

UNHCR Ireland recommendations to

the Child and Family Agency on the

proposed reforms of the care arrangements provided to unaccompanied and separated children seeking asylum in Ireland

I. Introduction

1. These recommendations are submitted by the United Nations High Commissioner for Refugees (“UNHCR”) in Ireland as part of the stakeholder engagement process initiated by the Child and Family Agency (“CFA”) and the request for feedback and support in relation to a number of proposed reforms of the care arrangements provided to unaccompanied and separated children seeking¹ asylum in Ireland.
2. UNHCR has a direct interest in law and policy in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.² Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas the 1951 Convention relating to the Status of Refugees (“1951 Convention”)⁴ and its 1967 Protocol relating to the Status of Refugees (“1967 Protocol”)⁵, both of which Ireland is party to, oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol),⁶
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection (“UNHCR Handbook”).⁷ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of forcibly displaced and stateless persons. UNHCR has had a continuous presence in Ireland since 1998 and its supervisory role is also recognised in national legislation, namely the *International Protection Act 2015* (“IP Act 2015”).

¹ Unaccompanied children: any person under the age of 18 who is outside his or her country of origin or habitual residence and who has been separated from both parents and other relatives and who is not being cared for by an adult who, by law or custom, is responsible for doing so. Separated children may be separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives. This may include children accompanied by other adult family members.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees* (“the Statute”), 14 December 1950, A/RES/428(V), available at: <https://www.refworld.org/docid/3ae6b3628.html>.

³ *Ibid*, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, *UNHCR’s supervisory responsibility*, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <https://www.refworld.org/docid/3ae6b3ae4.html>.

⁶ UNHCR’s supervisory responsibility has also been reflected in EU law, including by way of general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU.

⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>.

4. UNHCR welcomes the opportunity to provide feedback as well as the CFA stakeholder engagement process more generally. Significant challenges have been identified in the current care model, including the pressure placed on CFA staff. UNHCR therefore welcomes the Child and Family Agency's initiative to review its operation and seek ways to improve the efficiency of its process. The recent increases in the number of unaccompanied and separated children presenting to the CFA has undoubtedly placed pressure on existing services and the resources available for the care of such children. UNHCR fully supports the aim of finding new and innovative approaches to maximise the impact of the CFA's social worker teams and prioritise clinical social work, including the engagement of additional NGO services where appropriate. The restriction of service delivery and access to care and protection for unaccompanied and separated children seeking asylum should be avoided as much as possible.
5. The recommendations presented below aim to support CFA's efforts towards ensuring that all asylum-seeking children in Ireland are protected and cared for in line with international principles, standards, and best practice. UNHCR would be happy to meet with the Irish authorities to discuss these recommendations further and provide additional support as needed.

II. Referral of unaccompanied and separated children seeking asylum to the CFA

6. The 1989 Convention on the Rights of the Child ("CRC")⁸ provides a comprehensive framework for the responsibilities of State parties to all children within their jurisdiction, including children seeking international protection and refugees. Unaccompanied and separated children seeking international protection are also fully entitled to the rights in the 1951 Convention.
7. To secure effective access to the rights set out in the 1951 Convention and the CRC, children must be properly identified. This is particularly so where a child seeking international protection is unaccompanied.⁹ It follows that States have a duty to identify children as children, and whether they are unaccompanied or separated, as soon as their presence in the country becomes known to the authorities.¹⁰ UNHCR has recently provided observations with respect to CFA's procedural guidance on eligibility for services for unaccompanied and separated children seeking international protection. We note that this new policy has yet to be implemented in full but welcome the moves taken to date to do so and would welcome further efforts by the CFA to complete this process.
8. Section 14 of the *IP Act 2015* provides for the CFA to be notified of an unaccompanied child who seeks to make an application for international protection and section 15(4) states that an application for international protection in respect of an unaccompanied children can only be made by the CFA. We note that there remains some divergence in the interpretation and operation of these provisions between the International Protection Office (IPO) and the CFA. We also note the suggestion that a secondment of CFA staff to the IPO could facilitate an initial triaging of potential cases for notification under s.14. In considering any such change of practice it is essential to ensure that the statutory role of the IPO is not fettered by such practice. In addition, a presumption of minority should apply and the introduction of such measures should not prevent access to the new process to determine eligibility for services where the age of a young person is in doubt.

⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

⁹ European Union: *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 13 December 2005, OJ L 326/13, Article 17, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0085&from=en>. See also, UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 31(i), available at: <http://www.refworld.org/docid/42dd174b4.html>.

¹⁰ See CRC General Comment No. 6, *Ibid.*, Para. 31(i) and UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/0 para. 75, ("Child Asylum Claims Guidelines") available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

9. The continued engagement between the IPO and the CFA is welcome. Such cooperation is key to ensure that there is a shared understanding of how these provisions should operate and clear operational guidance in place to ensure they are effective in practice. A clarification of the roles and responsibilities through the development of Standard Operating Procedures for the whole process clearly stating who does what and when would be helpful.¹¹ UNHCR remains available to support this process and offer further advice as needed.

III. Applicability of the Child Care Acts to unaccompanied and separated children seeking asylum or temporary protection

10. While the *Child Care Act 1991 (as amended)* (“1991 Act”) places a specific obligation on the CFA to promote the welfare of children who are not receiving adequate care and protection, it does not specifically address how the CFA should deal with unaccompanied or separated children seeking international protection or which provisions are appropriate to provide for their care. The review of *the 1991 Act* and the consideration by the Oireachtas of the *Child Care (Amendment) Bill 2023 (No. 22 of 2023)* provides an opportunity for *the 1991 Act* to be amended to provide greater clarity in this area and to protect the rights and welfare of unaccompanied children seeking international protection. In particular, a provision should be considered providing new grounds for unaccompanied or separated children to be taken into the care of the CFA, where a child has no parent, guardian or person acting *in loco parentis* who is available, suitable and willing to provide care to the child. In the interim, operational guidance should be developed to promote consistency in the approach adopted to unaccompanied and separated children seeking asylum, the applicable provisions of *the 1991 Act* which should be relied upon, and the criteria to be considered in this respect.
11. Section 60 of the *IP Act 2015* transposes Ireland’s obligations with respect to the Temporary Protection Directive into Irish law. It does not, however, contain any provisions specific to unaccompanied and separated children who may qualify for temporary protection. Operational guidance should be developed to ensure clarity around the procedures and legal obligations that apply with respect to children in this position.¹² In particular it would be helpful to clarify if all relevant Departments and agencies agree with respect to the interpretation of s.13(c) of the *IP Act 2015* and the question of whether the provisions of the Act are triggered in circumstances where a child indicates that he or she fears or faces persecution or serious harm if returned to Ukraine.
12. Operational guidance would also be beneficial with respect to which sections of *the 1991 Act* are most appropriate for the provision of care and protection to such children and what procedure should be followed in order to determine whether it is in a child’s best interests to register for temporary protection and/or make an application for international protection. In certain circumstances, the latter option may be more appropriate in order to ensure their long-term immigration status in the country.¹³

IV. Legal status of unaccompanied and separated children

13. UNHCR notes the concerns raised by the Ombudsman for Children and the Health Information and Quality Agency with respect to reliance on s.4 and s.5 of *the 1991 Act* to provide for the care and protection of unaccompanied or separated children seeking asylum. As part of the consultation process the CFA have clearly explained the operational challenges associated with seeking care orders and the delays and backlogs that are developing as a result. This consultation process provides a useful opportunity to review practice and policy in this area to

¹¹ UN High Commissioner for Refugees (UNHCR), *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, July 2017, p.46, available at: <https://www.refworld.org/docid/59633afc4.html>

¹² European Commission, *Unaccompanied and Separated Children fleeing from war in Ukraine – FAQs on Registration, Reception and Care*, July 2022, Available at: https://home-affairs.ec.europa.eu/system/files/2022-07/FAQs%20UAMs%20and%20separated%20children%20TPD_en_1.pdf

¹³ UN High Commissioner for Refugees (UNHCR), *Voluntary Return to Ukraine of Refugee Children without Parental Care, including Unaccompanied Children and Children Evacuated from Care Institutions in Ukraine*, July 2023, available at: <https://www.refworld.org/pdfid/64ac0f924.pdf>

ensure that the rights of children are effectively protected, that greater consistency and efficiency is brought to these decisions that are taken in the best interests of the child, and that children are provided with the best level of care possible within available resources.

14. A decision on which provision of *the 1991 Act* to rely on — section 4, voluntary care; section 5, accommodation for homeless children; sections 13, 17-18: care orders — can have many consequences for the rights and support services available to the child concerned. In particular, while section 5 provides a basis to the CFA to provide for the immediate care and protection of unaccompanied or separated children referred to it, UNHCR has a number of concerns with respect to the utilisation of this provision. Key concerns include: children are not placed in the care of the CFA and, as a result, the child has no legal guardian in the state who may provide consent or take decisions on the child's behalf; no statutory safeguards apply to ensure the assessment and protection of the best interests of the child, such as the allocation of a social worker, the development of a care plan, a periodic child-in-care-review and access to court; there is no entitlement to after-care.
15. In UNHCR's view, Section 4 is a more appropriate mechanism to provide for the care of unaccompanied and separated children seeking asylum for the following reasons: the child is admitted into the care of the CFA who have legal capacity to take decisions on behalf of a child (while having regard to the wishes of the child's parent or person *in loco parentis*); unlike section 5 statutory safe-guards apply to ensure the assessment and protection of the best interests of the child, such as the allocation of a social worker, the development of a care plan, a periodic child-in-care-review and access to court; being in care under section 4 counts towards eligibility for aftercare.
16. The appropriate and effective operation of section 4 should be reviewed in light of the concerns raised by the Health Information and Quality Authority (HIQA) in its 2023 inspection report with respect to the practice observed of CFA staff signing voluntary agreements in the absence of a parent¹⁴. Operational guidance should be developed to ensure that the informed consent of parents is, in fact, sought and provided in all cases where the CFA wishes to rely upon section 4 and that this process is appropriately documented. As discussed above at para. 10, UNHCR recommends consideration of amendments to *the 1991 Act* to bring greater clarity to the admission of unaccompanied and separated children into the care of the CFA; this may provide for an equivalent level of protection to such children in circumstances where it is not possible to obtain the consent of parents without the need to seek a care order from a court in all cases.
17. Where it is not possible for the CFA to rely on section 4, in the absence of legislative change, UNHCR believes the most appropriate option to provide for the care of unaccompanied or separated children is by way of an application for a judicial care order. This may be the most appropriate option in any case where the age, circumstances and the care needs of the child concerned warrant such a level of care in line with the criteria set out in *the 1991 Act* that "the child's health, development or welfare is likely to be avoidably impaired or neglected" and that the child requires care or protection which he/she is unlikely to receive unless the court makes an order. It is important to note that there is an obligation on the CFA to apply for such an order per s.16 of *the 1991 Act* where it appears to it that a child "requires care or protection which he is unlikely to receive unless a court makes a care order ... in respect of him".
18. Where a care order is made by a court, the child in question can benefit from a number of additional safeguards and entitlements: a guardian *ad litem* may be appointed; he/she is entitled to be appointed a solicitor; the CFA has authority to exercise control over the child as if it were his/her parent and can provide consent on behalf of a child in many circumstances, including, for example, an application for naturalisation.
19. While acknowledging the considerable operational challenges and resource constraints the CFA is currently experiencing, UNHCR does not believe that increased reliance on section 5 of *the 1991 Act* is appropriate to mitigate these constraints. Clear legal obligations are set out in

¹⁴ Health Information and Quality Authority, *Inspection Report 4425, Separated Children Seeking International Protection*, February 2023, available at: <https://www.higa.ie/reports-and-publications/inspection-reports/4425-separated-children-seeking-international>

the 1991 Act with respect to its duties to children to apply for a Care Order where necessary to provide for their care and protection.

20. In the absence of legislative change, UNHCR recommends that efforts be invested in seeking to enhance the efficiency and effectiveness of the court application process with respect to unaccompanied and separated children seeking asylum where a care order is warranted. As other organisations in the consultation process have suggested, uncontested applications could be grouped together and scheduled for hearing on a specific day and time each week/month which would reduce the number of times the allocated social workers and CFA legal representatives need to attend court.

V. Role of a guardian in ensuring the right to be heard and protecting a child's best interests

21. Article 12 of the UN Convention on the Rights of the Child provides that children who are capable of forming their own views have the right to express them in all matters that affect them and for those views to be given "due weight in accordance with the age and maturity of the child". In particular, children must be provided with the opportunity to be heard in any judicial or administrative proceedings affecting them, "either directly, or **through a representative** or an appropriate body, in a manner consistent with the procedural rules of national law." The provision of an independent representative or guardian to unaccompanied children is an important procedural safeguard in ensuring the application of the best interests principle¹⁵. Similarly, a child's effective participation in any decision affecting her/him is facilitated by the provision of child-friendly information and procedures, counselling on options, interpretation services and the support of a guardian and, where relevant, a legal representative¹⁶.
22. According to the UN Committee on the Rights of the Child, states should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction¹⁷. Furthermore, it states the guardian should:
- be consulted and informed of all actions taken in relation to the child and have the authority to be present in all planning and decision-making processes, including immigration and care arrangements and all efforts to search for a durable solution.
 - have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, for example, acting as a link to existing specialist agencies/individuals who provide the continuum of care required by the child.
 - In the case of a separated child, guardianship should regularly be assigned to the accompanying adult family member or non-primary family caretaker unless there is an indication that it would not be in the best interests of the child to do so.
23. In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation.¹⁸ At all times children should be informed of arrangements with respect to guardianship and legal representation and their opinions should be taken into consideration. Agencies or individuals whose interests could potentially be in conflict with those of the child

¹⁵ UN High Commissioner for Refugees (UNHCR), *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at:

<https://www.refworld.org/docid/5423da264.html>, p.21

¹⁶ Ibid, p.34

¹⁷ CRC General comment No. 6, *supra*, note 9, p.12

¹⁸ A person who provides legal and procedural advice, assists with the completion of various forms including the international protection application form, prepares oral and written submissions, collects and submits supporting evidence, and attends interviews throughout, for example, the international protection process, including where applicable at the appeal stage, as well as in reopening procedures and procedures for cancellation, revocation or cessation of refugee status.

UN High Commissioner for Refugees (UNHCR), *Technical Guidance: Child Friendly Procedures*, 2021, available at: <https://www.refworld.org/docid/61b7355a4.html>

should not be eligible for guardianship.¹⁹ Guardianship institutions should be specialised and independent, they can be NGOs or public institutions but should be separate from the service and care providers to avoid any possible conflict of interest.²⁰

24. It may be difficult for unaccompanied children to understand the roles of various actors or difficult to trust adults and persons of authority. Procedures should be child-friendly throughout²¹, and the child should ideally have one reference point who will coordinate the process on his/her behalf in order that the child:

- does not have repetitive possibly re-traumatizing interviews²²
- does not inadvertently harm his/her own case through confusion or mistakenly providing contradictory information²³

25. As is already the case in Ireland, except for the asylum decision, all decisions concerning the unaccompanied child should be taken by a specialist of a child protection body with the views of the child fully accounted, rather than the asylum body (especially decisions in the scope of the best interest procedures). Guardians are a key figure in guiding decisions as agents for the child's best interests. Children, depending on age and level of maturity, must be involved in all key decisions involving them. A clarification of the roles and responsibilities (by developing standard operating procedures for the whole process clearly stating who does what and when) can help to ensure the distinction in roles and responsibilities are clear²⁴. These could form part of or complement the national guidelines on ensuring the rights of unaccompanied children recommended recently by the Committee on the Rights of the Child²⁵.

VI. Role of guardian/advocate/representative for unaccompanied and separated children in Ireland seeking asylum.

26. In Ireland, the CFA effectively fulfils many of the roles of guardian set out above for unaccompanied and separated children in Ireland seeking asylum. It should be noted however that a guardian *ad litum* may also be appointed by a Court in the context of judicial proceedings relating to Care Orders. Advocates may also be provided to children for whom care and protection is being provided by the CFA. This role is a non-statutory one provided by a number of non-governmental organisations in Ireland.

27. Advocates can play an important role in assisting unaccompanied and separated children as a support person: an individual whom the child trusts and wishes to be present during the procedure to provide moral and emotional support and supports the child to express their views

¹⁹ Ibid, p.12

²⁰ UNHCR, *The Way Forward*, *Supra* note 11, p.18

²¹ UNHCR, *Child Friendly Procedures*, *Supra* note 18

²² UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): *The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: <https://www.refworld.org/docid/4ae562c52.html>, para. 24; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 *on preventing and combating trafficking in human beings and protecting its victims*, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0036>, Articles 12 and Art. 15.

²³ UNHCR, *Safe & Sound*, *Supra* note 15, p.27

²⁴ UNHCR, *The Way Forward*, *Supra* note 11, p.46

²⁵ UN Committee on the Rights of the Child (CRC), *Concluding observations on the combined fifth and sixth periodic reports of Ireland*, 28 February 2023, CRC/C/IRL/CO/5-6, available at: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsvOufvUWRUJILHiLHKqpXzxBJ06ukR67VoC4Y8jg%2BGkzmf8DjzrqcpQTkSk6R3SYU8fjvSS%2Fcv9rb5HcSS8FEaMfiWutY8PRQZpDhZZQiAjc>

and preferences²⁶. A support person may also be a member of the child's family such as a sibling, a member of the community or a friend. Advocates can fulfil this role by:

- Helping children and young people to understand their rights and the proceedings they are participating in;
- Promoting their right to be heard and supporting them to participate in decisions that affect them;
- Providing independent information, support and advice;
- Advocating on their behalf.

28. The role of 'representative' is set out in both the Asylum Procedures Directive²⁷ and the Recast Reception Conditions Directive²⁸. The Directives are clear that this role can be filled by either the same or different entities however "Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives"²⁹. According to the Fundamental Rights Agency, guardians should not have any financial or institutional connections with institutions, services or public authorities responsible for providing the child with accommodation or day-to-day care³⁰.

29. The role of representative, as set out in the Directives, is to:

- assist and represent an unaccompanied minor in procedures provided for in the Directives
- represent and assist the unaccompanied child to enable him or her to benefit from the rights and comply with the obligations provided for in the Directives with a view to ensuring the best interests of the child and *exercising legal capacity for the minor where necessary*
- perform his or her duties in accordance with the principle of the best interests of the child and must have the necessary expertise to that end.

30. National Reception Conditions Regulations³¹ specify that the Child and Family Agency fulfils that role with respect to Reception Conditions. As discussed in para 14 above, however, the CFA is unlikely to meet the requirement to exercise "legal authority for the minor" in the absence of a care order where s.5 of *the 1991 Act* is being relied upon. The CFA also fulfils the role of representative with respect to international protection procedures as discussed further at para. 34 below.

31. As part of this consultation process, the CFA proposed consideration of a "European Guardianship model" for the international protection aspects of the model of care. Practices of guardianship in each European country can vary significantly, and there is not a unified definition of guardian adopted in European legislation. In the course of further discussions that occurred as part of this consultation process, and the non-statutory nature of the proposals, it is understood that what is being considered is more in line with an advocacy service. UNHCR recently welcomed the decision to provide an advocate to unaccompanied and separated children seeking asylum as part of the new eligibility intake procedures where it is determined that there is a requirement to explore if the person is in fact a child. The proposal to extend this service to all unaccompanied and separated children seeking asylum is a very welcome one in this context. Given the non-statutory nature of the role and the potential for confusion around

²⁶ UNHCR, *Child Friendly Procedures*, *Supra* note 18, p.26.

²⁷ Asylum Procedures Directive, , *Supra* note 9, Article 14

²⁸ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [OJ L 180, 29.6.2013, p.96-116], Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033>, Article 24

²⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), [OJ L 180, 29.6.2013, p.96-116], Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033>, Article 24

³⁰ European Agency for Fundamental Rights, *Guardianship for children deprived of parental care : A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, June 2014, ISBN 978-92-9239-464-6, available at: <https://www.refworld.org/docid/53b14fd34.html>, p.36

³¹ S.I. No. 230/2018 - *European Communities (Reception Conditions) Regulations 2018*, Regulation 10

roles and responsibilities, however, it is recommended that clear requirements on the qualifications and experience needed to fulfil such a role are developed as well as standard operating procedures clarifying roles and responsibilities (see further para. 25 above).

32. Over the medium term UNHCR recommends a more comprehensive review is conducted of the potential adoption of a guardianship model in Ireland for all unaccompanied and separated children seeking asylum in line with international best practice. This should include clearly defined standards for the qualifications and expertise expected of guardians as well as vetting requirements. Consideration should be given to also reviewing the role of representative under the Directives, whether there is any potential conflict of interest in this role being fulfilled by the CFA, and whether it may be appropriate to appoint someone else to fulfil these functions so that children could have the benefit of support by a guardian independent to the CFA. In such circumstances, consideration should be given to bringing such a role within the remit of the new national guardian *ad litem* service and regulations issued on the qualifications and experience required to act as a guardian³².

VII. Legal provisions regarding the CRA's role with respect to the international protection process

33. As soon as an unaccompanied or separated child is identified, States should “appoint a guardian or, where necessary, representation by an organization responsible for their care and well-being to accompany the child throughout the status determination and decision-making process”.³³ The CFA has indicated that, due to operational pressures and constraints, it is currently experiencing challenges in discharging its responsibilities with respect to supporting unaccompanied and separated children seeking asylum applying for and participating in the international protection process. Delays experienced in this process may have serious consequences for children, in particular with respect to their immigration status and the rights and entitlements that are associated with that, their entitlements to family reunification, and their accommodation and reception arrangements when they turn 18 prior to a final decision on their application. Such matters are essential to consider in order to effectively promote the best interests of a child.
34. National legislation does not specify that the CFA fulfils the role of representative with respect to asylum procedures but this can be inferred by the references to the agency in the *IP Act 2015*. It is clear from s.15 of the Act that only persons aged 18 or over may make an application for international protection. S.14(1) requires an officer of the Minister or an immigration officer to notify the Child and Family Agency of anyone seeking international protection in respect of whom it appears to them not to have “attained the age of 18 years and is not accompanied by an adult who is taking responsibility for the care and protection of the person”; thereafter that person shall be presumed to be a child.
35. In the case of separated children accompanied by an adult who is not their parent or legal guardian but is “taking responsibility for the care and protection of the person”, such arrangements may leave children in a precarious legal situation whereby the person caring for him/her have no legal responsibilities towards the child and no formal right to custody or to make decisions on behalf of the child.³⁴ UNHCR recommends that the legal provisions relating to separated children seeking international protection be reviewed and enhanced in order to provide greater safeguards in this area. In the absence of statutory change, it is all the more important to ensure adequate operational protocols are in place to assess human trafficking risks, as competent authorities under the revised National Referral Mechanism³⁵, and to

³² Department of Children, Equality, Disability, Integration and Youth, *Reform of guardian ad litem arrangements in child care proceedings*, 11 August 2022, Available at: <https://www.gov.ie/en/policy-information/04fc0e-reform-of-guardian-ad-litem-arrangements-in-child-care-proceedings/>

³³ UN General Assembly, *Guidelines for the Alternative Care of Children*: resolution / adopted by the General Assembly, 24 February 2010, A/RES/64/142, available at: <https://www.refworld.org/docid/4c3acd162.html>

³⁴ Burns, O'Mahony and Brennan, 'Private Family Arrangements' for Children in Ireland: The Informal Grey Space In-Between State Care and the Family Home, *British Journal of Social Work* (2021) 00, 1–18, available at: <https://doi.org/10.1093/bjsw/bcab032>

³⁵ Set out in Part 3 of *Criminal Law (Sexual Offences and Human Trafficking) Bill 2023* (Bill 62 of 2023), available at: <https://www.oireachtas.ie/en/bills/bill/2023/62/>

promote the welfare of the child in line with s.3 of *the 1991 Act*. In particular, appropriate referral arrangements should be in place to determine, where appropriate, if the adult in question is available, suitable and willing to provide such care on an ongoing basis and whether steps may be taken to support family reunification with the child's parents. Such persons, where they do not meet the definition of relative under the legislation³⁶, should be made aware of the obligations that arise with respect to private foster care arrangements as provided by ss.23O-23X of *the 1991 Act*, in particular the obligation to notify the CFA of such arrangements and their duties towards the child. It may also be appropriate to explore if the adult is aware of the possibility to apply and whether he/she is prepared to apply to become the child's guardian per s.6C Guardianship of Infants Act 1964.

36. S.15(4) provides that the Child and Family Agency must make an application for international protection on behalf of a child for whom it is providing "care and protection" where it appears "on the basis of information, including legal advice, available to it, that an application for international protection should be made". It must arrange for the appointment of an employee of the Agency or such other person as it may determine to make such an application on behalf of the child and to represent and assist the child with respect to the examination of the application. A number of other provisions refer to "a person appointed by the Child and Family Agency under section 15(4) to make an application on behalf of" a child. The wording of these provisions therefore suggests that the CFA may lawfully sub-contract this responsibility to another organisation or individuals who are not employees of the agency.³⁷
37. In order to ensure timely lodging and processing of international protection applications, UNHCR supports efforts by the CFA to explore alternative options to current arrangements whereby its staff are required to discharge all of these responsibilities directly. If the role of an advocate is expanded to include accompanying and supporting a child through the international protection process, this should enable the CFA to prioritise its resources where it is needed most with respect to best interest assessments, care placements, child protection and other clinical interventions. Appropriate registration arrangements should be put in place with respect to such advocates as well as vetting requirements. As discussed above in para. 31, it would be important that advocates fulfilling such roles have appropriate qualifications and experience as well as a familiarity with the procedures. UNHCR would be happy to support the CFA and to provide training to such advocates to support the introduction of such a service. It would also be important to ensure buy-in from other Departments and agencies to ensure that there is agreement on the legal question of whether the CFA may lawfully sub-contract such functions and that there is agreement as to how the new arrangements will work in practice.
38. As discussed at para. 23 above, children should be provided with legal representation where they are involved in asylum procedures or administrative or judicial proceedings. In addition to the allocation of an advocate, it is crucial that separated or unaccompanied children seeking international protection are also provided with legal representation and assistance at an early stage of the process and that there is clarity with respect to roles and responsibilities between the different actors, which should be communicated to children in accessible and child-friendly manner.

³⁶ grandparent, brother, sister, uncle or aunt, whether of the whole blood, half blood or by affinity, and includes the spouse of any such person and any person cohabiting with any such person

³⁷ Some references in statutory instruments are less clear however and should be reviewed in advance of any changes: Regulations relating to applications for international protection (S.I. No. 660/2016) provide for a signature by a guardian, where applicable, which is described as a "TUSLA — Child and Family Agency official". *Regulations relating to appeals to the International Protection Appeals Tribunal* (S.I. No. 542/2022) refer to a situation where a child "is in the care of" the Child and Family Agency and require applicants and appellants to provide the name of their representative.

VIII. Tiered approach to the provision of care based on assessed need

39. The CFA have proposed a revised tiered based approach to care arrangements on the basis of assessed need:
- Under 15's placed in Family placements/ requires additional recruitment
 - 15 and 16 year olds small group home accommodation
 - 17+ higher capacity children's residential centres
40. A wide range of options for care and accommodation arrangements exist and are explicitly acknowledged in article 20 (3) CRC: "... *inter alia*, foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children".³⁸ When assessing what option is most appropriate in an individual case, the particular vulnerabilities of a child, "not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account".³⁹ Regard should also be taken of the "desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background".⁴⁰
41. UNHCR's Executive Committee in their Conclusion No. 107 defines children considered to be at heightened risk as those children who are affected by risk factors both resulting from the wider protection environment and risks resulting from individual circumstances, taking into account the cumulative effects of being exposed to several risk factors.⁴¹ It is crucial therefore to put in place effective arrangements and procedures, for early and continuous identification of children at heightened risk. Individual risk factors include, *inter alia*: girl mothers and their children; child victims of trafficking and sexual abuse, including pornography, paedophilia and prostitution; survivors of torture; survivors of violence, in particular sexual and gender-based violence and other forms of abuse and exploitation; children who suffer from social discrimination; children with mental or physical disabilities; children suffering from serious diseases; and children out of school.
42. Family-based care is the preferred type of alternative care for unaccompanied children as outlined in the United Nations Guidelines for the Alternative Care of Children⁴². Family-based care provides children with individual care and attention and helps prepare them for reunification with their parents or other legal/ customary caregivers. Family-based care also supports children in building social relationships, developing their identity and integrating into their community.⁴³ Where possible and in the best interests of the child, unaccompanied or separated children should be released into the care of family members, including asylum-seeking or refugee family members or others, who have residency in the asylum country.
43. UNHCR recommends the CFA take steps to strengthen community-based foster care as it provides a protective care arrangement and is also the most cost-effective arrangement⁴⁴. Consideration should also be given to launching a pilot programme to explore recruitment among migrant and refugee communities in Ireland as it may be in the child's best interests to be placed with foster parents who share similar culture, traditions and religious preferences.⁴⁵
44. When family-based care is not possible, children may be accommodated in institutions or supervised group care with personnel and facilities which take into account the needs of

³⁸ UN *Convention on the Rights of the Child*, *Supra* note 8.

³⁹ UN CRC General comment No. 6, *Supra* note 9

⁴⁰ *Ibid*

⁴¹ Executive Committee of the High Commissioner's Programme, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII), <http://www.refworld.org/docid/471897232.html>

⁴² UNGA *Guidelines for the Alternative Care of Children*, *Supra* note 33.

⁴³ Inter-agency Working Group on Unaccompanied and Separated Children, *Alternative Care in Emergencies Toolkit* (2013), sect. 3.3, available at:

https://resourcecentre.savethechildren.net/node/7672/pdf/ace_toolkit_0.pdf

⁴⁴ UNHCR, *The Way Forward*, *Supra* note 11, p.27

⁴⁵ UN High Commissioner for Refugees (UNHCR), *Manual on Foster Care for Unaccompanied and Separated Children*, April 2018, available at: <https://www.refworld.org/docid/5bf417294.html>, p.15

children their age.⁴⁶ A number of conditions should be met with respect to care and accommodation arrangements:

- In order to ensure continuity of care and considering the best interests of the child, changes in residence for unaccompanied and separated children should be limited to instances where such change is in the best interests of the child;
- In accordance with the principle of family unity, siblings should be kept together;
- Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection against domestic violence or exploitation, and access to educational and vocational skills and opportunities;
- In large-scale emergencies, interim care must be provided for the shortest time appropriate for unaccompanied children. This interim care provides for their security and physical and emotional care in a setting that encourages their general development;
- Children must be kept informed of the care arrangements being made for them, and their opinions must be taken into consideration.⁴⁷

45. While a full and formal process of assessing and determining the best interests of the child is not required for every action taken by a State, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures is appropriate.⁴⁸ Such best interests procedures should involve interviews or consultations with the child, as well as additional information gathering as needed, by professionals with the required expertise, knowledge and skills in child protection and, as appropriate, the weighing of elements of the child's circumstances.⁴⁹ A more formal procedure is appropriate for making significant decisions that will have a fundamental impact on a child's future development with greater procedural safe-guards in place.⁵⁰ The specific, factual circumstances of the child is the primary point of departure for assessing the best interests of the child. While age is a relevant factor, when considering the best interests of the child, all relevant factors pertaining to the specific situation of the child must be carefully weighed.⁵¹ When determining what placement option the CFA considers to be in the child's best interests per s.36 of *the 1991 Act* such procedures should be adopted and fully documented in all cases. Should accommodation continue to be made available to unaccompanied or separated children under s.5 it would be necessary to ensure a comparable procedure is likewise provided for in all cases. While outside the scope of this submission to summarise, considerable guidance is available on the elements to consider and the procedural safeguards to apply in such a process.⁵²

46. Unfortunately, family-based care arrangements may not always be immediately achievable owing to a range of factors. These can include the demography of the child's community, high levels of mobility among displaced children and adults, sociocultural barriers to family placement, poverty or other economic factors, the child's preference to live without adult care given their prior experience of living independently (particularly if they are nearing adulthood), and/or a lack of suitable caregivers.⁵³ A wide array of care arrangements should be available, to cater to the different needs and circumstances of unaccompanied and separated children, including semi-independent supervised living, small group homes and foster care. In view of

⁴⁶ UNHCR, *Safe & Sound*, *Supra* note 15.

⁴⁷ UN CRC, *General comment No. 6*, *Supra* note 9.

⁴⁸ UN Committee on the Rights of the Child, *General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC /C/GC/14, para. 84., Available at: <http://www.refworld.org/docid/51a84b5e4.html>

⁴⁹ UNHCR, *Safe & Sound*, *Supra* note 15, p.20

⁵⁰ *Ibid*

⁵¹ *Ibid*, p.35

⁵² See in particular: UN CRC, *General comment No. 14*, *Supra* note 48, and UNHCR, *Safe & Sound*, *Supra* note 15.

⁵³ UN High Commissioner for Refugees (UNHCR), *Guidelines on supervised independent living for unaccompanied children*, 2021, available at <https://www.unhcr.org/media/guidelines-supervised-independent-living-unaccompanied-children>

limited capacities, care and services need to be targeted depending on the specific needs identified in each case.⁵⁴ Supervised independent living arrangements⁵⁵ — in which a child lives without full-time adult care — should not be used in the case of children who are less than 15 years of age, and should only be considered after all options for family-based care have been exhausted, prioritising the child’s best interests as a primary consideration.⁵⁶

IX. Summary of key recommendations

Referral of unaccompanied and separated children seeking asylum to the CFA

- The secondment of CFA staff to the IPO to triage potential cases for notification under s.14 must not fetter the statutory authority of the IPO or prevent access to the new process to determine eligibility for services where the age of a young person is in doubt.
- Effective cooperation between the IPO and the CFA is key to ensure that there is a shared understanding of how these provisions should operate.

Applicability of the Child Care Acts to unaccompanied and separated children seeking asylum or temporary protection

- The review of *the 1991 Act* and the consideration by the Oireachtas of the Child Care (Amendment) Bill 2023 (No. 22 of 2023) should be utilised to provide greater clarity in this area and to protect the rights and welfare of unaccompanied and separated children seeking international protection.
- In particular, a provision should be considered providing new grounds for unaccompanied or separated children to be taken into the care of the CFA, where a child has no parent, guardian or person acting in loco parentis who is available, suitable and willing to provide care to the child.

Legal status of unaccompanied and separated children

- While acknowledging the considerable operational challenges and resource constraints the CFA is currently experiencing, UNHCR does not believe that increased reliance on section 5 of *the 1991 Act* is appropriate to mitigate these constraints.
- Section 4 is a more appropriate mechanism to provide for the care of unaccompanied and separated children seeking asylum provided the informed consent of parents is, in fact, sought, provided and appropriately documented.
- Where it is not possible for the CFA to rely on section 4, in the absence of legislative change, UNHCR believes the most appropriate option to provide for the care of unaccompanied or separated children is by way of an application for a judicial care order. Further efforts should be invested in seeking to enhance the efficiency and effectiveness of the court application process in such circumstances.

Role of guardian/advocate/representative for unaccompanied and separated children in Ireland seeking asylum.

- The proposal to extend the provision of an advocacy service to all unaccompanied and separated children seeking asylum is a very welcome one. Advocates can play an important role in assisting children as a support person: an individual whom the child trusts and

⁵⁴ UNHCR, *The Way Forward*, *Supra* note 11, p.27

⁵⁵ For examples of practices in other European countries see: IOM, UNHCR and UNICEF, *Safety and dignity for refugee and migrant children: Recommendations for alternatives to detention and appropriate care arrangements in Europe*, May 2022, available at: <https://www.unhcr.org/media/safety-and-dignity-refugee-and-migrant-children-recommendations-alternatives-detention-and>

⁵⁶ UNHCR, Guidelines on supervised independent living, *Supra* note 53.

wishes to be present during the procedure to provide moral and emotional support and supports the child to express their views and preferences.

- A more comprehensive review should be conducted of the potential adoption of a guardianship model in Ireland for all unaccompanied and separated children seeking asylum in line with international best practice.
- The role of representative under the Directives should also be reviewed to consider if there is any potential conflict of interest in this role being fulfilled by the CFA, and whether it may be appropriate to appoint someone else to fulfil these functions so that children could have the benefit of support by a guardian independent to the CFA.

CRA's role with respect to the international protection process

- UNHCR supports efforts by the CFA to explore alternative options to ensure timely lodging and processing of international protection applications. If the role of an advocate is expanded to include accompanying and supporting a child through the international protection process, this should enable the CFA to prioritise its resources where it is needed most with respect to best interest assessments, care placements, child protection and other clinical interventions.
- Appropriate registration arrangements should be put in place with respect to such advocates as well as vetting requirements. Advocates fulfilling such roles should have appropriate qualifications and experience as well as a familiarity with the procedures. It would also be important to ensure buy-in from other Departments and agencies to ensure that there is agreement on the legal question of whether the CFA may lawfully sub-contract such functions and that there is agreement as to how the new arrangements will work in practice.
- It is crucial that unaccompanied and separated children are also provided with legal representation and assistance at an early stage of the process and that there is clarity with respect to roles and responsibilities between the different actors, that should be communicated to children in accessible and child-friendly manner.

Tiered approach to the provision of care based on assessed need

- Effective arrangements and procedures should be in place for early and continuous identification of children who are affected by risk factors both resulting from the wider protection environment and risks resulting from individual circumstances, taking into account the cumulative effects of being exposed to several risk factors.
- Family-based care is the preferred type of alternative care for unaccompanied children. Where possible, and in the best interests of the child, unaccompanied or separated children should be released into the care of family members, including asylum-seeking or refugee family members or others, who have residency in the asylum country.
- UNHCR recommends the CFA take steps to strengthen community-based foster care as it provides a protective care arrangement and is also the most cost-effective arrangement. Consideration should be given to launching a pilot programme to explore recruitment among migrant and refugee communities in Ireland as it may be in the child's best interests to be placed with foster parents who share similar culture, traditions and religious preferences.
- When determining what placement option the CFA considers to be in the child's best interests per s.36 of *the 1991 Act*, best interests assessment procedures should be adopted and fully documented in all cases in line with international best practice whereby all relevant factors pertaining to the specific situation of the child must be carefully weighed. Should accommodation continue to be made available to unaccompanied or separated under s.5 it would be necessary to ensure a comparable procedure is likewise provided for in all cases.
- In view of limited capacities, care and services need to be targeted depending on the specific needs identified in each case. Supervised independent living arrangements — in

which a child lives without full-time adult care — should not be used in the case of children who are less than 15 years of age, and should only be considered after all options for family-based care have been exhausted, prioritising the child’s best interests as a primary consideration.

Separated children

- Where possible and in the best interests of the child, unaccompanied or separated children should be released into the care of family members, including asylum-seeking or refugee family members or others, who have residency in Ireland.
- In the case of separated children accompanied by an adult who is not their parent or legal guardian but is “taking responsibility for the care and protection of the person”, such arrangements may leave children in a precarious legal situation whereby the person caring for him/her have no legal responsibilities towards the child and no formal right to custody or to make decisions on behalf of the child.
- An accompanying adult family member or non-primary family caretaker of a separated child should be supported to apply to become the child’s legal guardian unless there is an indication that it would not be in the best interests of the child to do so.
- UNHCR recommends that the legal provisions relating to separated children seeking international protection be reviewed and enhanced in order to provide greater safeguards in this area.
- In the absence of statutory change, it is all the more important to ensure adequate procedures are in place to assess human trafficking risks, as competent authorities under the revised National Referral Mechanism, and to promote the welfare of the child in line with s.3 of *the 1991 Act*.

Operational Guidance/Standard Operating Procedures

Operational guidance and standard operating procedures for the whole process clearly stating who does what and when could form part of or complement the national guidelines on ensuring the rights of unaccompanied children recommended recently by the Committee on the Rights of the Child. In particular they should cover:

- A clarification of the roles and responsibilities with respect to advocates, social workers, guardians *ad litem*, legal representatives and other support persons to ensure the distinction in roles and responsibilities are clear.
- The applicable provisions of *the 1991 Act* which should be relied upon, and the criteria to be considered in providing access to care and protection for unaccompanied and separated children seeking asylum.
- The procedures to be applied to ensure that the informed consent of parents is, in fact, sought and provided in all cases where the CFA wishes to rely upon section 4 of *the 1991 Act* and that this process is appropriately documented.
- A clarification of the roles and responsibilities of the CFA and the IPO with respect to separated and unaccompanied children seeking asylum.
- In the case of separated children accompanied by an adult who is not their parent or legal guardian, referral pathways and procedures to assess human trafficking risks, to safeguard the best interests of the child, and determine if the adult in question is available, suitable and willing to provide such care on an ongoing basis
- The legal obligations that apply with respect to unaccompanied and separated children who may qualify for temporary protection and the procedures to be followed in order to determine whether it is in a child’s best interests to register for temporary protection and/or make an application for international protection.

X. Conclusion

47. UNHCR welcomes the opportunity to provide recommendations as part of this consultation process and hope they are helpful to the CFA in its review of practice in this area. We support the proposal to establish an inter-departmental group to review how the system operates, to continue this process and to explore further improvements. UNHCR remains available to discuss these issues in more detail and to support further with respect to the implementation of any new measures.

UNHCR Ireland
January 2024