course of criminal proceedings, except where national law provides for such a decision to be made in other legal proceedings. Member States are also asked to encourage offenders to pay compensation to victims.

ACTORS INVOLVED

Guardianship/Representation for children

- Both the recast EU asylum instruments and the EU Trafficking Directive contain provisions on guardianship/representation although they allow Member States considerable discretion in their implementation, for example, the Trafficking Directive which allows States to provide unaccompanied children who have been victims of trafficking with guardians, “where necessary”. Nonetheless, the instruments nonetheless provide valuable recognition to this vital safeguard and the European Court may be the ultimate arbiter of when the appointment of guardians is necessary.

Legal assistance

- Legal assistance is made available to children in a variety of forms in the new legislation.

Training of professionals engaged with children

- Provisions in the recast EU Asylum Reception Directive provides that those working with unaccompanied children shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

CHILDREN’S RIGHTS TO PROTECTION

Assistance to children who have been sexually abused, trafficked or otherwise the victim of crime

- Individual assessment of special needs of children, and provision of services

Specially Adapted Procedures

- Provisions to ensure children do not have to confront defendants in court; avoiding visual contact, ensuring that the victim may be heard in the courtroom without being present, avoiding unnecessary questioning about the victim’s private life unrelated to the criminal offence; recording interviews;

Protection of Privacy

- In the interests of child victims, the Victim’s Directive provides that authorities must prevent information that could lead to their identification being publicly disseminated.

Non prosecution and non-punishment provisions

- Both the Trafficking Directive and the Sexual Abuse Directive contain provisions of these kind for children who have been trafficked.

Detention

- The EU International Protection instruments contain provisions relating to the detention of children within families and children travelling alone or separated from adults who are primarily responsible for their care.

Cross border procedures

- EU law is uniquely positioned to create jurisdictional rules between Member States on cases concerning children which it has done in the case of matters of parental responsibility (Brussels IIa) and in matters of allocating responsibility for determining asylum claims, where an asylum applicant travels within the EU (Dublin II regulation). Information exchange between jurisdictions is also established.

3. RECENT JURISPRUDENCE

In two recent cases, we can see how child rights principles and these types of child specific provisions in EU law have been interpreted in the regional European Courts judgements. Both cases are drawn from the immigration context, a context which often serves as a litmus test for the application of the UN CRC rights in a particular jurisdiction, given that the migration is an area where there are strong countervailing arguments are often made on the basis of the public interest in border control and security.

In each case, the courts have found that national authorities failed to consider the best interests of the child and have emphasised that the best interests' principle is central in interpreting the application of law. The ability of children to participate in proceedings has also been a determining factor in the court's decision-making.

3.1 Rahimi v. Greece 1

- Facts of the case
 - The case concerned the conditions in which an Afghan child, Eivas Rahimi, who, following the death of his parents in armed conflict, left Afghanistan and entered Greece illegally.
 - He was held in the Pagani detention centre on the island of Lesbos for two days and subsequently released with a view to his expulsion.
 - The parties did not agree on other crucial facts. The authorities submitted that, by means of a note written in Arabic, Eivas had been informed of his right to complain to the chief of police and to apply to the president of the administrative court as regards his detention. The applicant claimed that he had not been informed of his rights and situation in a language he could understand. He alleged that he had been placed with adults in detention, had slept on a dirty mattress, had had to eat while sitting on the floor and had not been allowed contact with persons outside the detention centre, meeting only one representative of the German NGO (who was on official business on the island). In contrast, the Greek Government claimed that the applicant had been held in a cell specially adapted for minors and had not made any complaint to the local authorities about the detention conditions.
 - When an order for the applicant's deportation was issued, it mentioned that his cousin, N.M., born in 1987, was accompanying him. The applicant stated that he did not know N.M. and had never otherwise claimed to the authorities.
 - On his release from detention, the applicant was not provided with any accommodation or transport, and apparently received assistance from an NGO.
 - After arriving in Athens, he remained homeless for several days but subsequently provided with accommodation by the NGO Arsis in an Athens hostel. Arsis testified to the court that when the applicant had arrived in Athens he had difficulties integrating, sleeping in the dark and speaking, and was very emaciated.
 - Arsis noted that Eivas had apparently fled Afghanistan because he feared being conscripted into the Taliban armed forces.
 - Arsis claimed that no guardian had been appointed although the public prosecutor responsible for minors had been apprised of the situation.

¹ Rahimi v. Greece ECHR (8687/08)

- In September 2007 the applicant's application for political asylum was rejected; although his appeal was still pending in 2008 when he lodged proceedings before the European Court of Human Rights.
- In the case before the court he alleged violations of Article 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy) of the ECHR, based inter alia on the a lack of support appropriate to his status as a child, the conditions in the Pagani detention centre, consistent disregard for his situation as unaccompanied child, and lack of information on reasons for his arrest or of any remedies in that connection.
- The European Court of Human Rights accepted the applicant's version of the facts in several important regards. Although the detention had been for only two days, the Court condemned the Greek State for a violation of Eivas Rahimi's human rights. The judgement of the European Court of Human Rights, which also found violations of the child's rights on several other counts, is important in several regards.
 - First the Court found that automatic application of the legislation to detain a child without any consideration of his best interests caused a breach of his rights.
 - The Court did not examine what would have been in the child's best interests or what factors should have been considered but considered failure to consider the best interests when taking a decision to detain the child was in and of itself problematic.
 - This underlines the need for a specific step in detention procedures when a child is involved, and requires an active review by the Court of the circumstances of the child.
 - The Court also noted the deep concern expressed by UNHCR that Greek prosecutors, although designated by law as the temporary guardians of minors seeking asylum, rarely intervened in matters relating to the latter's living conditions and treatment. The absence of a guardian, and the deficit in the information and the way it was provided ("the information brochure had been incomprehensible to him"), were significant factors in the Court's finding that the Greek State actions had violated the rights of the child.
 - The Court noted that "it was clear that the authorities were undertaking no efforts to protect [unaccompanied children released from detention] from possible violence and exploitation".

As a whole, the findings illuminate the need for specific safeguards in justice processes for children in precarious situations, in light of their vulnerability and their needs and rights to special protection and assistance.

3.2 *M.A, BT, DA v Secretary of State for the Home Department*²

Facts

- Two minors of Eritrean nationality (MA and BT) and a minor of Iraqi nationality (DA) applied for asylum in the United Kingdom.
- No member of their families was legally present in another Member State of the EU.
- The United Kingdom authorities established that they had already lodged applications for asylum in other Member States: in Italy (MA and BT) and in the Netherlands (DA) and decided that the minors would be transferred to those States, which were considered responsible for examining their asylum applications.

² MA and Others v UK, Case C-648/11

- This case which was referred to the European Court of Justice by a UK court is of enormous interest because it deals with the interpretation of the best interests' principle in relation to technically complex and politically sensitive legislation, namely the so-called "Dublin II Regulation" to which we previously referred, which sets out criteria for determining which Member State is responsible for examining an asylum application of an asylum applicant who has moved from one country to another.
- Before proceeding with the transfer of MA and DA, but after BT had been transferred, the United Kingdom authorities decided to examine the applications for asylum themselves, under the 'sovereignty clause' provided for by the regulation. Consequently, BT was able to return to the United Kingdom.
- However the Court in any event delivered a judgement in the cases.

Judgement

- The Dublin II Regulation explicitly refers to the application of the best interests' principle as regards the application of some provisions in relation to children but not others. In the absence of a family member, the Member State responsible for examining the application is to be that where the minor has lodged his application for asylum, although the regulation does not specify whether that is the first application which the minor lodged in a Member State or the most recent application lodged in another Member State.
- The Court of Justice declared that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged an asylum application in more than one Member State, the Member State responsible for examining it will be that in which the minor is present after having lodged an application there.
- The Court referred to Article 24(2) of the Charter of Fundamental Rights. It found that "although express mention of the best interest of the minor is made only in the first paragraph of Article 6 of Regulation No 343/2003, the effect of Article 24(2) of the Charter, in conjunction with Article 51(1) thereof, is that the child's best interests must also be a primary consideration in all decisions adopted by the Member States on the basis of the second paragraph of Article 6 of Regulation No 343/2003."
- The Court press release noted that "that since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State".

4. KEY TOOLS

- It can be seen from this jurisprudence, that the European Courts increasingly may hold national authorities to account for violations of child rights, both in terms of procedural and substantive deficiencies in procedures involving children.
- As noted above, there are a number of tools available to foster better implementation and application/interpretation of these legislative provisions. Some key examples are worthy of particular attention.

4.1 EU acquis and policy documents on the rights of the child

- This document compiles and tracks all EU legislation and provisions - as well as major policy documents - on the rights of the child, including other documents of particular relevance to children. It also includes Commission proposals for legislation in order to provide an overview.

4.2 FRA Handbook of European law on the Rights of Children

- The Fundamental Rights Agency, in cooperation with the Council of Europe, is preparing a handbook on children's rights which analyses the case law of the European Court of Human Rights, the European Committee on Social Rights and the Court of Justice of the European Union on children's rights. It is intended to assist lawyers, judges, prosecutors and social workers, as well as others working with national authorities, and NGOs and other bodies that may be confronted by legal issues related to the rights of the child.

4.3 Guidance on Victim's Directive

- The Guidance notes that for many Member States, and for practitioners working in the national systems, the transposition and implementation of this Directive will undoubtedly be complex and sometimes challenging. The Guidance is intended "to help national authorities, practitioners and relevant service providers to understand some of the most complicated and far-reaching provisions of the Directive."
- The Guidance provides information and interpretation on the objectives of the Directive as a whole and then article by article.
- It notes that "the core objective of this Directive is to deal with victims' needs in an individual manner, based on an individual assessment and a targeted and participatory approach towards the provision of information, support, protection and procedural rights. Special attention is given to special support and protection for victims of certain crimes, including victims of gender based violence, predominantly women, due in particular to the high risk of secondary and repeat victimisation, of intimidation and of retaliation. The Directive also insists on a child sensitive approach, whereby the best interests of a child victim must be the primary consideration throughout their involvement in criminal proceedings."

4.4 Reference Document on Unaccompanied Minors in EU Law & Policy

- The EU funded CONNECT Project produced "a Reference Document on Unaccompanied Children – compilation of EU measures".
- The EU Reference Document is intended to be used to support the work of both policy makers and practitioners regionally, nationally and locally and is drafted for use by both specialist and non-specialists. It provides a listing of relevant instruments as well as references to further useful background materials.
- This brings together in one place – for the first time – all of the key EU legal and policy measures on unaccompanied children.
- It also includes a section on the international law which should inform EU action, including Council of Europe and UN Conventions and the key General Comments from the UN Committee on the Rights of the Child, including the recent General Comment No 14 on the best interests' principle.
- The Reference Document houses a table of legal provisions which allows you to capture at a glance what obligations exist across the different EU instruments on asylum, trafficking, family reunification and return.
- One important feature of the table is that it links the EU obligations to UN CRC clusters, which should support Member States in implementing them in a way that fulfils children's rights.

CONCLUSIONS & BEGINNING OF DISCUSSION

There are a wide range of provisions under EU law that may have a bearing on child friendly justice. Although many of them need to be implemented into national law, and may take different forms, the objectives which these national measures should achieve are the same.

The EU also generates a wide range of other actions, including policy and practical measures of support, which have a bearing on the practical work of implementing and interpreting EU law.

Jurisprudence from regional courts in Europe provides a clear indication that the rights of the child have both procedural and substantive implications.

Practitioners should be alert to the specific tools that may assist in ensuring child rights obligations are translated into a reality in the justice process.

WORKSHOP

Case Scenario:

A child from Vietnam, was trafficked into the EU to be criminally exploited within a cannabis farm.

Law enforcement encountered this young person of foreign origin but without documentation such as a passport or ID working on the cannabis farm, with several other young persons.

Prosecuted and found guilty of crime related to cannabis cultivation. No consideration of how the farm was run and whether the person had been trafficked was contained in this original proceedings.

Young person had no guardian, had a lawyer.

Social services subsequently assessed the person to be 16 and he was sent to a young offender's institution to serve his sentence.

While in the institution, he was advised by an NGO to appeal.

In the proceeding before Criminal Appeal Court, young person's lawyer argues that the individual is a child; that the child was smuggled into the country; he were exploited to pay back debt and his involvement in cannabis farm arose out of this exploitation and consequently he should not have been prosecuted or punished.

Prosecutor's office concedes that, on evidence now available including evidence of Vietnamese debt bondage and cannabis farming activities, it is likely that other persons directed and controlled the young person's activity.

TO BE EXPLORED IN WORKSHOP

A. What legal issues arose in these proceedings that should have been addressed better in the original proceedings or should be addressed by the appeal? What sources of law are relevant to resolve the case? What child rights were involved in this situation?

B. What practical challenges arise for the justice system in situations of these kind? What actors are/should be Involved in addressing the child's situation? Exchange of perspectives between different professionals and different national systems.

SUPPORTING NOTES FOR MODERATORS TO HELP STIMULATE DISCUSSIONS.

A. Legal Issues Raised in Original Proceedings and/or subsequent Appeal

Different Dimensions of Law Involved:

Criminal Law, Child Protection & Immigration Control/International Protection

Different Legal Issues Involved:

1. Age Assessment: identification of the young person as a child.
2. Procedural issues in justice proceedings when child is involved: appointment of a guardian, legal representation, information for the child
3. Identifying the child as a trafficked child.
4. Identifying that the child's criminal activity was consequent to the trafficking.
5. Availability of redress for the child from the trafficker or the State
6. Identifying whether the child has benefited from the support to which he was entitled as a trafficked child
7. Future protection measures for the child.

Age assessment:

Sources of law: EU Trafficking Directive, UN CRC

Child Rights involved: Right to identity:

- In this case, it is clear that the person's identity is a crucial element, in terms of their age and nationality. The absence of documentation means the person has no means of establishing their identity.
- Every possible and appropriate step should be taken to establish their identity, first through trying to get appropriate documentation from Vietnam or secondly through a proper age assessment exercise, with the child assisted by a guardian during the age assessment process.
- Benefit of the doubt to person where there is reason to believe a child, pending age determination

Procedural Safeguards: appointment of a guardian, legal representation, information for the childm adapted procedures

Sources of law: EU Trafficking Directive, EU Victims Directive, UN CRC

Child rights involved:

- Information in a child friendly way: vital in this complex and sensitive situation, especially where the child may be the only source of certain key information, e.g. journey to the country.
- Guardianship: important for any child deprived of parental care and in conflict with the law. Important for any unaccompanied children from a third country.
- Right to be heard
 - Apart from the steps above, right to legal representation/legal counselling/legal advice.
 - Did the proceedings hear the child directly?
 - Was an interpreter available?

Identifying the child as trafficked:

Sources of law: definition of trafficking in the Trafficking Directive, elements relevant to trafficking of a child, no need for use of coercion etc, UN CRC

Identification of a child as trafficked may be done as part of a separate process under a national referral mechanism by a national body, e.g. UKBA, but ultimately for a court to examine any evidence even in the absence of a referral, particularly in the case of a child

Child rights involved: right to protection from violence:

- A child has a right to protection from violence, with specific measures set out in Article 19 et al of the UN CRC and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- Every effort should be made to identify whether the child is at risk of trafficking, has been trafficked. Evidence of situation in Vietnam, or evidence of Vietnamese criminal activity in the UK, should be reviewed.
- The child also has a right to assistance and care. As an unaccompanied child, the child has a right to special protection and assistance under Article 20 of the UNCRC. General Comment No 6 of the UN CRC provides guidance on how their situation should be addressed.

Practical steps include:

- Appointment of guardian
- Individual needs assessment
- Reception and care, including specialised health and mental health care.
- The principle of non-discrimination can play a significant role in terms of access of a non-national child to health and education services.

Identifying the criminal activity involved as consequent or integral to the trafficking

Source of law: Article 8 of the Trafficking Directive; UN CRC non prosecution, non-punishment

Child Rights: non punishment, prohibition of detention, due process

Availability of redress for the child from the trafficker or the State:

Source of law: EU Trafficking Directive, Victim's Directive, national crime compensation schemes,

Child Rights: access to redress

Identifying whether the child has benefited from the support to which he was entitled as a trafficked child:

Source of law: Trafficking Directive; UN CRC; National child protection law

Child rights: Guardian; needs screening; availability of appropriate care and services, based on a multidisciplinary assessment of his individual needs.

Future protection measures for the child:

Source of law: EU Trafficking Directive durable solutions provision; other legal provisions under humanitarian national law? Other immigration/international protection law/National child protection law

Child Rights: Child protection; Best interests

Elements of the child's situation which should be addressed to promote their best interests:

- Non prosecution, non-punishment
- No deprivation of liberty
- Finding a durable solution for the child, including whether the child should receive a protection status (international protection, trafficking victim status, humanitarian leave to stay on the basis of national law) that allows them stay in the country or whether return to Vietnam or transfer to another country is in the best interests of the child, e.g. if a family member lives in another country and it is in the best interests of the child to reside with them;
- Availability of compensation

Factors to be considered:

- Views of the child
- Is restoring family links possible and in the best interests of the child?
- The safety, security and other conditions, including socio-economic conditions, awaiting the child upon return, including through home study, where appropriate, conducted by social network organizations;
- The availability of care arrangements for that particular child;
- The child's level of integration in the host country and the duration of absence from the home country;
- The child's right "to preserve his or her identity, including nationality, name and family relations" (art. 8);
- The "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (art. 20)
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B. PRACTICAL CHALLENGES

1. Finding the right procedure and decision – making forum for the different legal issues: Identifying possible outcomes and what decision- making forum can deliver them; Cooperation or Links between different procedures

2. What can help in responding to the challenges? New procedures, involvement of different actors, cooperation between different decision making fora,

3. Information Gathering:

Getting a complete picture of the situation of the child

Engaging with the child properly

Differences between adversarial and accusatorial systems/different models in terms of how information is gathered and decisions are taken?

4. Assessing best interests: are the right elements brought together and who takes the decision

ACTORS

Law enforcement

Guardian

Services engaged in caring for the child

Interpreter

Lawyer

Actors who may have a role in gathering information about the child, including organisations involved in restoring family links where this is in the best interests of the child
Actors with expert knowledge of child trafficking
Prosecutor
Immigration officials
Judge – Criminal Court/Child Protection
Other decision making bodies who can make a decision on the current care of the child and the long term solutions
Other professionals such as psychologists
Family members
Support persons

Note to moderator: The aim is to identify key challenges for justice systems to resolving the situation of trafficked children, who often fall between the cracks of different procedures, different laws, a failure to gather sufficient information. This should be a rich and interactive discussion.

The discussion should also lead to identifying the different actors who play a part in the justice proceedings and the role each of them might play in resolving the legal issues that arise. The discussion can identify the authority, role, skills and tools they might have, how they do or might cooperate (see seminar notes). It can be based on an exchange between different professionals and/or between different national experiences on which types of actors are involved and how.