

# Legal Standards Provided by the Council of Europe and the Case-Law of the European Court of Human Rights

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## ABSTRACT

The European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) play a significant role in protecting and promoting children's rights in Europe. Despite the limited explicit references to children's rights in the ECHR, the ECtHR has developed a substantial body of case law dealing with children's rights, frequently referencing the UN Convention on the Rights of the Child (CRC). The dynamic character of the ECHR and its interpretative approaches have contributed to its growing impact on the development of children's rights in Europe, especially when consistent with other international and European instruments. The Council of Europe (CoE) has made protecting children's rights and promoting child-friendly justice a priority, aligning with the principles of the CRC and addressing this issue in its conventions, action plans, guidelines, and handbooks.

## KEYWORDS

Council of Europe, ECHR, ECtHR, best interest of the child, right to be heard, right to participation in proceedings

## 1. The Aim of CoE and ECtHR

Besides our main source of law, the Convention on the Rights of the Child (hereinafter CRC)<sup>1</sup>, children's rights are protected by other international instruments, including general human rights treaties such as the European Convention of Human Rights (hereinafter ECHR) and its case law, as well as specialised instruments that deal with precise aspects of children's rights like adoption, child-friendly justice, and juvenile detention, which have been developed by the Council of Europe (hereinafter CoE).

The CoE was formed after the Second World War, bringing together the European states to uphold human rights, democracy, and the rule of law in Europe. Today, the

1 United Nations, 1989.

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CoE is composed of 47 Member States, including all EU Member States. In 1950, the CoE adopted the ECHR.<sup>2</sup>

The CoE has had, since its establishment, a clear mandate to protect and promote human rights. Its primary human rights treaty, ratified by all CoE Member States, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the ECHR and its additional protocols, contain specific references to children. The ECHR was the first instrument to crystallise and give binding effect to the rights set out in the Universal Declaration of Human Rights. The ECHR applies equally to adults and children.<sup>3</sup> It means that all the other general provisions, civil rights, and freedoms laid down in the ECHR are applicable to everyone, including children, without explicitly mentioning children's rights. It lays down absolute rights, which the States can never breach, such as the right to life or the prohibition of torture. Furthermore, it protects certain rights and freedoms that can be restricted by law only when necessary in a democratic society, for example, the right to liberty and security or the right to respect for private and family life. Some of them have been shown to have particular relevance to children.

Article 19 of the ECHR established the European Court of Human Rights (hereinafter ECtHR) as a judicial mechanism to ensure that states observe their obligations under the ECHR.<sup>4</sup> The ECtHR examines complaints from individuals, groups of individuals, or legal persons alleging violations of the ECHR. It can also examine interstate cases brought by one or more CoE Member States against another Member State. Furthermore, since the entry into force of Protocol 16 to the ECHR on 1 August 2018, the highest courts and tribunals of a State Party may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto.<sup>5</sup> By using interpretative approaches that focus on the positive obligations inherent in the ECHR provisions, the ECtHR has developed a large body of case law dealing with children's rights, including frequent references to the CRC. The ECtHR analyses applications on a case-by-case basis and, therefore, does not offer a comprehensive overview of children's rights under the ECHR.<sup>6</sup>

As all EU Member States and CoE Member States are parties to the UN CRC,<sup>7</sup> the guiding principles of the CRC, such as the principle of the best interests of the child, the prohibition of discrimination, the right to survival, and the right of the child to be heard, have been incorporated into EU and CoE legal instruments.<sup>8</sup>

2 Council of Europe, 1995.

3 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 16–17.

4 See the details of its process: Tóth, 2022, pp. 181–183.

5 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 16–17; Liefwaard, 2016, p. 914.

6 Ibid., pp. 24–25.

7 United Nations, 1989.

8 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 18.

Over the last decade, the ECHR has had a growing impact on the development of children's rights in Europe. One reason for this development is that the ECHR is the international instrument in the field of human rights that has the most effective mechanism for enforcing the rights of a Court which is open to individual applications and which delivers legally binding decisions.<sup>9</sup> When interpreting the rights of the ECHR, the ECtHR takes more and more account of other international and European instruments in the field of the guarantee in question. This includes the CRC when it is consistent with the reasoning of the Court.<sup>10</sup> The ECHR has been interpreted by the ECtHR to apply to children even though it contains few specific references to children's rights.<sup>11</sup> The absence of explicit children's rights provision limits the extent to which the ECHR can be interpreted to advance children's rights, although references to the CRC in its case law have enhanced its potential in this area.<sup>12</sup>

Furthermore, the ECtHR has repeatedly stressed that the ECHR is a living instrument which must be interpreted in the light of present-day conditions. Keeping in mind the significant changes in social and family structures over the last decades, the dynamic character of the ECHR is of particular relevance to children's issues.<sup>13</sup>

For the CoE, protecting children's rights and promoting child-friendly justice is a priority. The issue of protection of children was addressed by the Action Plan of the 3<sup>rd</sup> Summit of Heads of State and Government of the Council of Europe in Warsaw in 2005.<sup>14</sup>

The following guidelines are the CoE's direct response to Resolution No. 2 on child-friendly justice adopted at the 28<sup>th</sup> Conference of European Ministers of Justice (Lanzarote, 25-26 October 2007), which requested concrete guidance for the Member States in this field. The Committee of Ministers thus instructed four CoE bodies to *prepare guidelines on child-friendly justice*, proposing solutions to assist Member States in establishing judicial systems in response to the specific needs of children, to ensure children's effective and adequate access to and treatment in justice, in any sphere: civil, administrative, or criminal. With that transversal perspective in mind, the CoE adopted an innovative integrated approach bringing together three of its major inter-governmental committees dealing with civil and administrative law (the European Committee on Legal Cooperation – CDCJ), criminal law (the European Committee on Crime Problems – CDPC), general human rights (the Steering Committee for Human Rights – CDDH), and the European Commission for the Efficiency of Justice (CEPEJ). The guidelines were also drafted in close cooperation with the program “Building a Europe for and with children”, which made child-friendly justice one of the core pillars of the CoE’s “Strategy on Children’s Rights” for 2009-11.

9 See: Kilkelly, 2001, pp. 308–326.

10 An example can be seen in ECtHR, *Söderman v. Sweden*, (GC), 12 November 2013.

11 See: Kilkelly, 1999, pp. 6–12.

12 See: Kilkelly, 2001, pp. 308–326.

13 Council of Europe, 2014, p. 14.

14 Council of Europe, 2011b, p. 37.

The CoE started this work in 2008 with the preparation of four expert reports assessing the challenges and obstacles faced by children in accessing justice at the national level in all sectors of the judicial system. It gives examples such as the cost of proceedings and the lack of legal counsel and recommends other obstacles that shall also be removed.<sup>15</sup> These reports were presented and used as a basis for discussions at high-level Council of Europe conferences held under the auspices of the Swedish chairmanship of the Committee of Ministers, “Building a Europe for and with Children – Towards a strategy for 2009-2011”, (Stockholm, 8-10 September 2008), and Spanish chairmanship of the “The protection of children in European justice systems”, (Toledo, 12-13 March 2009). The findings of the reports and the conclusions of the conferences paved the way for the drafting of the guidelines and provided valuable material for the Group of Specialists on child-friendly justice (CJ-S-CH), which was established to prepare the guidelines in 2009-10. This Group of Specialists was composed of 17 independent specialists selected by the Council of Europe in consultation with the CDCJ, CDPC, and CDDH based on their personal expertise in children’s rights. The group included judges, attorneys, prosecutors, academics, psychologists, police officers, social workers, and representatives of the governments of the Member States and was, therefore, characterised by its multidisciplinary composition. The draft guidelines and their explanatory memorandum were examined and approved by the CDCJ during its 85<sup>th</sup> plenary meeting held from 11 to 14 October 2010, before their transmission to the Committee of Ministers for adoption on 17 November 2010.<sup>16</sup>

At the policy level, the CoE has, since 2006, implemented the program “Building a Europe for and with children”, a transversal plan of action involving national governments, civil society, the EU, and other international organisations and stakeholders. The CoE’s intergovernmental work in the area of the rights of the child is guided by consecutive strategies for the rights of the child. The CoE’s “Strategy for the Rights of the Child” is implemented in synergy with priorities and actions proposed by other CoE strategies and action plans.<sup>17</sup> The first Stockholm Strategy (2009-2011) set out three priority areas: promoting children’s access to justice, eradicating all forms of violence against children, and participation of children and their influence in society. The next one was the Monaco Strategy (2012-2015), which had four objectives: promoting child-friendly services and systems (in the areas of justice, health and social services), eliminating all forms of violence against children (including sexual violence, trafficking, corporal punishment and violence in schools), guaranteeing the rights of children in vulnerable situations (such as those with disabilities, in detention, in alternative care, migrant children and minorities, including Roma children), and promoting child participation.

The previous Strategy for the Rights of the Child (2016-2021) was adopted in Sofia in April 2016, guided by the “Steering Committee for the Rights of the Child (CDENF)”,

15 See: Berro-Lefèvre, 2008, pp. 69–78.

16 Council of Europe, 2011b, pp. 37–39.

17 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 27–28.

established in 2020 as the successor to the Ad Hoc Committee for the Rights of the Child (2016–2019) and guiding the intergovernmental work in this area. It guides the CoE’s work in this field by advising the Committee of Ministers on appropriate action and proposals concerning the overall priorities to be taken in its field of competence and future work. Where appropriate, it undertakes actions for the development and promotion of activities and instruments. That Strategy had five priority areas: equal opportunities for all children, participation of all children, a life free from violence for all children, child-friendly justice for all children, and rights of the child in the digital environment.

The CDENF also oversees the implementation of the CoE Strategy for the Rights of the Child (2022-2027), which was adopted in Rome on 23 February 2022. It ensures that the rights of the child are mainstreamed into all relevant Council of Europe committees and bodies, and supports Member States in mainstreaming children’s rights.<sup>18</sup> The new Strategy has six key priority areas: freedom from violence, equal opportunities and social inclusion, access to and safe use of technologies for all children, child-friendly justice, giving a voice to every child, and children’s rights in crisis and emergency situations.

To strengthen the rights of children in every justice system, CoE published the “Handbook on European law relating to the rights of the child”,<sup>19</sup> providing an overview of the fundamental rights of children in the EU and CoE Member States. The Handbook acknowledges children as holders of all human/fundamental rights, as well as subjects of special regulations given their specific characteristics. It focuses on the areas of law which are of specific importance to children.

Since the first edition was published in 2015, there have been a number of legislative changes as well as important case law relevant to the rights of the child. The ECtHR has delivered several important judgments, notably in the areas of violence against children and detention of migrant children. In the CoE, a large number of conventions and their respective treaty bodies focus on specific aspects of the protection of the rights of the child, including protection from sexual abuse and exploitation, cybercrime, trafficking, gender-based violence, and violation of data protection rights. These conventions contribute to enhancing the protection granted to children under the ECtHR and the European Social Charter, including by the jurisprudence of the ECtHR and the decisions of the European Committee of Social Rights.

In addition, the CoE has adopted a number of treaties that address a range of specific children’s rights issues, including the following: Lanzarote Convention<sup>20</sup>; Convention on the Exercise of Children’s Rights<sup>21</sup>; Convention on the Legal Status of Children Born out of Wedlock<sup>22</sup>; Convention on the Adoption of Children, revised in

18 See: Council of Europe – Children’s rights web page [Online]. Available at: <https://www.coe.int/en/web/children/cdenf> (Accessed: 27 December 2023).

19 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022.

20 Council of Europe, 2007.

21 Council of Europe, 1996a.

22 Council of Europe, 1975.

2008<sup>23</sup>; Convention on Contact concerning Children<sup>24</sup>; Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)<sup>25</sup>; Convention on Cybercrime (Budapest Convention)<sup>26</sup>.

### ***1.1. Guidelines on Child-Friendly Justice***

In 2010, a broad consultation instigated by the CoE and by the Committee of Ministers, children, and youth reported a general mistrust of the system, and pointed out many shortcomings such as intimidating settings, lack of age-appropriate information and explanations, a weak approach to the family, as well as proceedings that are either too long or, on the contrary, too expeditious. The CoE adopted the Guidelines, as previously mentioned, specifically to ensure that justice is always friendly towards children, no matter who they are or what they have done. The Guidelines give the definition of “child-friendly justice”, which refers to justice systems that guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age-appropriate, speedy, diligent, and adapted to and focused on the needs and rights of the child, respecting the rights of the child, including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life, and to integrity and dignity.<sup>27</sup> A child-friendly justice system has to be accessible, understandable, and reliable. It listens to children, takes their views seriously, and makes sure that the interests of those who cannot express themselves (such as babies) are also protected. It adjusts its pace to children; it is neither expeditious nor lengthy, but reasonably speedy. The Guidelines are intended to ensure all this and guarantee that all children have adequate access to and treatment in justice respectfully and responsively. The Guidelines aim to ensure that, in any such proceedings, all rights of children, among which the right to information, representation, participation, and protection, are fully respected with due consideration to the child’s level of maturity and understanding and to the circumstances of the case. However, respecting children’s rights should not jeopardise the rights of other parties involved.<sup>28</sup>

The Guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil, or administrative law.<sup>29</sup>

It is also notable that the ECtHR has increasingly engaged with the Guidelines on child-friendly justice in its case law on various aspects of the justice system, both

23 Council of Europe, 2008a.

24 Council of Europe, 2003.

25 Council of Europe, 2011.

26 Council of Europe, 2001.

27 Council of Europe, 2011b, p. 17.

28 Ibid., pp. 7–8.

29 Ibid., p. 16.

inside and outside the juvenile justice system. As far as juvenile justice is concerned, the Court has referred to the Guidelines as a relevant source of law. It has also directly engaged with the content of the Guidelines. This shows the legal relevance of the document, which was primarily meant to serve as a set of recommendations to the 47 Council of Europe Member States.<sup>30</sup>

## 2. Right of the Child Protected by ECHR

In this chapter, we would like to present an overview of rights and freedoms that impact children's rights. We will focus on Articles in connection with Child-friendly justice: the participation and the rights of the child in civil, criminal, and administrative court proceedings. It analyses the right of the child to freedom of thought, conscience, and religion<sup>31</sup>; to freedom of expression and information<sup>32</sup>; to be heard<sup>33</sup>; and to freedom of assembly and association<sup>34</sup>. In this chapter, we would like to focus on statements made in the Handbook and the Guidelines of CoE in accordance with the rights of children who have been involved in the justice system in some form. First, we will examine civil and administrative procedures, and in another chapter, we will examine the rights of the child in criminal procedures.

### 2.1. The Definition of a Child

In contrast to the CRC, the ECHR does not contain any provisions dealing with the end of childhood at a certain age limit. Member States enjoy a wide margin of appreciation in this matter.<sup>35</sup> Under CoE law, most instruments, and in its jurisprudence, the ECHR has accepted the CRC's definition of a child,<sup>36</sup> endorsing the "below the age of 18 years". Under international law, the CRC establishes in its Article 1 that 'child means every human being below the age of eighteen years'. Examples include Article 1.1 of the European Convention on the Exercise of Children's Rights (ETS No. 160), Article 4 (d) of the CoE Convention on Action against Trafficking in Human Beings,<sup>37</sup> and Article 3 (a) of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).<sup>38</sup> The ECHR does not contain a definition of a child; however, its Article 1 obliges States to secure rights under the convention to "everyone" within their jurisdiction. Article 14 of the ECHR guarantees the enjoyment of the rights set out in the convention "without discrimination on any

30 Liefwaard, 2020, pp. 13–14.

31 Arts. 9 (freedom of religion) and 14 (prohibition of discrimination) of ECHR.

32 Ibid., Art. 10.

33 Ibid., Art. 6.

34 Ibid., Art. 11.

35 Kilkelly, 1999, p. 21 et seq.

36 See, for example: ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009; ECtHR, *Çoşelav v. Turkey*, No. 1413/07, 9 October 2012.

37 Council of Europe, 2005.

38 Council of Europe, 2007.

ground”, including grounds of age.<sup>39</sup> The ECtHR has accepted applications by and on behalf of children irrespective of their age.

The “prohibition of discrimination” is also a well-established principle in international human rights law. Article 2 of the UN CRC is viewed as one of its guiding principles.<sup>40</sup> The rights of children shall be secured without discrimination on any grounds such as sex, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, status of their parent(s), association with a national minority, property, birth, sexual orientation, gender identity, or other status. ‘Specific protection and assistance may need to be granted to more vulnerable children’, such as migrant children, refugee and asylum-seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions.<sup>41</sup>

On the specific question of “race”, the CoE’s “European Commission against Racism and Intolerance (ECRI)”, in its General Policy Recommendation No. 7 on national legislation to combat racism and discrimination, indicates ‘Since all human beings belong to the same species, ECRI rejects theories based on the existence of different “races”’. Some categories of particularly vulnerable children may need special protection in this respect,<sup>42</sup> as we have seen in the case of, e.g. Roma children.

Another important factor of discrimination in the area of children’s rights is age and capacity. For these children, alternative systems of representation need to be developed in order to avoid discrimination.<sup>43</sup> (See the details in the chapter dealing with the right to be heard)

The question of whether an embryo/foetus enjoys the protection of the right to life guaranteed by Article 2 has not been answered by the ECtHR<sup>44</sup> and is certainly one of the questions most disputed among member states. Other unanswered questions concern the end of childhood and the applicability of Article 5 (1) (d) to the detention of minors; Article 6 (1), second sentence, on the exclusion of the press and public from trials when required in the interest of juveniles; or Article 12, which guarantees the right to marry.<sup>45</sup>

In cases of certain specific crimes committed against children or certain aspects of civil or family law, access to court should be granted for a period of time after the child has reached the age of majority, where necessary.<sup>46</sup> The CoE’s “Convention on

39 ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010. See also: European Union Agency for Fundamental Rights (FRA) and ECtHR, 2018, p. 103. The ECtHR has held that in Article 14, ‘age’ is included among ‘other status’.

40 Council of Europe, 2011b, p. 55.

41 Ibid., p. 19.

42 Ibid., p. 56.

43 Ibid.

44 Explicitly leaving the question unanswered ECtHR, 8/7/2004 (GC), *Vo v France*, No. 53924/00, para. 79 et seq; Peukert, 1988, p. 511; p. 515 et seq.

45 Kilkelly, 1999, p. 21 et seq.

46 Council of Europe, 2011b, p. 26.



the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)” could usefully serve as an inspiration in this regard (see later).<sup>47</sup>

## 2.2. *The Best Interest of the Child*

Member States should guarantee the effective implementation of one of the most important principles of CRC, namely the ‘right of children to have their best interests as a primary consideration in all matters involving or affecting them’. While the judicial authorities have the ultimate competence and responsibility for making the final decisions, Member States should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of children in procedures involving them.<sup>48</sup> This chapter does not wish to deal with rules of CRC in detail; however, we have to emphasise that the best interests of the child must always be considered in combination with other children’s rights, for example, the right to be heard, the right to be protected from violence, the right not to be separated from parents, etc. A comprehensive approach must be the rule.<sup>49</sup>

In all proceedings involving children, the “urgency principle” should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law. In family law cases (for example, parentage, custody, parental abduction), courts should exercise exceptional diligence to avoid any risk of adverse consequences on family relations. In two cases against Germany,<sup>50</sup> the time element was discussed by the Court, which found that in cases of parent–child relationships, there is a duty to exercise exceptional diligence since the risk of passage of time may result in a *de facto* determination of the matter and that the relation of a child with one of his/her parents might be curtailed.

In the case of *Paulsen-Medalen and Svensson v. Sweden*, the Court found that Article 6, paragraph 1, of the ECHR had been violated since the authorities had not acted with the required exceptional diligence when handling a dispute on access.<sup>51</sup>

When necessary, judicial authorities should consider the possibility of taking provisional decisions or making preliminary judgments to be monitored for a certain period of time in order to be reviewed later. In accordance with the law, judicial authorities should have the possibility to make decisions that are immediately enforceable in cases where this would be in the best interests of the child.<sup>52</sup>

In many cases, particularly civil cases, the judgment does not necessarily mean that the conflict or problem is settled: family matters could be a good example. In this sensitive area, there should be clear rules on ‘avoiding force, coercion, or violence

47 Ibid., p. 76.

48 Ibid., p. 18.

49 For practical suggestions see: United Nations High Commissioner of Refugees, 2008.

50 ECtHR (Grand Chamber), judgment of 13 July 2000; *Elsholz v. Germany*, No. 25735/94, and judgment of 8 July 2003, *Sommerfeld v. Germany*, No. 31871/96.

51 ECtHR (Chamber), judgment of 19 February 1998, *Paulsen-Medalen and Svensson v. Sweden*, No. 16817/90.

52 Council of Europe, 2010, pp. 28–29.

in the implementation of decisions', for example, visitation arrangements, to avoid further traumatising. Therefore, parents should rather be referred to mediating services or neutral visitation centres to end their disputes instead of having court decisions executed by the police or executor. In cases of enforcement of decisions on family law issues, such as access and custody rights, the Court held on several occasions that what is decisive is the question of whether national authorities have taken all necessary steps to facilitate the execution as can reasonably be demanded in the special circumstances of each case.<sup>53</sup>

We think one of the most important suggestions of the CoE's "Guidelines on Child-Friendly Justice" is that Member States shall consider the establishment of a system of specialised judges and lawyers for children and further develop courts in which both legal and social measures can be taken in favour of children and their families. Furthermore, they shall promote to ensure that all concerned professionals working in contact with children in justice systems receive appropriate support and training, and practical guidance in order to guarantee and implement adequately the rights of children, in particular while assessing children's best interests in all types of procedures involving or affecting them.<sup>54</sup>

Within the theme of best interest, we have to deal with the rules on data protection and the protection of the personal identity of the child. The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law. This generally implies that no information or personal data shall be made available or published which could reveal or indirectly enable the disclosure of the child's identity, including images, detailed descriptions of the child or the child's family, names or addresses, audio and video records, etc., to third persons. Member States should stipulate limited access to all records or documents containing personal and sensitive data of children, in particular in proceedings involving them. If the transfer of personal and sensitive data is necessary while taking into account the best interests of the child, Member States should regulate this transfer in line with relevant data protection legislation.<sup>55</sup>

### *2.2.1. Right to Respect for Private and Family Life*

Article 8 of the ECHR is an important article in the field of children's rights and the ECHR. The Court's case law already embraces many different situations with which children are confronted: e.g. family life in general, adoption, child abduction, decisions on custody, visiting rights, or identity issues. Article 8 of the ECHR names four different spheres of protection: private life, family life, home, and correspondence. Generally, all of them are equally applicable to adults and children. There are many situations that fall within the scope of Article 8 of the ECHR where not only children's

53 Council of Europe, 2011b, p. 91.

54 Council of Europe, 2011b, p. 33–34; See: Liefwaard, 2016, p. 912.

55 Council of Europe, 2011b, p. 22.

rights are affected but also the rights of other family members, so a fair balance must, therefore, be struck between the different positions. Children may often require a greater amount of protection under Article 8 of the ECHR than adults.<sup>56</sup>

Anonymity and protection of personal data in relation to mass media may be necessary for the child, as stipulated by several instruments.<sup>57</sup> In this respect, special mention should be made of the CoE's "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)",<sup>58</sup> which lists the set of commonly accepted standards concerning, in particular, the collection and processing of data and data quality. As in the case of the ECHR, children enjoy all rights under this convention even though it does not explicitly refer to children's rights. Other categories of data could be defined as sensitive by domestic law or treated as such by public authorities, allowing for the better protection of children's privacy.<sup>59</sup>

In the case of *B. and P. v. the United Kingdom*, the Court decided that proceedings concerning the residence of children after divorce or separation are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and other parties and avoid prejudicing the interests of justice.<sup>60</sup>

In the cases of *V. and T. v. the United Kingdom*, where criminal proceedings against two young boys who murdered a toddler, the Court stated,

'It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his/her feelings of intimidation and inhibition.'<sup>61</sup>

The issue of privacy is particularly relevant in some measures intended to tackle the anti-social behaviours of children. More specifically, the implementation of so-called "Anti-Social Behaviour Orders (ASBOs)" in the United Kingdom, including the policy of "naming and shaming", shows that, in such cases, personal data is not always kept away from the general public. Guideline 10 imposes a strict obligation in this respect

56 Council of Europe, 2014, p. 15.

57 Article 11.3 of the Convention on Action against Trafficking in Human Beings (CETS No. 197) deals with privacy and protects personal data while urging states to set up regulatory measures for the press. The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005), paragraph X, 27, states: 'Information related to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or a witness in the justice process.'

58 CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), Strasbourg, 28 January 1981.

59 Council of Europe, 2011b, p. 61.

60 ECtHR *B. and P. v. UK*, Nos. 36337/97 et 35974/97, 24 April 2001.

61 ECtHR (Grand Chamber), judgments of 16 December 1999, *T. v. UK*, No. 24724/94, and *V. v. UK*, No. 24888/94.

on all professionals working with children except where there is a risk of harm to the child.<sup>62</sup>

The right to respect for family life is guaranteed not only to parents but also to other family members, in particular children. The scope of the right to family life was soon extended by the ECtHR's case law from a marriage-based relationship with or without minor children to other de facto "family" ties. Cohabitation is, therefore, not a necessary requirement for Article 8 to apply under the head of "family life" nor for there to be a family tie between the parents and their child. The natural family relationship is not terminated if the child is taken into public care; however, the relationship is terminated by adoption.<sup>63</sup> It is also the child's opinion that should be taken into account concerning its adoption once the child has attained the necessary maturity to give its opinion on the matter.

Interferences with the right to respect for family life protected by Article 8 of the ECHR can be found in all measures that hinder the mutual enjoyment by parent and child of each other's company. Member States enjoy a wide margin of appreciation for decisions on rights of custody and rights of access because the ECtHR considers that national authorities have the benefit of direct contact with all the persons concerned. National authorities must strike a fair balance between the interests of the child and those of the parents. Particular importance should be attached to the best interests of the child, which may override the interests of the parents. In particular, a parent is not entitled under Article 8 to have such measures taken as would harm the child's health and development.<sup>64</sup>

In the case of *Sahin v. Germany*,<sup>65</sup> the mother prohibited all contact between the applicant and his four-year-old daughter. The German regional court decided that granting the father access to his daughter would be harmful to the child because of the serious tensions between the parents. It did so without hearing the child on whether she wanted to continue seeing her father. On the question of hearing the child in court, the ECtHR referred to the expert's explanation before the regional court in Germany. After several meetings with the child, her mother, and the applicant, the expert considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to obliging the direct questioning of the child on her relationship with her father. Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child

62 Council of Europe, 2010, p. 63 and see Article 12 of the CoE Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse.

63 Council of Europe, 2014, pp. 15–16.

64 Ibid., p. 16.

65 ECtHR, *Sahin v. Germany* [GC], No. 30943/96, 8 July 2003, para. 73. On the specific aspect of national courts having to assess the evidence they have obtained, as well as the relevance of the evidence that defendants seek to adduce, see also ECtHR, *Vidal v. Belgium*, No. 12351/86, 22 April 1992.

and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.

*Maslov v. Austria*<sup>66</sup> concerns the deportation of the applicant, who had been convicted of a number of criminal offences as a child. The ECtHR held that, where expulsion measures against a juvenile offender were concerned, the obligation to take the best interests of the child into account included an obligation to facilitate the child's reintegration, in line with Article 40 of the CRC. In the ECtHR's view, reintegration would not be achieved by severing the child's family or social ties through expulsion.<sup>67</sup> The CRC was thus one of the grounds used to find that the expulsion was a disproportionate interference with the applicant's rights under Article 8 of the ECHR (respect for family life).

### **2.3. Right to Participation**

The CoE's "Recommendation on the Participation of Children and Young People Under the Age of 18"<sup>68</sup> refers to their right to be heard in all settings, including in schools, communities, and the family, as well as at national and European levels. It also contains guidelines for Member States when implementing the recommendation, such as protecting children's and young people's right to participate, promoting participation and informing children and young people about it, and creating spaces for participation. The CoE's "Child Participation Assessment Tool"<sup>69</sup> provides specific and measurable indicators to measure progress in implementing this recommendation.

According to the Guidelines, all children have the right to be informed about their rights, to be given appropriate ways to access justice, and to be consulted and heard in proceedings involving or affecting them, which should be respected.<sup>70</sup> The domestic law should facilitate, where appropriate, the possibility of access to court for children who have a sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice. Guideline 35 recommends that Member States remove all obstacles to children's access to court.

From their first involvement with the justice system or other competent authorities (such as the police, immigration, educational, social or health care services) and throughout that process, children and their parents should be promptly and adequately informed of, inter alia: their rights, in particular the specific rights children have with regard to judicial or non-judicial proceedings in which they are or might be involved, and the instruments available to remedy possible violations of their rights, including the opportunity to have recourse to either a judicial or non-judicial

66 ECtHR, *Maslov v. Austria* [GC], No. 1638/03, 23 June 2008.

67 Ibid., para. 83.

68 Council of Europe, 2012.

69 Council of Europe, 2016.

70 Council of Europe, 2011b, p. 17.

proceeding or other interventions. This may include information on the likely duration of proceedings, possible access to appeals, and independent complaints mechanisms; the system and procedures involved, taking into consideration the particular place the child will have and the role he/she may play in it and the different procedural steps; the existing support mechanisms for the child when participating in these procedures; the appropriateness and possible consequences of given in-court or out-of-court proceedings; where applicable, the charges or the follow-up given to their complaint; the time and place of court proceedings and other relevant events, such as hearings, if the child is personally affected; the general progress and outcome of the proceedings or intervention; the availability of protective measures; the existing mechanisms for review of decisions affecting the child; the existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings, or through other processes; the availability of the services (health, psychological, social, interpretation and translation, and other) or organisations which can provide support and the means of accessing such services along with emergency financial support, where applicable; any special arrangements available in order to protect as far as possible their best interests if they are resident in another State.

As a rule, both the children and parents or legal representatives should directly receive the information. The information and advice should be provided to children in a manner adapted to their age and maturity, in a language that they can understand.<sup>71</sup> Provision of the information to the parents should not be an alternative to communicating the information to the child.<sup>72</sup> Children may experience a lack of objective and complete information. Parents may not always share all pertinent information, and what they give may be biased. In this context, the role of children's lawyers, ombudspersons, and legal services for children is very important.<sup>73</sup>

"Children should have the right to their own legal counsel and representation", in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties. In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian *ad litem* or another independent representative to represent the views and interests of the child. Children should have access to free legal aid under the same or more lenient conditions as adults.

It is also important that the "legal fees of the children's lawyer are not charged to their parents", either directly or indirectly. If a lawyer is paid by the parents, in particular in cases with conflicting interests, there is no guarantee that the lawyer will be able to independently defend the child's views.<sup>74</sup>

71 See: Stalford, Cairns and Marshall, 2017, pp. 207–218.

72 Council of Europe, 2011b, pp. 20–21.

73 Ibid., p. 59.

74 Ibid., p. 78.

Lawyers representing children should be “trained in and knowledgeable on children’s rights and related issues”, receive ongoing and in-depth training and be “capable of communicating with children at their level of understanding”. If children are to have access to justice that is genuinely child-friendly, Member States should facilitate access to a lawyer or other institution or entity which, according to national law, is responsible for defending children’s rights and be represented in their own name where there is, or could be, a conflict of interest between the child and the parents or other involved parties. This is the main message of Guideline 37.<sup>75</sup> The European Convention on the Exercise of Children’s Rights<sup>76</sup> states, ‘Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular [...] a separate representative [...] a lawyer.’ Children should be considered as fully-fledged clients with their own rights, and lawyers representing children should bring forward the opinion of the child.<sup>77</sup> It is important to clarify the exact role of the child’s lawyer. The lawyer does not have to bring forward what he/she considers to be in the best interests of the child (as does a guardian or a public defender) but should determine and defend the child’s views and opinions, as in the case of an adult client. However, combining the functions of a lawyer and a guardian *ad litem* in one person should be avoided because of the potential conflict of interests that may arise. The competent authority should, in certain cases, appoint either a guardian *ad litem* or another independent representative to represent the views of the child. This could be done at the request of the child.<sup>78</sup>

The child’s lawyer, guardian *ad litem*, or legal representative should “communicate and explain” the given decision or judgment to the child in a language adapted to the child’s level of understanding and should give the necessary information on possible measures that could be taken, such as appeal or independent complaint mechanisms.<sup>79</sup>

The Lanzarote Convention,<sup>80</sup> Article 9, addresses the participation of children in the development and implementation of state policies, programmes, or other initiatives concerning the fight against sexual exploitation and sexual abuse of children. Article 14 (1) of the same Convention provides that assistance to victims must take due account of the child’s views, needs, and concerns.<sup>81</sup>

#### **2.4. Freedom of Expression and Receiving Information**

The CRC under Article 13 (1) recognises the child’s right to freedom of expression and includes the freedom to seek, receive, and impart information and ideas of all kinds,

<sup>75</sup> Ibid., p. 77.

<sup>76</sup> Council of Europe, 1996a, Article 5.b.

<sup>77</sup> Council of Europe, 2011b, p. 27.

<sup>78</sup> Ibid., p. 78.

<sup>79</sup> Ibid., p. 31.

<sup>80</sup> CoE, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007.

<sup>81</sup> Gál, 2021, pp. 33–34.

regardless of frontiers, orally, in writing, or in print, in the form of art, or through any other medium of the child's choice.<sup>82</sup> Under CoE law, freedom of expression is guaranteed by Article 10 of the ECHR and may be limited only when prescribed by law, in pursuit of one of the legitimate aims listed in Article 10 (2), and when necessary in a democratic society. We have to deal with this Article because we consider the content is an element of the right to effective participation and to fair trial. Moreover, according to the interpretation of CRC, the child has a choice on how to be heard in a court proceeding: orally or in writing, directly by the judge or through an expert. The European Convention on the Exercise of Children's Rights<sup>83</sup> deals with the right of children to express their views freely.

In its case law, the ECtHR has stressed that

'[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man [...] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population.'<sup>84</sup>

A relevant case under Article 10 of the ECHR concerns the right of children placed in care to access information. The case *Gaskin v. the United Kingdom*<sup>85</sup> concerns a person who was placed in care for most of his childhood, during which period the local authority kept confidential records. These included various reports by medical practitioners, school teachers, police and probation officers, social workers, health visitors, foster parents, and residential school staff. When the applicant sought access to those records to proceed for personal injuries against the local authority, he was refused. The confidentiality of such records had been warranted in the public interest for the proper operation of the childcare service, which would be jeopardised if contributors to the records were reluctant to be frank in their reports in the future. The ECtHR accepted that persons who were in state care as children had a vital interest 'in receiving the information necessary to know and to understand their childhood and early development'. While the confidentiality of public records needs to be guaranteed, a system like the British one, which made access to records dependent on the consent of the contributor, could, in principle, be compatible with Article 8 of the ECHR if the interests of the individual seeking access to records were secured when a contributor to the records was unavailable or improperly refused consent. In such a case, an independent authority should ultimately decide whether access should be granted. No such procedure was available to the applicant in the present case, and the

82 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 44.

83 Council of Europe, 1996a.

84 See, for example: ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, 7 December 1976.

85 ECtHR, *Gaskin v. the United Kingdom*, No. 10454/83, 7 July 1989.



Court found a violation of the applicant's rights under Article 8 of the ECHR (right to respect for private and family life). The ECtHR, however, found no violation of Article 10 of the ECHR, reiterating that the right to freedom to receive information prohibits a government from restricting a person from receiving information that others wish or may be willing to impart but does not oblige a state to impart the information in question to the individual.

### **2.5. Right to Be Heard**

This principle has paramount importance in a child-friendly justice system because we can interpret the right to fair trial and effective participation through it. In all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have.<sup>86</sup> The CRC recognises that “children who are capable of forming their own views have the right to express their own views freely in all matters affecting them” as one of its general principles. Article 12 (2) of the CRC furthermore prescribes that children must be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, on the manner in which they wish to be heard, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. The CoE Guidelines on child-friendly justice<sup>87</sup> also emphasise the importance of children's right to be heard in all proceedings involving or affecting them. Whenever children are being heard or are giving evidence in judicial or non-judicial proceedings or other interventions, where appropriate, ‘this should preferably take place on camera’. As a rule, only those directly involved should be present, provided that they do not obstruct children in giving evidence.<sup>88</sup>

The reference made to the term “capable of forming their own views” should not be seen as a limitation but rather a duty on the authorities to fully assess the children's capacity as far as possible. Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has, in fact, this capacity. It is not up to the child to prove this.<sup>89</sup>

We have to emphasise that in this part, we will introduce both civil and criminal cases because the conditions national courts have to take into consideration, whether the child has this capacity or not, are the same in both procedures. In the *S.C. v. United Kingdom* case of ECtHR, dealing with an accused minor with a low level of understanding, the Court found that

‘effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake

86 Council of Europe, 2011b, pp. 29–30.

87 Council of Europe, 2011a.

88 Council of Europe, 2011b, p. 22.

89 Ibid., p. 51.

for him/her, including the significance of any penalty which may be imposed. It means that he/she, if necessary, with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his/her own lawyers his/her version of events, point out any statements with which he/she disagrees and make them aware of any facts which should be put forward in his/her defence.’<sup>90</sup>

In the cases of both *V. and T. against the United Kingdom*, the Court noted that effective participation in the courtroom presupposes that the accused has a broad understanding of the nature of the trial process, including the significance of any penalty which may be imposed. Therefore, juvenile defendants must be, in any case, represented by skilled lawyers experienced in dealing with children.<sup>91</sup> But in another custody case, *Hokkannen v. Finland*, where the father claimed custody of his daughter who had been living with her grandparents for years but the girl did not want to live with him, the Court judged that the 12-year-old girl was ‘sufficiently mature for her views to be taken into account and that access therefore should not be accorded against her wishes’.<sup>92</sup>

In family cases, children should be included in the discussions prior to any decision that affects their present and/or future well-being. All measures to ensure that children are included in the judicial proceedings should be the responsibility of the judge, who should verify that children have been effectively included in the process and are absent only when children themselves have declined to participate or are of such maturity and understanding that their involvement is not possible.<sup>93</sup>

Under CoE law, the ECtHR does not interpret the right to respect for private and family life<sup>94</sup> as always requiring the child to be heard in court.<sup>95</sup> As a general rule, it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts. Domestic courts are not always required to hear a child in court on the issue of access to a parent who does not have custody rights. This issue has to be assessed in light of the specific circumstances of each case, giving due regard to the age and maturity of the child concerned. Moreover, the ECtHR will often ensure, under the procedural limb of Article 8, that the authorities have taken appropriate steps to accompany their decisions with the necessary safeguards.

90 ECtHR (Fourth Section), *S.C. v. UK*, No. 60958/00, 15 June 2004.

91 ECtHR (Grand Chamber), judgment of 16 December 1999, and *T. v. UK*, No. 24724/94, and judgment of 16 December 1999, *V. v. UK*, No. 24888/94.

92 ECtHR (Chamber), judgment of 23 September 1994, *Hokkanen v. Finland*, No. 19823/92.

93 Council of Europe, 2011b, p. 51.

94 Article 8 of the ECHR.

95 See also ECtHR, *N.Ts. v. Georgia*, No. 71776/12, 2 February 2016; ECtHR, *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, No. 23298/12, 11 October 2016; ECtHR, *C v. Croatia*, No. 80117/17, 8 October 2020; ECtHR, *M.N. and Others v. Belgium*, No. 3599/18, 5 March 2020; ECtHR, *Petrov and X v. Russia*, No. 23608/16, 23 October 2018.

The case of *M. and M. v. Croatia*<sup>96</sup> concerns a custody dispute, including allegations of child abuse by the father. The ECtHR was particularly struck by the fact that the child, at the relevant time aged 13 and a half, had still not been heard in custody proceedings, which had thus far lasted over four years, and had, thus, not been given the chance to express her views before the courts about which parent she wanted to live with. It cannot be said that children capable of forming their own views are sufficiently involved in the decision-making process if they are not provided with the opportunity to be heard and, thus, express their views. The circumscribed autonomy of children, which gradually increases with their evolving maturity, is exercised through their right to be consulted and heard. In the specific circumstances of the case, not respecting the first applicant's wishes regarding which parent she wished to live with breached her right to respect for private and family life under Article 8.

The Committee on the Rights of the Child emphasises that it is not enough that legislation should establish children's rights to be heard and have their views given due weight; children must be made aware of their rights. The right to information is a prerequisite for participation.<sup>97</sup>

Access to court can be based on a set age limit or the notion of a certain discernment, maturity, or level of understanding. Both systems have advantages and disadvantages. A clear age limit has the advantage of objectivity for all children and guarantees legal certainty. However, granting children access based on their own individual discernment gives the opportunity for adaptation to every single child, according to their levels of maturity. The capability, maturity, and level of understanding are more representative of the children's real capacities than their age. This system can pose risks due to the wide margin of appreciation left to the judge in question. A third possibility is a combination of both: a set legal age limit with a possibility for a child under this age to challenge this. This may, however, raise the additional problem that the burden of proof of capacity or discernment lies with the child.<sup>98</sup>

However, we have to emphasise that the right to be heard is a right of the children, not their duty. Where children are to be asked or express their wish to give evidence in family proceedings as a witness, due regard should be given to their vulnerable position in that family and to the effect such testimony may have on present and future relationships. All possible efforts should be made to ensure that the child is made aware of the consequences of the testimony and supported in giving evidence by any of the means already referred to.<sup>99</sup>

96 ECtHR, *M. and M. v. Croatia*, No. 10161/13, 3 September 2015.

97 Wopera, 2023, p. 4.

98 Council of Europe, 2011b, p. 75.

99 Guidelines, p. 89; See also: Visontai-Szabó, 2018, pp. 1–2.

Before proceedings begin, children should be familiarised with the layout of the court or other facilities and the roles and identities of the officials involved. When children are heard or interviewed in judicial and non-judicial proceedings and during other interventions, judges and other professionals should interact with them with respect and sensitivity. Interview methods, such as video or audio-recording or pre-trial hearings in camera, should be used and considered as admissible evidence. Regular breaks should be planned, and hearings should not last too long. As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.<sup>100</sup> Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals<sup>101</sup> and, if possible, by one person.

The aim is to avoid intimidation, humiliation, or distress for the child on trial. Elements of this practice direction are, *inter alia*: the possibility for the child to visit the courtroom before the trial to become familiarised with it, the possibility of police support to avoid intimidation or abuse by the press, no wigs or gowns to be worn, the explanation of the procedure in terms the child can understand, restricted attendance of court's hearings, etc.<sup>102</sup>

However, whenever children take the initiative to be heard in a case that affects them, the judge should not, unless it is in the children's best interests, refuse to hear the children and should listen to their views and opinions on matters concerning them in the case.

The European Convention on the Exercise of Children's Rights<sup>103</sup> grants children specific procedural rights in family proceedings before a judicial authority, in particular for proceedings involving the exercise of parental responsibilities, such as residence and access to children. Article 3 of the Convention grants children the right to be informed and to express their views in proceedings as a procedural right, thus "combines the right to be heard with the right to be informed". In judicial proceedings, children should receive all relevant information, be consulted and express their views, and be informed of the possible consequences of compliance with these views and the possible consequences of any decision to use the right to be heard effectively.<sup>104</sup>

In Article 4, the child is granted the right to apply for the appointment of a special representative in proceedings before a judicial authority affecting her/him. In line with Article 6, authorities must ensure that the child has received all relevant information, consult her/him in person, if appropriate, and allow the child to express her/his views.

100 Council of Europe, 2011b, pp. 29–30.

101 See: Herczog, 2023, p. 9.

102 Council of Europe, 2011b, p. 86.

103 Council of Europe, 1996a.

104 Council of Europe, 2011b, p. 79.

However, it should be explained to them that their right to be heard and have their views taken into consideration may not necessarily determine the final decision.<sup>105</sup>

## ***2.6. Children's Rights Within Criminal Justice and Alternative (Non-Judicial) Proceedings***

Children's rights in the context of juvenile justice proceedings concern children accused of, prosecuted for, or sentenced for having committed criminal offences, as well as children who participate in judicial proceedings as victims and/or as witnesses. The position of children in the context of juvenile justice is regulated by general human rights provisions relevant to both adults and children. This chapter presents an overview of the CoE norms relevant to children involved in judicial and alternative proceedings. It addresses fair trial guarantees, including effective participation and access to a lawyer, the rights of detained young offenders, including pre-trial detention (substantive and procedural safeguards), conditions of detention and protection against ill-treatment, and the protection of child witnesses and victims.<sup>106</sup> Protection aspects are especially relevant for non-adversarial, alternative proceedings, which should be used whenever these may best serve the child's best interests.<sup>107</sup> In the case of children, objectives of criminal justice, such as social integration, education, and prevention of re-offending, are basic principles that are valued.<sup>108</sup>

The right to a fair trial is a core pillar of a democratic society. We examined many elements of it above, so now we will focus on the elements connected closely to criminal procedures. Children suspected or accused of a crime have the right to a fair trial, and they benefit from the same guarantees as any other person in conflict with the law. Fair trial guarantees apply from the child's first interrogation and subsist throughout the trial. Children in conflict with the law are, however, particularly vulnerable and need additional protection. For example, during the investigation, police should respect the personal rights and dignity of all children and have regard for their vulnerability, that is, take account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties. Children should be informed in a manner and in language that is appropriate to their age and level of understanding of the reason for which they have been taken into custody.<sup>109</sup> Children should be provided with access to a lawyer and given the opportunity to contact their parents or a person whom they trust. The parent(s) should be informed of the child's presence in the police station, given details of the reason why the child has been taken into custody, and be asked to come to the station.

105 Ibid., p. 28.

106 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 242.

107 Council of Europe, 2010, para. 24.

108 See also: FRA and ECtHR (2016), Handbook on European law relating to access to justice, 22 June 2016.

109 Liefwaard, 2016, p. 919.

Police should ensure that, as far as possible, no child in their custody is detained together with adults.<sup>110</sup>

The ECHR fair trial guarantees are laid down in Article 6, which generates the most extensive case law of the ECtHR. Article 6 para. 1 of the ECHR includes some express fair trial guarantees: the right to a fair public hearing/ pronouncement (unless it is contrary to, among others, the best interests of juveniles), the right to a trial within a reasonable time, the right to a trial by an independent and impartial tribunal,<sup>111</sup> and the right to a trial by a tribunal established by law. Inherent to the concept of a fair trial, the ECtHR has developed guarantees: equality of arms and adversarial proceedings, the right to remain silent, access to a lawyer, effective participation, presence at the hearing, and reasoned decisions.

Everyone must be presumed innocent until proven guilty according to law<sup>112</sup>. In addition, everyone charged with a criminal offence shall have the following minimum rights: the right to be informed promptly about the charges in a language she/he understands<sup>113</sup>, the right to have adequate time and facilities for the preparation of her/his defence<sup>114</sup>, the right to have legal assistance of her/his own choosing (Article 6 (3) (c) of the ECHR), the right to examine or have witnesses examined<sup>115</sup>, and the right to have the free assistance of an interpreter<sup>116</sup>. These guarantees apply to adults and children alike. However, aspects which have generated child-specific case law concern mainly the right to effective participation and the right to access a lawyer. These two specific fair trial guarantees are therefore further elaborated in this chapter.<sup>117</sup>

The CoE's Guidelines on Child-Friendly Justice are directly relevant to children who are suspected or accused. Even though they are not legally binding, the guidelines represent a milestone in ensuring that justice proceedings, including those part of the criminal justice system, take into account the specific needs of children. They build on existing ECtHR case law and other European and international legal standards, such as the UN CRC, and are a useful tool for professionals dealing with children. According to Section I (1), the guidelines apply to children in judicial (criminal or non-criminal) proceedings or in alternatives to such proceedings. The following sections are of specific importance for children in criminal proceedings: the right to have the information on criminal charges explained to both the child and the parents in a way that they understand the exact charge (Section IV.A.1.5), the right to be questioned only in the presence of the lawyer/parents or a person of trust (Section C (30)), the

110 Council of Europe, pp. 25–26.

111 ECtHR, *Nortier v. the Netherlands*, No. 13924/88, 24 August 1993; ECtHR, *Adamkiewicz v. Poland*, No. 54729/00, 2 March 2010.

112 Art. 6 para. 2 of the ECHR.

113 *Ibid.*, Art. 6 para. 3 point a).

114 *Ibid.*, point b).

115 *Ibid.*, point d).

116 *Ibid.*, point e).

117 See also: Council of Europe, 2007, Chapter VII.

right to speedy proceedings (Section D (4)), and the right to child-sensitive interviews or hearings (Section D (5)).

The ECtHR has elaborated under Article 6 of the ECHR specific requirements for ensuring children’s effective participation in criminal trials, and it is also at the core of the CoE’s Guidelines. Justice for children, including juvenile justice, should be

‘accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the right to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.’<sup>118</sup>

As a general rule, ‘proceedings should ensure that the child’s age, level of maturity and emotional capacities are taken into account’.<sup>119</sup> Concrete examples of “effective participation” requirements include the child’s presence during the hearings, holding of in-camera hearings, limiting trial publicity, ensuring that the child understands what is at stake, and limiting the formality of court sessions. One of the most important Guidelines is that ‘the minimum age of criminal responsibility should not be too low’ and should be determined by law.<sup>120</sup> So far, the ECtHR has not held that setting the age of criminal responsibility too low constitutes, in itself, a violation of Article 6 of the ECHR. When assessing whether a child was able to participate effectively in national proceedings, the ECtHR looks at the concrete circumstances of each case.

The recognition of the “right to effective participation” is the next principle. Children should also be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children’s rights as described in these Guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings.<sup>121</sup> The Guidelines provide specific guidance on how children should be treated during juvenile justice or other justice proceedings. Children should have access to court and judicial proceedings, and their rights to legal counsel and representation and to be heard and express their views should be safeguarded. Undue delay should be avoided, proceedings should be organised in a child-friendly way (which affects the environment and language), and special safeguards should be in place to take and respond to evidence/statements provided by children.<sup>122</sup>

118 Council of Europe, 2010, para. II. C.

119 ECtHR, *T. v. the UK* [GC], No. 24724/94, 16 December 1999; see also: Liefwaard, 2016, pp. 909–910.

120 Council of Europe, 2011b, p. 25.

121 Ibid.

122 Ibid., Section D.

The Lanzarote Convention also stipulates that the effective participation of children in proceedings must be ‘treated as priority and carried out without any unjustified delay’. It also provides rules for interviews with the child, which must be carried out without unjustified delays by professionals trained for this purpose and in premises designed for this purpose.

The case of *T. v. the United Kingdom*<sup>123</sup> concerns the murder of a two-year-old by two ten-year-olds. They were committed to a public trial under significant media attention. The court procedure was partly modified in that shorter sessions were held, the applicant’s parents were placed close to him, a play area was available during breaks, etc. Nevertheless, the applicant and his co-accused were tried in an adult court, and most of the rigours of a criminal trial were preserved. The ECtHR held that the applicant had not been able to participate effectively in the proceedings due to the public nature of the sessions, combined with the high level of media attention, and his limited capacity to instruct his lawyers and provide adequate testimonies. His rights under Article 6 of the ECHR were, therefore, violated.

The ECtHR considers “access to a lawyer” to be one of the fundamental elements of the right to a fair trial. Individuals charged with a criminal offence have the right to access a lawyer from the early stages of a police investigation. That right may be limited in exceptional circumstances, provided that the limitation does not unduly prejudice the rights of the accused. The ECtHR’s scrutiny of whether an applicant had effective access to a lawyer is stricter in cases involving children.<sup>124</sup>

The case of *Panovits v. Cyprus*<sup>125</sup> concerns a 17-year-old who was charged with murder and robbery. He was brought to the police station, accompanied by his father. He was then arrested and taken to a separate room for questioning in the absence of the father or a lawyer. While the applicant was being questioned, his father was informed of the applicant’s right to contact a lawyer. Several minutes later, the father was told that his son had meanwhile confessed to having committed the crime. The ECtHR found that, because of his age, the applicant could not have been considered to be aware of his right to legal representation before making any statement. It was also unlikely that he could have reasonably appreciated the consequences of his being questioned without the assistance of a lawyer in criminal proceedings concerning a murder. Even though the authorities appeared to have at all times been willing to allow the applicant to be assisted by a lawyer if he so requested, they had failed to make him aware of his right to request the assignment of a lawyer free of charge if necessary. There was no evidence that the applicant or his father expressly and unequivocally waived their right to legal assistance. Consequently, the Court found a violation of Article 6 para. 3 point c) in conjunction with Article 6 para. 1 of the ECHR.

123 ECtHR, *T. v. the UK* [GC], No. 24724/94, 16 December 1999.

124 ECtHR, *Salduz v. Turkey* [GC], No. 36391/02, 27 November 2008; ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], Nos. 50541/08 et al., 13 September 2016; ECtHR, *Beuze v. Belgium*, No. 71409/10, 9 November 2018.

125 ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008.



### 2.6.1. *Rights of Young Offenders in Relation to Detention*

Every person has the right to liberty. Deprivation of liberty, therefore, constitutes an exception and includes any form of placement in an institution by decision of a judicial or administrative authority, from which the juvenile is not permitted to leave at will.<sup>126</sup> Given the importance of safeguarding the rights of the child, including their best interests, situations of liberty deprivation should be considered from that particular angle when concerning children.<sup>127</sup>

International instruments universally affirm that detention must be a measure of last resort, used for the shortest time possible and restricted to serious cases.<sup>128</sup> This means that state authorities faced with the question of placing a child in detention should first give adequate consideration to alternatives to protect the best interests of the child, as well as to further the reintegration of the child<sup>129</sup>. Alternatives can include, for example, ‘care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes’<sup>130</sup>. Only where alternatives are not feasible should detention be considered. Moreover, detention should only be ordered for the shortest period of time and under appropriate substantive and procedural guarantees. Because of their age and vulnerability, children benefit from special rights and guarantees when placed in detention.<sup>131</sup>

126 Council of Europe, 2008b, Rule 21.5.

127 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 252.

128 Recommendation of the Committee of Ministers, CM/Rec(2008) 11, para. 59.1.

129 Art. 40 para. 1 of the CRC.

130 Ibid., para. 4.

131 Ibid. p. 252

Article 5 of the ECHR<sup>132</sup> provides that everyone has the right to liberty. Detention is an exception which should be provided for by national law and should not be arbitrary. In addition, detention has to be justified under one of the six exhaustive situations listed under Article 5 para. 1 points a) to f). Detention of children in contact with the criminal justice system can be justified under paragraphs

- a. detention after conviction by a competent court;
- c. pre-trial detention; or
- d. detention for the purpose of educational supervision, in particular.

The latter two shall be analysed, as they have given rise to specific duties for state authorities.

“Pre-trial detention” refers to situations where individuals are taken into police custody on suspicion of having committed a criminal offence or are held in remand. It starts when an individual is taken into custody and ends with the determination on the merits of the case by a court of first instance.<sup>133</sup> While children benefit from the same guarantees as adults, the ECtHR has laid down several additional principles to strengthen the position of children in domestic criminal proceedings. International children’s rights bodies are very critical of applying pre-trial detention and are

132 Art. 5 Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his/her committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his/her lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his/her effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his/her arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his/her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and his/her release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

133 ECtHR, *Idalov v. Russia*, No. 5826/03, 22 May 2012.

seeking to reduce it.<sup>134</sup> The ECtHR has generally interpreted Article 5 para. 1 point c) and Article 5 para. 3 as requiring that a person be placed in pre-trial detention only if there is a reasonable suspicion of him/her having committed a criminal offence. Further, pre-trial detention should not exceed a reasonable time and should be reviewed at reasonable intervals. The longer the period of detention, the stronger the reasons put forward by the authorities to justify it need to be. According to ECtHR case law, a person charged with an offence must always be released pending trial unless the state can show that there are “relevant and sufficient” reasons to justify the continued detention.<sup>135</sup> In addition, the continuation of pre-trial detention should be strictly necessary, and the state must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying a continued deprivation of liberty.<sup>136</sup>

In cases involving children, the ECtHR mandates that state authorities should pay particular attention to the child’s age when balancing the relevant arguments for and against pre-trial detention; it should be used as a measure of last resort and for the shortest possible period.<sup>137</sup> This implies that the authorities should consider alternatives to pre-trial detention.<sup>138</sup> Furthermore, state authorities should display special diligence in bringing children to trial within a reasonable time.<sup>139</sup>

In *Nart v. Turkey*,<sup>140</sup> the 17-year-old applicant was arrested on suspicion of having robbed a grocery shop. He was placed in pre-trial detention in an adult prison for 48 days. With particular reference to the fact that the applicant was a child, the ECtHR stated that ‘pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults’. In this particular case, the authorities attempted to justify the pre-trial detention on the basis of the “state of evidence”, but the ECtHR found that this reason alone could not justify the length of the applicant’s detention. Consequently, the ECtHR found a violation of Article 5 para. 3 of the ECHR. The reasoning was the same in *Selçuk v. Turkey*,<sup>141</sup> in which the applicant

134 See, for example, the Concluding Observations for Belgium: ‘The Committee recommends that the state party: [...] (c) [...] ensure, in accordance with Article 37 of the Convention, that the deprivation of liberty is only used as a measure of last resort, for the shortest possible time, that guarantees of due process are fully respected and that persons under 18 are not detained with adults.’ (CRC/C/15/Add. 178, para. 32, c, 13 June 2002).

135 ECtHR, *Smirnova v. Russia*, Nos. 46133/99 and 48183/99, 24 July 2003.

136 Ibid., paras. 58–59; ECtHR, *Ladent v. Poland*, No. 11036/03, 18 March 2008.

137 ECtHR, *Korneykova v. Ukraine*, No. 39884/05, 19 January 2012; see also: ECtHR, *Selçuk v. Turkey*, No. 21768/02, 10 January 2006; ECtHR, *J.M. v. Denmark*, No. 34421/09, 13 November 2012; *Koştı and Others v. Turkey*, No. 74321/01, 3 May 2007; ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

138 ECtHR, *Dinç and Çakır v. Turkey*, No. 66066/09, 9 July 2013; ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

139 ECtHR, *Kuptsov and Kuptsova v. Russia*, No. 6110/03, 3 March 2011; see also: European Committee of Social Rights, 2020.

140 ECtHR, *Nart v. Turkey*, No. 20817/04, 6 May 2008.

141 ECtHR, *Selçuk v. Turkey*, No. 21768/02, 10 January 2006.

had spent some four months in pre-trial detention when he was 16 years old, and in *Güveç v. Turkey*,<sup>142</sup> where the applicant was detained from the age of 15 and was kept in pre-trial detention for a period over four and a half years. The ECtHR reiterated its comments on excessive periods of detention, and found violations of Article 5 para 3 of the Convention.

This form of detention has been ordered in situations where the child has a particular need for “educational supervision” because of a disturbed personality and violent behaviour. Article 5 para. 1 point d) of the ECHR primarily targets forms of detention outside the scope of the juvenile justice system.<sup>143</sup>

In *Blokhin v. Russia*,<sup>144</sup> a 12-year-old suffering from attention-deficit hyperactivity disorder was arrested and taken to a police station on suspicion of extorting money from another child. Since he could not be prosecuted under domestic law, a court ordered his placement in a temporary detention centre for juvenile offenders for 30 days to ‘correct his behaviour’ and prevent his committing further acts of delinquency. Recalling that detention for educational supervision must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements, the ECtHR noted that none of the domestic courts had stated that the applicant’s placement in the correction facility was for educational purposes. Nor did it see how any meaningful educational supervision to change a child’s behaviour and offer appropriate treatment and rehabilitation could be provided during a maximum period of 30 days. A violation of Article 5 was found.

The case of *Bouamar v. Belgium*<sup>145</sup> concerns the placement of a child in a remand adult prison on nine occasions for periods of around 15 days. The applicant was an adolescent considered to have a disturbed personality and violent behaviour. The Belgian Government submitted that he had been placed in the remand prison for the purpose of educational supervision. The ECtHR noted that interim placements in a remand prison are not, in themselves, contrary to Article 5 (1) (d), as long as the authorities pursue the purpose of placing the juvenile under educational supervision. However, the ECtHR found that in the applicant’s case, the authorities failed to show they had the intention or possibility to place him in an institution where he could benefit from educational supervision. Consequently, the ECtHR found a violation of Article 5 para. 1 point d) of the ECHR. Furthermore, unjustified lapses of time were hardly considered to be compatible with the speed required by the terms of Article 5 para. 4 of the ECHR.

*D.G. v. Ireland*<sup>146</sup> concerns the placement of a child in a detention centre without charge or conviction. The applicant had a serious personality disorder. The ECtHR held that, in the context of the detention of children, the notion of educational supervision should not be equated strictly with notions of classroom teaching. Educational

142 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

143 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 254–255.

144 ECtHR, *Blokhin v. Russia*, No. 47152/06, 23 March 2016.

145 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

146 ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002.

supervision entails many aspects of the exercise of parental rights by the local authority for the benefit and protection of the child. The ECtHR also held that it is permissible for domestic authorities to place juveniles in detention facilities on a temporary basis until suitable accommodation is found, as long as this happens speedily. In the applicant's case, the speediness requirement was not met as he was only placed in a suitable accommodation more than six months after his release from detention. The ECtHR, therefore, concluded that the applicant's detention was not compatible with Article 5 para. 1 point d) of the ECHR.

In addition to the guarantees mentioned above, state authorities must ensure that children have the “right to challenge the lawfulness of the detention” at reasonable intervals and that they have access to a lawyer during the proceedings determining the lawfulness of their detention. Furthermore, these legal challenges “need to be decided speedily” by domestic courts. The ECtHR derives these procedural guarantees from the text of Article 5 para. 4 of the ECHR. In *Bouamar v. Belgium*,<sup>147</sup> mentioned before, the ECtHR found a violation of Article 5 para. 4 because the hearings for the determination of the applicant's detention took place in the absence of his lawyers, they were not decided speedily, there was no actual decision on the “lawfulness of the detention”, since the domestic courts dismissed the applicant's appeals as devoid of purpose.

In relation to the conditions of detention, the ECtHR found that ‘detaining children together with adults might lead to a breach of Article 3’<sup>148</sup> or Article 5 of the ECHR. The ECSR has consistently interpreted Article 17 of the ESC to the effect that if children are detained or imprisoned, they should be separated from adults.<sup>149</sup> The CoE's “European Rules for Juvenile Offenders” also provide that juveniles should not be held in institutions for adults but in institutions specially designed for them.<sup>150</sup>

Further, the lack of adequate medical care in detention could also raise issues under Article 3. Other aspects which may potentially raise issues under Article 3 include available cell space, lighting, and recreational activities. In assessing the compatibility of conditions of detention with the standards of Article 3 of the ECHR, the ECtHR often relies on the set of standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which monitors prison conditions under the umbrella of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>151</sup> by conducting site visits to CoE member States.

147 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.

148 Prohibition of torture – No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

149 European Committee of Social Rights, 2020, Art. 17 para. 1.

150 Council of Europe, 2008b, Rule 59.1.

151 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126) Strasbourg 26/11/1987.

In *Güveç v. Turkey*,<sup>152</sup> a 15-year-old boy was arrested on suspicion of membership of the Kurdistan Working Party (PKK). He was detained by the State Security Court in a prison for adults for five years. The ECtHR observed that his detention contravened Turkish regulations and obligations under international treaties, including, among others, Article 37 point c) of the CRC, which requires that children are kept separate from adults. The Court also noted that the applicant began to have psychological problems in prison, as a result of which he repeatedly attempted to commit suicide. In addition, the authorities failed to provide the applicant with adequate medical care. Consequently, given the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and their failure to take steps to prevent his repeated attempts to commit suicide, the ECtHR had no doubt that the applicant was subjected to inhuman and degrading treatment. There had accordingly been a violation of Article 3 of the ECHR.

Given the vulnerability of children deprived of liberty, the Guidelines emphasise the importance of family ties and promoting reintegration into society. Furthermore, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments. In addition to other rights, children, in particular, should have the right to: maintain regular and meaningful contact with parents, family, and friends through visits and correspondence, except when restrictions are required in the interests of justice and the interests of the child. Restrictions on this right should never be used as a punishment; receive appropriate education, vocational guidance and training, and medical care, and enjoy freedom of thought, conscience, and religion, and access to leisure, including physical education and sport; access programmes that prepare children in advance for their return to their communities, with full attention given to them with respect to their emotional and physical needs, their family relationships, housing, schooling, and employment possibilities, and socio-economic status.<sup>153</sup>

The ECtHR has repeatedly held that domestic authorities are responsible for protecting persons in detention from death, abuse, or ill-treatment caused by other inmates or the authorities themselves. States' obligations in this respect are particularly strong since detainees are under the authority and control of the state.<sup>154</sup> In addition to taking reasonable measures to protect inmates, state authorities must also conduct effective investigations into arguable allegations of ill-treatment or death.

The case of *Çoşelav v. Turkey*<sup>155</sup> concerns the suicide of a 16-year-old in prison who had previously unsuccessfully attempted to commit suicide on several occasions. Following those attempts, the authorities transferred him from a wing for juveniles to a detention facility for adults. Having first established that the authorities knew

152 ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

153 Council of Europe, 2010, p. 24.

154 ECtHR, *Anguelova v. Bulgaria*, No. 38361/97, 13 June 2002; ECtHR, *H.Y. and Hü.Y. v. Turkey*, No. 40262/98, 6 October 2005.

155 ECtHR, *Çoşelav v. Turkey*, No. 1413/07, 9 October 2012.

or ought to have known of the existence of a real and immediate risk to the life of the applicants' son, the Court then noted that the authorities failed to take reasonable measures to prevent the risk of suicide. The ECtHR placed a strong emphasis on the age of the deceased and the fact that he had been detained together with adults. Consequently, the ECtHR found a violation of the substantive aspect of Article 2 of the ECHR (right to life). In addition, the Court also found a violation of the procedural limb of Article 2 due to the authorities' failure to conduct an effective investigation into the death of the applicants' son. The reasons supporting these findings include the failure of the authorities to promptly inform the applicants of their son's death, the failure of the prosecution to examine the alleged failures in preventing the suicide, and the excessive length of the ensuing administrative proceeding.

In general, a preventive and reintegrating approach should be promoted and implemented in matters of juvenile justice. The criminal law system should not automatically be set in motion by minor offences committed by children when more constructive and educational measures can be more successful. Moreover, Member States should react to offences in proportion not only to the circumstances and gravity of an offence but also to age, lesser culpability, and needs of the child and the needs of society.<sup>156</sup>

#### 2.6.2. *Protection of Child Victims and Witnesses*

The ECtHR ruled that it is the duty of the state to protect victims' interests, including victims who participate as witnesses in criminal proceedings. Their interests under ECHR provisions, such as Article 2 and Article 8, must be balanced against the interests of the defence.<sup>157</sup> The CoE's Guidelines on Child-Friendly Justice also pay attention to the protection of the child victim and witness, particularly when they give evidence in judicial proceedings. The Guidelines call upon Member States to make '[e]very effort [...] for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have'.<sup>158</sup> To this end, trained professionals should be involved, and, for example, audiovisual statements encouraged, while respecting the right of other parties to contest the content of such statements. When more than one interview is necessary, they should preferably be carried out by the same person to ensure coherence of approach in the best interests of the child. Children should also have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator. The guidelines also recognise that this child-friendly approach should respect the right of other parties to contest the content of the child's statements. In addition, the guidelines provide that the privacy and family life of child witnesses should be protected (Section IV (a) (9)), and proceedings should preferably be held in camera. Most importantly, a child's statements and

156 Council of Europe, 2011b, p. 70.

157 ECtHR, *Doorson v. the Netherlands*, No. 20524/92, 26 March 1996.

158 Council of Europe, 2010, para. 64.

evidence should never be presumed invalid or untrustworthy by reason only of the child's age.<sup>159</sup>

In the case of *W.S. v. Poland*,<sup>160</sup> the Court suggested possible ways to test the reliability of a young child victim and pointed out that this could be done in a less invasive manner than via direct questioning. Several sophisticated methods might be applied, such as having the child interviewed in the presence of a psychologist with questions being put in writing by the defence or in a studio, enabling the applicant or his lawyer to be present at such an interview via video-link or one-way mirror.

In *Kovač v. Croatia*,<sup>161</sup> a 12-year-old girl testified before an investigating judge that the applicant had committed indecent acts on her. The applicant had not been present or represented during the said testimony, nor was he given the opportunity to contest the victim's statement. The ECtHR reiterated that, as a rule, all evidence must be provided in the presence of the accused at a public hearing with a view to adversarial arguments. If statements at the stage of the police inquiry or the judicial investigation are used as evidence, this is not, in itself, inconsistent with Article 6 of the ECHR, provided that the defendant is given an adequate and proper opportunity to challenge and question the witness concerned, either at the time of making the statements or at a later stage of the proceedings. In the applicant's case, the victim's statements were the only direct evidence of the facts held against the applicant, and this evidence was decisive in the court's decision to issue a guilty verdict. However, the applicant had been unable to contest or obtain a reply from the domestic courts concerning his complaint in that respect. Furthermore, the victim's actual statement had never been read out before the trial court. Instead, the judge merely noted that the victim upheld her statement made before the investigating judge. Therefore, the ECtHR concluded that the applicant had not been afforded a fair trial, a breach of Article 6 (1) in conjunction with Article 6 (3) (d) of the ECHR.

The ECtHR has several rulings concerning sexual offences in which children testified against the alleged perpetrators. Concerning children as victims, the Guidelines of CoE are inspired by the principles of the "United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime",<sup>162</sup> and the CoE's "Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse",<sup>163</sup> which calls for providing for the safety of children, their families, and witnesses on their behalf from intimidation, retaliation, and repeated victimisation. The Court recognised that criminal proceedings concerning sexual offences 'are often conceived of as an ordeal by the victim, in particular when the latter was unwillingly confronted with the defendant' and that this was even more prominent when children were concerned.<sup>164</sup> Consequently, the Court accepted that in such cases certain measures

159 Council of Europe, 2011b, p. 31.

160 ECtHR (Fourth Section), *W.S. v. Poland*, No. 21508/02, 19 June 2007.

161 ECtHR, *Kovač v. Croatia*, No. 503/05, 12 July 2007.

162 United Nations, 2005.

163 Council of Europe, 2007.

164 ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.



may be taken for the purpose of protecting the child victims. The Guidelines also emphasise that special precautionary measures should apply to children when the alleged perpetrator is a parent, a member of the family, or a primary caregiver.<sup>165</sup> However, it also noted that such measures may not jeopardise the adequate and effective exercise of the rights of the defence, and the judicial authorities may, therefore, be required to take measures which counterbalance the handicaps under which the defence operates.<sup>166</sup>

In *S.N. v. Sweden*,<sup>167</sup> a 10-year-old boy testified to the police that he was sexually abused by the applicant. The boy was interviewed twice by a police inspector with significant experience in child abuse cases. The first interview was videotaped, and the second was audiotaped. The lawyer of the applicant did not attend the second interview but agreed with the police inspector on the issues that needed to be discussed. During the trial, the District Court played the recordings of the child's interviews but did not examine him in person. The court ultimately convicted the applicant, relying almost entirely on the child's testimonies. The Court of Appeal upheld the conviction. It found that the police interviews provided sufficient evidence for the applicant's guilt to be established, even though it acknowledged that there was no technical evidence supporting the child's allegations, which were sometimes imprecise. The ECtHR accepted that, in sexual offence cases, cross-examination of a witness is not always possible and that, in such cases, witness testimonies should be treated with extreme care. Although the statements made by the child were virtually the sole evidence against the accused, the proceedings as a whole were fair. The videotape was shown during the trial and appeal hearings, and the transcript of the second interview was read out before the District Court; the audiotape was also played before the Court of Appeal. This gave the applicant sufficient opportunity to challenge the child's testimony and his credibility in the course of the criminal proceedings. Consequently, there had been no violation of Article 6 para. 3 point d) of the ECHR.

The case law of the ECtHR is not only about balancing the protection of child victims and the right of the defendant to a fair trial but also about the protection of the right to life of witnesses and their families, including children, under Article 2 of the ECHR, as shown by the following example. *R.R. and Others v. Hungary*<sup>168</sup> concerns a prisoner who testified in open court about his drug-trafficking activities and who was, along with his wife and two children, put in the official witness-protection programme for risk of retribution. When the authorities realised that the prisoner was still in contact with criminal circles, they removed him and his family from the witness protection programme for having breached its terms. Under Article 2 of the ECHR, the family claimed that their exclusion from the witness-protection programme had

165 Council of Europe, 2011b, p. 23.

166 ECtHR, *Bocos-Cuesta v. the Netherlands*, No. 54789/00, 10 November 2005; ECtHR, *A.L. v. Finland*, No. 23220/04, 27 January 2009; ECtHR, *W. v. Finland*, No. 14151/02, 24 April 2007; ECtHR, *Kovač v. Croatia*, No. 503/05, 12 July 2007.

167 ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.

168 ECtHR, *R.R. and Others v. Hungary*, No. 19400/11, 4 December 2012.

put their lives at risk of mafia retribution. The Court accepted that the applicants' inclusion in the witness protection programme and the father's collaboration with the authorities meant that the applicants' lives had been at risk when the measure was originally put in place. As the cancellation of their protection by the programme was not motivated by a reduction of that risk but by a breach of its terms, the Court was not persuaded that the authorities had proven that the risk had ceased to exist. Furthermore, it was not unreasonable to suppose that, following the withdrawal of the family's cover identities, their identities and whereabouts became accessible to anyone wishing to harm them. In that way, the authorities potentially exposed the family to a life-threatening danger in breach of Article 2 of the ECHR.

The case of *X and Others v. Bulgaria*<sup>169</sup> concerned allegations of child sexual abuse in an orphanage. In regard to the procedural part, the Court ruled that the Bulgarian authorities had breached their procedural obligation under Article 3 of the ECHR, which requires authorities to conduct an effective investigation into arguable claims of torture or inhuman or degrading treatment. Although the Bulgarian authorities had taken a series of investigative steps, the Court found that these had not met the required level of "effectiveness". One of the reasons for this was a failure to take any steps to involve the victims in the investigation. In its interpretation of Article 3, the Court took into account other applicable international instruments and, in particular, the Lanzarote Convention. Article 31 of the Lanzarote Convention indicates which general measures of protection Member States should take to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings (Article 31 (1)). These measures include information about their rights as victims, the availability of services, and the general progress of the investigation or proceedings; the protection of their privacy and safety (including information on the release of the person prosecuted or convicted); and the avoidance of contact between victims and perpetrators in court and law enforcement agency premises. In addition, Article 31 provides that victims must have access to legal aid (Article 31 (3)). The information provided must be adapted to children's age and maturity and be in a language he/she understands (Article 31 (6)).<sup>170</sup>

Of course, particular health care and appropriate social and therapeutic intervention programmes or measures for victims of neglect, violence, abuse, or other crimes should be provided, ideally free of charge, and children and their caregivers should be promptly and adequately informed of the availability of such services.<sup>171</sup>

169 ECtHR, *X and Others v. Bulgaria*, No. 22457/16, 2 February 2021.

170 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 365.

171 Council of Europe, 2011b, p. 32.

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