

4. Article 12 in Practice

Having considered what Article 12 together with the other relevant CRC provisions require generally, the manner in which this applies in the context of judicial and administrative proceedings as envisaged under Article 12 (2) specifically will now be explored. This next section explores the right of the child to be heard in specific judicial proceedings – **[trainer may choose ONE of the following areas depending on who the target audience is]**

- 1)** Family law proceedings,
- 2)** Criminal law proceedings where the child is in conflict with the law and
- 3)** Administrative proceedings.

In such circumstances, the person who will hear the views of the child can be

- an adult involved in the matters affecting the child (e.g. a teacher, social worker or caregiver),
- a decision maker in an institution (e.g. a director, administrator or judge), or
- a specialist (e.g. a psychologist or physician).

It is important to note that there was very little international guidance in this area up until 2009 and so countries all over the world sought to implement Article 12 in a manner which they understood to be Article 12 compliant. This has resulted in the evolution of a variety of mechanisms all over the world designed to facilitate children being heard in legal proceedings and administrative proceedings affecting them.

In 2009, the UN Committee on the Rights of the Child developed a General Comment on Article 12 which is essentially a roadmap for countries seeking to implement Article 12 in an effective manner.

Guidance from the Committee on the Rights of the Child (2009)¹:

According to the UN Committee on the Rights of the Child, the following steps are especially relevant to the implementation of Article 12 in judicial and administrative decision-making.

1. Preparation – those responsible for hearing the child must ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child, in particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome. The child must receive information about the option of

¹ Supra n. 3

either communicating directly or through a representative and be made aware of the possible consequences of this choice. The decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard.

2. The Hearing – the context or environment where the child is heard has to be enabling and encouraging, so that the child can be sure that the adult responsible is willing to listen and seriously consider what the child has decided to communicate. Hearing a child in such settings should not be a one-sided examination, according to the Committee on the Rights of the Child, but should have the format of a conversation. In judicial proceedings, a child should not, preferably be heard in open court, but rather in a confidential setting. Every effort should be made to ensure that the environment is comfortable and safe, that the child understands the parameters of the conversation and how his or her views will be taken into account. It should be made clear to the child that his or her views will be listened to, taken into account but they may not be definitive or decisive for the outcome of the case being heard.

3. Assessment of the capacity of the child – the person hearing the child will normally have the responsibility to determine what weight should be attached to the child's views in line with his or her age and maturity. In many cases, the adult hearing the child will be in a position – and indeed best placed – to determine the child's maturity and following on from that to determine what weight should be given to the child's views. In more complex or sensitive cases, it will be necessary to have professional expertise determining this element of Article 12. If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue.

4. Information about the weight given to the views of the child – an important part of concluding the Article 12 process is to ensure that the child receives feedback as to what has happened to his or her views once they have been expressed. According to the Committee on the Rights of the Child, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.

5. Complaints, remedies and redress – if a child’s right to be heard and have their views taken into account is not taken seriously, is ignored or is violated, children should have access to complaints mechanisms or remedies. For instance, children should be able to make a complaint to an independent and impartial body, such as an Ombudsman or a similar person in children’s institutions like schools and residential settings. Children should know who they are and how to access them. Children should have the right to appeal a judicial or administrative decision that does not take their views into account.

a. Family Proceedings

In cases of separation and divorce, the children of the relationship are often affected by decisions of the courts and other bodies. Judges can determine with whom the child should live, with whom and in what form contact should be maintained between the child and his or her parents, and issues of maintenance and inheritance can be decided. Sometimes these decisions are made in family court or they might be facilitated through a process of mediation. Many jurisdictions have included in their laws a requirement that the judge have regard to the best interests of the child in such decisions and many countries also require that children’s views are taken into account in this process. The Committee on the Rights of the Child has recommended that family law legislation should include the right of the child to be heard by decision makers in court-based and mediation processes. Although some jurisdictions prefer to state an age at which the child is regarded as capable of expressing her or his own views in this context, the Convention anticipates that this matter be determined on a case-by-case basis, requiring an individual assessment of the capacity of the child.

Methods of Direct Participation

In the case of direct participation in legal proceedings, the Committee has interpreted Article 12 to mean that in each case, once a child is deemed capable of forming views, they should have the option of being heard directly by the judge. There are two main ways in which the child may express his or her views directly to a judge: (a) in open court or (b) in a private discussion in chambers. It is worth noting that hearing the child in open court has been strongly discouraged by the Committee who has emphasised confidentiality issues in such cases.² Children may also write a letter to the judge which is also a form of direct participation.

Indirect Methods of Including the Voice of the Child

² UN Committee, 2009, para. 43

The reference under Article 12(2) to the right of the child to be heard indirectly in judicial and administrative proceedings implies the use of alternative mechanisms for the representation of the views of the child in family law proceedings. Alternative mechanisms of a similar nature have been adopted in some jurisdictions to facilitate the indirect participation of children in family law proceedings. These include the use of court/expert/social reports, the *guardian ad litem* service and separate legal representatives.

As noted earlier, the decision as to how the child's views are heard by the court or other body is for the child to make. Research indicates that children want to speak directly to decision-makers rather than have their views presented to decision-makers like judges by a third party. However, this may not always be possible- such as where presence in the courtroom might be harmful to the child. However, every effort should be made to ensure that children who want to be heard directly find that means. In some cases, it will be appropriate for a child to be heard in the courtroom. However, the child might also prefer to write a letter to the judge or to speak informally to him or her in an informal setting or venue.

Article 12 is also relevant to a decision to remove a child from his or her parents when the child is a victim of abuse or neglect within his or her home. In such cases, the view of the child must also be taken into account in order to determine the best interests of the child and to ensure that the process benefits from the child's experience. Frequently in such cases, a social worker or a Guardian ad Litem (a third party) will be appointed to the child to ensure that the judge or decision-maker hears his or her views. This right to be heard also applies to children taken into care so that the child's views are solicited and considered in all part of the process, including in decisions regarding their placement in foster care, in the development of care plans and their review, and as to what decisions are made regarding the child's visits with parents and family.

b. Criminal Proceedings

In penal proceedings, the right of child to express her or his views freely in all matters affecting the child has to be fully respected and implemented throughout every stage of the process of juvenile justice. Criminal or penal matters in a variety of ways can affect children, including where they are accused of having breached criminal law, where they appear as witnesses or where they are affected as victims of crime. They are also affected when their parents and other family members are involved in the criminal justice system and increasing attention is being placed on the children's rights implications of sentencing parents to detention.

For children in conflict with the law, there are important due process guarantees set out in Article 40 of the CRC. In addition, however, Article 12(2) contains a more general right to be heard in such proceedings, which the Committee on the Rights of the Child states applies throughout all stages of the proceedings. In particular, the Convention requires that this right has to be fully observed from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge. It also applies through the stages of adjudication and disposition, as well as implementation of the imposed measures. The child should be given the opportunity to express his or her views concerning any measures to be imposed, and the specific wishes or preferences that the child may have in this regard should be given due weight.

In order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court. The proceedings should be conducted in an atmosphere enabling the child to participate and to express her/himself freely.

The court and other hearings of a child in conflict with the law should be conducted behind closed doors. Exceptions to this rule should be very limited, clearly outlined in national legislation and guided by the best interests of the child. This reflects the requirement in Article 40 of the CRC to protect the child's right to privacy throughout all stages of the proceedings.

Case-law of the European Court of Human Rights is also relevant to this area. In 1999, in the case of *T v. United Kingdom*³, the European Court of Human Rights (the Court) held that the trial of two 11-year-old boys in the English Crown Court violated their right to a fair trial under Article 6. The trial took place over three weeks with high levels of media and public interest and although some measures were taken in view of their young age and to promote their understanding of the proceedings, including shortening of the hearing times and explaining the procedures to the children in advance, nonetheless the Court concluded that the formality and ritual of the Crown Court must, at times, have seemed incomprehensible to such young children. In the circumstances, the Court held that it was insufficient for the purposes of Article 6 that the applicants had skilled lawyers because it was highly unlikely that they would have felt sufficiently uninhibited, in the tense courtroom and in the glare of public scrutiny, to have consulted with them during the trial. Accordingly, it found that neither applicant was able to participate effectively in the criminal proceedings against him and both boys were, as a consequence, denied a fair hearing.

³ *T v. United Kingdom*, Judgment of 16 December 1999, Application No. 24724/94

The Court held that:

... a child charged with an offence (must be) dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings⁴.

This principle of effective participation has particular relevance to children tried in the adult courts, but in the absence of any caveats, it must also be intended to inform in a general way how the courts deal with all children.

In the case of *SC v. United Kingdom*⁵, an 11-year-old boy had been sentenced to 2 ½ years detention as a result of his involvement in an armed robbery. SC complained to the European Court of Human Rights that the UK had violated his right to a fair trial as a result of his young age and low intellectual ability. While the court acknowledged that there was no need for the child to understand absolutely everything in order to effectively participate in his trial, the court still pointed to the need for the defendant to be able to follow what is said by the prosecution witnesses and, if represented to explain to his own lawyers his version of events and point out any statements which he disagrees with and make them aware of any facts which could be used in his defence. According to the Court, the ECHR does not require that a child on trial should understand or indeed be capable of understanding every point of law or evidential detail, not least because given the sophistication of modern legal systems many adults of normal intelligence are unable fully to comprehend all the intricacies and exchanges which take place in the courtroom. However, in this context 'effective participation presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him, including the significance of any penalty which may be imposed' (para 29). Accordingly, the Court said, the young defendant should be able to follow what is said by the prosecution witness, explain to his own lawyers his version of events, point out any statements with which he disagrees, and make them aware of any facts which should be put forward in his defence. While in this case many of the intimidating features of the trial in T and V cases were absent, and efforts were made to help the accused to understand the process, nonetheless the boy was found to have had little comprehension of the role of the jury and 'even more strikingly' did not seem to have grasped the fact that he risked, or had in fact received, a custodial sentence. In the instant case, the court concluded that the accused

⁴ Ibid at para 84.

⁵ *SC v. UK*, judgment of 15 May 2004 (2005) 40 EHRR 10.

was not capable of participating in his own defence and so the applicant's rights under article 6(1) had been violated.

According to the European Court in this case, certain duties flow from the decision to deal with a child by way of criminal proceedings. Where the child risks not being able to participate due to his young age and limited intellectual capacity, 'it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours and adapt its procedure accordingly' (para 35). The wide application of this principle is apparent from the Court's conclusion that it does not follow from a child being fit to plead that he is capable of participating effectively in his/her trial to the extent required by Article 6.

Children as Victims and Witnesses

A child may also be affected by criminal proceedings where they are a victim of a crime or a witness in the proceedings. A child victim or child witness of a crime must be given an opportunity to fully exercise her or his right to freely express her or his view in accordance with United Nations Economic and Social Council resolution 2005/20, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. This means that every effort has to be made to ensure that a child victim or/and witness is consulted on the relevant matters with regard to involvement in the case under scrutiny, and enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process. The right of the child victim and witness is also linked to the right to be informed about issues such as availability of health, psychological and social services, the role of a child victim and/or witness, the ways in which "questioning" is conducted, existing support mechanisms in place for the child when submitting a complaint and participating in investigations and court proceedings, the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal. The European Guidelines on Child-friendly Justice also highlight the importance of avoiding secondary victimisation of children during this process.

c. Administrative proceedings

What constitutes administrative proceedings in practices is loosely defined. For example, proceedings concerning migration and refugee status would be mainly of an administrative nature in the first instance in most jurisdictions. Other types of administrative proceedings would include school disciplinary proceedings for example. For cases concerning questions of refugee status, Article 22 CRC recognises the right of children who are seeking such status (often called asylum seekers) to appropriate protection and assistance in enjoying their rights under relevant international law. As part

of this process, children are entitled as of right to a determination as to refugee status. Furthermore, Article 10 CRC concerns the reunification of family members living in different countries, thus having implications for the right of children to be heard in immigration proceedings.