



Access to Justice and Child-friendly Justice for Refugee and Migrant Children: International and European Legal Perspectives

Stephanie Rap*

ABSTRACT

In recent years the notions of access to justice for children and child-friendly justice have gained increasing attention from legal scholars and policymakers alike. Specifically, access to justice in a child-friendly way for children involved in asylum or immigration proceedings is not self-evident. They experience barriers in accessing justice and receiving timely remedies. These barriers relate to the complexity of proceedings, their lack of legal knowledge and the fact that proceedings are not child-specific or child-friendly. In this article, the meaning of access to justice for refugee and migrant children will be analysed. It will be argued that the concepts of access to justice and child-friendly justice are complementary and mutually reinforcing. Moreover, three elements of access to justice will be examined, namely the availability of legal representation for children, the participation of and information provision to children in asylum and immigration proceedings and the availability of effective remedies.

RESUME

Ces dernières années, la nécessité d’instaurer une justice adaptée aux enfants est au centre de l’attention des juristes et des responsables politiques. Sans un accès effectif à la justice, les enfants restent vulnérables aux abus qui proviennent régulièrement de l’environnement familial, de la société et de l’État. Or, l’accès à la justice des enfants de familles réfugiées et des mineurs demandeurs d’asile n’est pas toujours acquis. Ils rencontrent souvent des obstacles liés à la complexité des procédures, au manque de connaissances juridiques et au fait que les procédures en cause ne sont pas adaptées à leurs besoins. L’article examine les spécificités des procédures concernant cette catégorie vulnérable de la population en mettant l’accent sur les trois garanties d’une justice adaptée aux mineurs, à savoir la disponibilité d’une représentation juridique pour les enfants, la participation des enfants et la communication d’informations aux enfants dans les procédures d’asile et d’immigration et la disponibilité de recours effectifs.

KEYWORDS: children’s rights - refugee and migrant children - **access to justice** - asylum and immigration proceedings

Cite the paper

Rap Stephanie, ‘Access to Justice and Child-Friendly Justice for Refugee and Migrant Children: International and European Legal Perspectives’, 2020(2), *Europe of Rights & Liberties/Europe des Droits & Libertés*, 277-292.

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Stephanie Rap*

1. INTRODUCTION

*Child rights standards in international instruments do not mean much for the lived reality of children if they are not implemented.*¹

The above quote is the start of the foreword drafted by the then chairperson of the UN Committee on the Rights of the Child ('CRC Committee'), Dr Mezmur, in a report on access to justice for children by the Child Rights International Network (CRIN).² The report contains a ranking of all countries worldwide on how well they provide access to justice for children based on several criteria determined by CRIN.³ The criteria are derived from international standards concerning access to justice for children, providing for a broad definition of access to justice, that is applicable to various forms of rights violations and in different judicial proceedings. It has been observed, however, that children experience barriers in accessing justice. These barriers relate to the complexity of proceedings, their lack of legal knowledge and the fact that proceedings are not child-specific or child-friendly.⁴

In this article, I analyse what access to justice means for children in the context of child refugees and migrants. In order to do so I will first discuss access to justice as a concept in relation to other children's rights principles. I will argue that the concepts of access to justice and child-friendly justice are complementary and mutually reinforcing. Moreover, in order to make access to justice a reality for children other related principles need to be implemented. In this article the focus will be on the availability of legal representation for children, the participation of and information provision to children in asylum and immigration proceedings and the availability of effective remedies. First, however, the position of children as rights holders will be discussed in Section 2. This will be followed by a conceptualisation of access to justice for children, in relation to child-friendly justice

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¹ Mezmur, 'Foreword' in CRIN, *Rights, Remedies & Representation: Global report on access to justice for children* (2016) at 4.

² CRIN, *Rights, Remedies & Representation: Global report on access to justice for children* (2016).

³ These criteria are: legal status of the United Nations Convention on the Rights of the Child 1989; legal status of the child; challenging children's rights violations (effective remedies); and practical considerations.

⁴ CRIN, *Rights, Remedies & Representation: Global report on access to justice for children* (2016); Liefwaard, 'Access to justice for children: Towards a specific research and implementation agenda' (2019) 27 *International Journal of Children's Rights* 195.

in Section 3. In Section 4, these three elements will be analysed in relation to children involved in asylum and immigration proceedings. This article will close with some concluding remarks in Section 5.

2. CHILDREN AS RIGHTS HOLDERS

The year 2019 celebrated the thirtieth anniversary of the United Nations (UN) Convention on the Rights of the Child (CRC),⁵ meaning that children achieved internationally recognised rights only at the start of the last decade of the twentieth century. The evolution of acknowledgement of children as human beings entitled to fundamental rights is part of a broader movement towards the recognition of specific groups in society, such as women, indigenous people and people with disabilities.⁶ What is special about the position of children is that they are in the development stage of their lives having not yet reached adult levels of cognition and understanding.⁷ This complicates their position as a rights holder *vis-à-vis* adult authorities and decision-makers in judicial proceedings, making them particularly vulnerable to unfairness. However, this has not always been the dominant view on the position of children in society. Over the centuries common conceptions of children have changed from seeing them as ‘mini-adults’, who were responsible for their actions from a young age, to ‘adults in waiting’, who had to be protected against dangers from the outside world, to children who had to be educated and prepared for adulthood.⁸

In the second half of the twentieth century, the idea of the autonomous child and the child as an independent human being rather than as a developing person gained momentum in the international community.⁹ This resulted in further thinking and discussion on the drafting of a binding treaty for children, in which they were accorded fundamental rights and were seen as active bearers of rights.¹⁰ At the same time, children were also still seen as more vulnerable and in need of protection compared to adults and reliant upon adults for

⁵ UN Convention on the Rights of the Child 1989, UNTS 1577.

⁶ See Henderson, *Understanding International Law* (2010). See Convention on the Elimination of All Forms of Discrimination Against Women 1979, 18 December 1979, A/RES/34/180; Convention on the Rights of Persons with Disabilities 2006, UNTS 2515.

⁷ Rap, *The participation of juvenile defendants in the youth court: A comparative study of juvenile justice procedures in Europe* (2013).

⁸ Reynaert et al., ‘Introduction: A critical approach to children’s rights’ in Vandenhole et al., (eds), *Routledge International Handbook of Children’s Rights Studies* (2015) 1 at 3; Verhellen, ‘The Convention on the Rights of the Child: Reflections from a historical, social policy and educational perspective’ in Vandenhole et al., (eds), *ibid.*, 43; Ben-Arieh and Tarshish, ‘Children’s rights and well-being’ in Ruck, Peterson-Badali and Freeman (eds), *Handbook of children’s rights. Global and multidisciplinary perspectives* (2017) 68; Hanson, ‘Schools of Thought in Children’s Rights’ in Liebel et al., (eds), *Children’s Rights from Below: Cross-Cultural Perspectives* (2012) 63.

⁹ Reynaert et al., *supra* n 8; Verhellen, *supra* n 8; Invernizzi and Williams, ‘Introduction’ in Invernizzi and Williams (eds), *Children and Citizenship* (2008) 1. See also Scott and Huntington, ‘Conceptualizing Legal Childhood in the Twenty-First Century’ (2020) 118(7) *Michigan Law Review* 1371.

¹⁰ Verhellen, *ibid.* See also Freeman, ‘Why It Remains Important to Take Children’s Rights Seriously’ (2007) 15(5) *The International Journal of Children’s Rights* 5; Freeman, ‘Taking Children’s Rights More Seriously’ (1992) 6 *International Journal of Law and the Family* 52.

such protection, simultaneously highlighting children's dependency and their autonomy.¹¹ This paradox is apparent in several children's rights principles, such as the notion that the best interests of the child shall be a primary consideration in all actions concerning children (Article 3(1) CRC), that parents¹² should 'provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise' of his¹³ rights (Article 5 CRC), and that the views of the child should be given 'due weight in accordance with the age and maturity of the child' (Article 12(1) CRC).

The right to be heard (Article 12 CRC) has challenged traditional views on hierarchical structures and relations between adults and children.¹⁴ It provides the basis of the notion that children should be enabled to participate in decision-making affecting their lives.¹⁵ The crux in thinking about children's rights is that the rights of children do not oppose the rights of parents or other adults, but that '[c]hildren must be accepted as co-authors in dialogue about their best interests.'¹⁶ Parental rights are justified by the fact that they promote child well-being, because of the mere fact that stable parent-child relationships (and minimal state intervention) are beneficial to the child's development.¹⁷ Moreover, this may mean that children, being minors, are not afforded the same procedural rights in relation to legal standing as do adults, and as a consequence do not have the same possibilities for independently accessing and participating in judicial proceedings. Schmidt, Rap and Liefwaard conclude that internationally an overarching view on children's legal capacity is largely lacking, resulting in a plethora of age limits applied within and across jurisdictions and legal fields.¹⁸

In the context of migration, children are frequently seen as vulnerable persons, who require protection and help. However, increasingly scholars have acknowledged that these children should be treated as children first and foremost, with the backing of all their rights, and as migrants second.¹⁹ In addition, refugee and migrant children should be considered as active actors in their migration process. In other words, they should be included and participate as

¹¹ Verhellen, *ibid.* at 51-2.

¹² In the context of this article, parents refer to legal parents and caretakers who can act as legal representatives of the child.

¹³ A reference to persons with 'he', 'him' or 'his', includes to a reference to 'she' or 'her'.

¹⁴ Tisdall, 'Children and young people's participation: A critical consideration of article 12' in Vandenhoe et al. (eds), *supra* n 8, 185.

¹⁵ UN Committee on the Rights of the Child, General Comment No 12: The right of the child to be heard, 20 July 2009.

¹⁶ Vanobbergen, 'Children's rights and childhood studies: From living apart together to a happy marriage' in Vandenhoe et al., *supra* n 8, 60 at 73.

¹⁷ Scott and Huntington, *supra* n 9.

¹⁸ Schmidt, Rap and Liefwaard, 'Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits? Reflections on the Fundamental Principles and Practical Application of Age Limits in Light of International Children's Rights Law' (2020) 1 *Erasmus Law Review* 4.

¹⁹ Smyth, 'Migration, Refugees, and Children's Rights' in Kilkelly and Liefwaard (eds), *International Human Rights of Children* (2018) 421.

agents rather than ‘objects’ or ‘victims of circumstances’.²⁰ This notion will be further elaborated upon in the following sections.

3. ACCESS TO JUSTICE AND CHILD-FRIENDLY JUSTICE

The right of access to justice is not a right that is explicitly provided for in the CRC, nor is the right to an effective remedy. Other international treaties, such as the Universal Declaration on Human Rights (Articles 8 and 10);²¹ the 1951 Convention Relating to the Status of Refugees (Article 16);²² the International Covenant on Civil and Political Rights (Articles 2(3) and 14(1));²³ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 18(d))²⁴ can be considered as the general basis of the right to access to justice for people, including children.

The UN Committee on the Rights of the Child stated in its General Comment on the general measures of implementation of the Convention on the Rights of the Child that ‘[f]or rights to have meaning, effective remedies must be available to redress violations’.²⁶ Also, children must have access to appeals, complaints procedures and an ombudsperson or children’s rights commissioner.²⁷ A few years before the CRIN report was published, the UN High Commissioner for Human Rights released a report specifically addressing access to justice for children.²⁸ Access to justice for children was defined as ‘the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including the Convention on the Rights of the Child’.²⁹ Moreover, it qualified as ‘a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights’.³⁰ Over the past decades access to justice as a legal concept has gained considerable attention.³¹ For example, it has been included in the UN Sustainable Development Goals, where target 16.3 provides that ‘equal access to justice for

²⁰ Crock, ‘Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child’ in Mahmoudi et al. (eds), *Child-friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (2015) 221 at 238.

²¹ United Nations Universal Declaration of Human Rights 1948, GA Res 217A (III), 10 December 1948, A/810.

²² Convention Relating to the Status of Refugees 1951, UNTS 189.

²³ International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

²⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990, GA Res 45/158 (2003) 18 December 1990, A/RES/45/158.

²⁵ Note that this is a non-exhaustive list.

²⁶ UN Committee on the Rights of the Child, General comment No 5: General measures of implementation of the Convention on the Rights of the Child, 27 November 2003 at para 24.

²⁷ UN Committee on the Rights of the Child, supra n 15 at paras 46-47.

²⁸ UN Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Access to Justice for Children, A/HRC/25/35, 16 December 2013.

²⁹ Ibid. at para 4.

³⁰ Ibid. at para 3.

³¹ Liefwaard, supra n 4.

all' should be promoted, including for children.³² Moreover, in 2014 the Third Optional Protocol to the CRC was adopted, which grants children the right to lodge individual communications before the CRC Committee (see below at Section 4.C).³³ In the same period of time the notion of child-friendly justice has also gained considerable attention. First, in the 2005 ECOSOC Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime the term 'child-sensitive' was used, which 'denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views'.³⁴ The CRC Committee stated in its 2009 General Comment on the right to be heard that 'a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his age. Proceedings must be both accessible and child appropriate'.³⁵

In Europe, the notion of child-friendly justice has been further conceptualised by the Council of Europe and the European Union, catapulting it as a key priority in its children's rights policy.³⁶ The Council of Europe 'Guidelines on Child-friendly Justice' form an important reference point in this regard.³⁷ The Guidelines claim to contain the principles necessary to ensure that 'all rights of children' are fully respected in judicial proceedings³⁸ and it contains practical guidance for the Council of Europe's member states to 'give a place and voice to the child in justice at all stages of the procedures.'³⁹ It is noted specifically that '[s]pecific protection and assistance may need to be granted to more vulnerable children, such as migrant children, refugee and asylum seeking children, unaccompanied children'.⁴⁰ With regard to children affected by migration, both supranational bodies have issued further policy documents in which the importance of child-friendly justice is highlighted. The European Commission stated that access to information, legal representation and guardianship, the right to be heard and the right to an

³² UN General Assembly, Transforming our world: The 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015.

³³ Optional Protocol to the Convention on the Rights of the Child on a communications procedure 2011, GA Res 66/138 (2014).

³⁴ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Res 2005/20 at para 9. This has been further formalised in the Guidelines (at para 29(d) by the following statement: '[u]se child-sensitive procedures, including interview rooms designed for children, interdisciplinary services for child victims integrated in the same location, modified court environments that take child witnesses into consideration, recesses during a child's testimony, hearings scheduled at times of day appropriate to the age and maturity of the child, an appropriate notification system to ensure the child goes to court only when necessary and other appropriate measures to facilitate the child's testimony'.

³⁵ UN Committee on the Rights of the Child, *supra* n 15 at para 34.

³⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An EU Agenda for the Rights of the Child*, COM(2011) 60 final; Council of Europe, *Strategy for the Rights of the Child (2016-2021)* (2016).

³⁷ Stalford, Cairns and Marshall, 'Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information' (2017) 5(3) *Social Inclusion* 207; Liefwaard, 'Child-Friendly Justice: Protection and Participation of Children in the Justice System' (2016) 88 *Temple Law Review* 905.

³⁸ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies at I, para 3.

³⁹ *Ibid.* at Explanatory Memorandum, para 16.

⁴⁰ *Ibid.* at III.D.2.

effective remedy are key protection measures for children and children need to be informed – in a child-sensitive and age and context appropriate manner – on their rights, on procedures and on services available for their protection.⁴¹ The Council of Europe stresses the importance of access to rights, access to information and child-friendly procedures.⁴²

It can be argued that the concepts of access to justice and child-friendly justice are complementary in upholding the rights of children. The UN High Commissioner for Human Rights has stated that child-sensitive procedures form a prerequisite for effective access to justice for children and that children should be empowered with child-sensitive information in order to have effective access to justice and, consequently, to effective remedies.⁴³ Therefore, access to justice should be understood as a procedural (e.g. access to courts, legal representation) as well as a substantive concept (e.g. financial compensation, reparation). Effective remedies can be obtained through both formal, judicial and administrative procedures as well as informal procedures.⁴⁴ Liefwaard has distinguished three elements of child-friendly access to justice for children : child-friendly information, child participation in proceedings and child-friendly outcomes and remedies.⁴⁵ These elements, complemented by the legal representation of children will be further addressed in the following section.

4. ELEMENTS OF ACCESS TO JUSTICE FOR CHILDREN IN MIGRATION

Children who are affected by migration generally find themselves in a particularly vulnerable position having fled from their homes to a foreign country and being involved in highly complex and politicised asylum and immigration proceedings.⁴⁶ Moreover, asylum and immigration proceedings are often not designed for and adapted to children, taking into account their age and level of maturity.⁴⁷ In this section, three elements will be

⁴¹ European Commission, *Communication from the commission to the European Parliament and Council. The protection of children in migration*, COM(2017) 211 final, at 9 and 14.

⁴² Committee of Ministers, *Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe*, CM(2017) 54-final, at 1-2.

⁴³ UN Human Rights Council, *supra* n 28 at paras 4, 18ff and 21ff.

⁴⁴ Liefwaard, *supra* n 4.

⁴⁵ *Ibid.*

⁴⁶ See, for example, Smyth, *supra* n 19; Smyth, *European Asylum Law and the Rights of the Child* (2014); Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) 32 *Immigration, Asylum and Nationality Law* 258; Lundberg and Lind, 'Technologies of Displacement and Children's Right to Asylum in Sweden' (2017) 18 *Human Rights Review* 189; Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights' (2011) 3(1) *Journal of Human Rights Practice* 49; Lidén and Rusten, 'Asylum, Participation, and the Best Interests of the Child: New Lessons from Norway' (2007) 21 *Children and Society* 273.

⁴⁷ Marku, *Child-Friendly Information for Children in Migration: What Do Children Think?* (2018); Hedlund, 'Constructions of Credibility in Decisions Concerning Unaccompanied Minors' (2017) 13(2) *International Journal of Migration, Health & Social Care* 157; Ottosson and Lundberg, 'People Out of Place: Advocates' Negotiations on Children's Participation in the Asylum Application Process in Sweden' (2013) 27 *International Journal of Law, Policy and the Family* 266; Shamseldin, 'Implementation of the United Nations Convention on the Rights of the Child 1989 in the Care and Protection of Unaccompanied Asylum Seeking Children: Findings from Empirical Research in England, Ireland and Sweden' (2012) 20 *International Journal of Children's Rights* 90; Chase, 'Agency and Silence:

addressed that can contribute to the effective access to justice for refugee and migrant children, namely legal representation, participation and information and effective remedies. The overarching principle is that these elements should be implemented in a child-friendly manner.

A. Legal Representation

As discussed in Section 2, children, although being acknowledged as independent rights holders, by virtue of their age and maturity are not always afforded full legal standing in judicial proceedings. Therefore, the child's representative can be vital if he is to secure access to justice. Liefwaard posits that 'legal representation by parents or others does not need negatively to affect the child's right to access justice'. However, two problems may arise in this situation, namely (1) children are not actually involved in the proceedings, which negatively affects their right to be heard and to participate, and (2) a conflict of interests between the child and his parents may arise, for example, in case parents are the ones who have infringed upon the rights and freedoms of their child.⁴⁸ Both scenarios are often the reality for children, as will be shown below.

In the case of refugee and migrant children, two groups of children should be distinguished : those who are unaccompanied or separated from their parents and those who are accompanied by their parents. For the latter group of children, parents usually apply for asylum for themselves and their underage children and children do not have the capacity to apply for asylum on their own until a certain age, for example, 12 years of age in the Netherlands and 15 years in Greece.⁴⁹ Unaccompanied and separated children can also lack the legal capacity to apply for asylum as a consequence of their young age and the fact that they are not accompanied by a legal parent. In several European Union member states, unaccompanied children cannot independently apply for asylum and they therefore need a legal representative until they are 18 years.⁵⁰ This means that children who apply for asylum are highly dependent upon a legal representative in the asylum application process. In Section 4.B it will be discussed what this means for the participation of children in these proceedings.

Young People Seeking Asylum Alone in the UK' (2010) 40 *British Journal of Social Work* 2050; Kohli, 'The Sound of Silence: Listening to What Unaccompanied Asylum-Seeking Children Say and Do Not Say' (2006) 36 *British Journal of Social Work* 707.

⁴⁸ Liefwaard, *supra* n 4.

⁴⁹ European Agency for Fundamental Rights, *Children's Rights and Justice. Minimum Age Requirements in the EU* (2018); European Agency for Fundamental Rights, '[Mapping Minimum Age Requirements with Respect to the Rights of the Child in the EU. Asylum Applications for Accompanied Children](#)', [last accessed 3 September 2020].

⁵⁰ European Agency for Fundamental Rights, '[Mapping Minimum Age Requirements Concerning the Rights of the Child in the EU. Asylum Applications for Unaccompanied Children](#)' [last accessed 3 September 2020]. See also Rosani, 'Unaccompanied Asylum-Seeking Children as Rights Holders: Theory and Reality in the EU Legal System in the Case of Age Assessment and Applications for International Protection' in Rodrigues et al., (eds), *Safeguarding Children's Rights in Immigration Law* (2020) 41.

The UN High Commissioner already stated in his report in 2013 that children need legal assistance and other services in order to gain access to ‘complex legal systems that are generally designed for adults’.⁵¹ In the case of refugee and migrant children, the fact whether they are unaccompanied or accompanied affects the type of representation they are entitled to. Unaccompanied children should at least be represented by a guardian because their parents are not available to do so.⁵² A guardian is an independent person whose role is to complement the child’s limited legal capacity (due to his age) in their daily life (legal) activities and to safeguard his best interests.⁵³ The CRC Committee notes that a guardian should be appointed as soon as the child has been identified and until the child has either reached the age of majority or has permanently left the country.⁵⁴ Moreover, the CRC Committee recommends that all children, including those who are accompanied by their parents, should be appointed a legal representative to provide representation free of charge at all stages in the proceedings and with whom they can communicate freely.⁵⁵ The legal representative’s functions are ‘limited’ to protecting the rights of the child and to bring forward his opinion to truly represent his interests throughout the legal proceedings.⁵⁶

Under EU law, states must ensure that unaccompanied minors are appointed a representative who can assist them in benefiting from the rights under the Directive and to comply with the Directive’s obligations.⁵⁷ In particular, a representative should assist and represent the unaccompanied child, ensure the best interests of the child in the procedure and exercise legal capacity when necessary.⁵⁸ During all phases of a formal asylum procedure a qualified representative should be available free of charge.⁵⁹ The representative should be given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the personal interview and how to prepare himself for the

⁵¹ UN Human Rights Council, *supra* n 28 at para. 40.

⁵² European Union Agency for Fundamental Rights, *Guardianship systems for children deprived of parental care in the European Union* (2015).

⁵³ UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, 1 September 2005, at paras 37 and 71.

⁵⁴ *Ibid.* at para 33.

⁵⁵ Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, at para 17(f); UN Committee on the Rights of the Child, *supra* n 53 at paras 21, 36, 69. See also the Guidelines on child-friendly justice, *supra* n 38 at IV. D, paras 37-43.

⁵⁶ Kilkelly et al., [Promoting child-friendly approaches in the area of migration: Standards, guidance and current practices \(2019\)](#) [last accessed 6 October 2020]; Vandekerckhove and O'Brien, ‘Child-Friendly Justice: Turning Law into Reality’ (2013) 14(4) *ERA Forum* 523.

⁵⁷ Article 25(1)(a) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ/L 180/60 (‘Directive 2013/32/EU’).

⁵⁸ Article 2(n) Directive 2013/32/EU.

⁵⁹ Articles 7(3), 19, 20 and 21 Directive 2013/32/EU. See also Article 31 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ/L 337/9-337/26.

interview, and must be able to attend the interview and have the opportunity to ask questions or make comments.⁶⁰ This representative, however, is not necessarily a lawyer, because, as a minimum, asylum applicants have to be provided with free legal assistance and representation in appeals procedures.⁶¹ For accompanied children, no legal representative is provided for in EU law and it is assumed that parents serve this role.

B. Participation and Information

i. The Right to be Heard

The CRC Committee firmly states that children should be provided with access to asylum proceedings in a child-sensitive and age-appropriate manner.⁶² In accordance with Article 12(2) of the CRC, children have the right to express their views on all aspects of the asylum and immigration proceedings.⁶³ This has been specifically emphasised by the CRC Committee which has recognised the particular vulnerability of refugee and migrant children, justifying the urgency to ‘fully implement their right to express their views on all aspects of their immigration and asylum proceedings’.⁶⁴ The child must have the opportunity to present his reasons that lead to the asylum application⁶⁵ and the CRC Committee states that ‘[c]hildren should be heard independently of their parents, and their individual circumstances should be included in the consideration of the family’s cases’.⁶⁶

In relation to accompanied children, the CRC Committee stresses that ‘[s]tates parties should take all appropriate measures aimed at ensuring children’s right to be heard in the immigration procedures concerning their parents, in particular where the decision could affect the children’s rights, such as the right to not be separated from their parents’.⁶⁷ Moreover, it should be taken into account that some information children provide is not (always) integrally accurate or real due to the communication difficulties they may have.⁶⁸ This is why different child-friendly methods and tools that are not intimidating, should be used when interviewing refugee and migrant children, like drawing, role-playing, and singing to elicit their feelings, needs and wishes.⁶⁹

⁶⁰ Articles 25(1)(a)-(b) Directive 2013/32/EU.

⁶¹ Article 20(1) Directive 2013/32/EU.

⁶² UN Committee on the Rights of the Child, Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, para 35.

⁶³ *Ibid.* at para 37. See Article 12(2) CRC.

⁶⁴ UN Committee on the Rights of the Child, *supra* n 15 at paras 123-124.

⁶⁵ UN Committee on the Rights of the Child, *ibid.* at para 123.

⁶⁶ UN Committee on the Rights of the Child, *supra* n 62 at para 37.

⁶⁷ *Ibid.* at para. 38. See also Crock, *supra* n 20.

⁶⁸ UNHCR, Guidelines on international protection: Child Asylum claims under Articles 1(A) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Statutes of Refugees, HCR/GIP/09/08, 22 December 2009 at para 71.

⁶⁹ Macdonald, ‘Hearing Children’s Voices? Including Children’s Perspectives on their Experiences of Domestic Violence in Welfare Reports Prepared for the English Courts in Private Family Law Proceedings’ (2017) 65 *Child Abuse & Neglect* 1–13; Clark and Moss, *Listening to Young Children: The Mosaic Approach*, 2nd edn (2011).

At the European level, EU countries have established common procedural standards regarding asylum procedures in order to guarantee fair and efficient proceedings.⁷⁰ These procedural guarantees include an initial interview, a written and reasoned decision by a qualified person, the right to appeal, the right to legal aid, the right to have a representative appointed for unaccompanied minors, and the right to be informed in a language the applicant understands.⁷¹ The jurisprudence developed by the Court of Justice of the European Union (CJEU) is of relevance for refugee and migrant children's access to justice as well. The CJEU has emphasised the paramount importance of the best interests of the child for any (migration) decision involving a child.⁷² In addition, the CJEU has stated that the right to be heard as provided by Article 24 of the Charter of the European Union⁷³ does not constitute an absolute right, but an opportunity for children to express their views freely and for their views to be taken into consideration. The main argument of the CJEU was that in some circumstances it is not in the best interests of the child concerned to be heard, leaving a degree of discretion to domestic courts.⁷⁴

The European Court of Human Rights (ECtHR or 'the Court') has developed the notion of due process rights by articulating procedural safeguards based on Article 3 (the prohibition of torture), read in conjunction with Article 13 (right to an effective remedy). It has emphasised, for example, the necessity to conduct an individualised assessment for each child following a personal hearing and the right to appeal a decision.⁷⁵ Additional protocols reinforce the provisions enshrined in the Convention itself. These are Protocol 7,⁷⁶ which establishes procedural safeguards regarding the expulsion of aliens lawfully resident, and Protocol 4,⁷⁷ which prescribes the collective expulsion of aliens and promotes the idea that expulsions can only be implemented after an objective and reasonable scrutiny of the particular situation of each individual migrant.⁷⁸ Moreover, the ECtHR has recognised the child's right to be heard through Article 8 ECHR (the right to respect for family life).⁷⁹ The Court has expressed the necessity for children involved in proceedings to be sufficiently

⁷⁰ Directive 2013/32/EU.

⁷¹ See Terlouw, 'Access to Justice for Asylum Seekers: Is the Right to Seek and Enjoy Asylum Only Black Letter Law', in Grütters et al., *Migration on the Move: Essays on the Dynamics of Migration* (2017) 243-263; Smyth, supra n 19.

⁷² C-356/11 and C-357/11 *O, S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* 6 December 2012.

⁷³ Charter of Fundamental Rights of the European Union [2012] OJ C 326.

⁷⁴ C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* 22 December 2010.

⁷⁵ Mole and Meredith, *Asylum and the European Convention on Human Rights. Human Rights Files No. 9* (Council of Europe, 2010); Smyth, supra n 19.

⁷⁶ Article 1 Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1984, ETS 117.

⁷⁷ Article 4 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 1963, ETS 46.

⁷⁸ Smyth, supra n 19.

⁷⁹ Liefwaard and Kilkelly, 'Child-Friendly Justice: Past, Present and Future' in Goldson (ed.), *Juvenile Justice in Europe. Past, Present and Future* (2018) 57.

involved in the decision-making process.⁸⁰ However, the Court has ruled that there is no absolute obligation to hear children as the decision to do so depends on the circumstances of the case.⁸¹ When the child is heard, it is essential for him to be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings, including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition.⁸²

In addition, no legal prescription regarding the age at which children should be consulted exists at the international level. The CRC provides in Article 5 that the age, maturity and the evolving capacities of the child should be taken into due consideration in the exercise of their rights. Evidence exists that every child, even when very young, can express his views if consulted in a child-friendly environment, adapted to his needs, age, maturity and evolving capacities.⁸³ However, in practice, different age limits are applied to hearing children in asylum proceedings, both for unaccompanied as well as accompanied children. In ten EU member states specific minimum age limits are laid down for hearing children in asylum cases, ranging from six to 18 years. In nine other member states, courts decide on an *ad hoc* basis whether or not to provide children with the opportunity to be heard.⁸⁴ In the Netherlands, for example, unaccompanied children from the age of six are heard, in a child-friendly interview room and by a specialist immigration officer. Accompanied children are in principle always heard from the age of 15 years, at which age they are required to file their own asylum application.⁸⁵

ii. The Right to Information

In the international and European legal framework a connection can be observed between the right to be heard and to participate and the right to receive information (Articles 17 and 42 CRC).⁸⁶ The CRC Committee states that refugee and migrant children must ‘be fully informed throughout the entire procedure, together with their guardian and legal adviser, including information on their rights and all relevant information that could affect them’.⁸⁷ Moreover, the information should be adapted to the level of maturity and understanding of the child.⁸⁸ Refugee and migrant children should receive all necessary and relevant information, as early as possible and continuously throughout the asylum procedure, in

⁸⁰ *M. and M. v Croatia* Application No 10161/13, Merits and Just Satisfaction, 3 September 2015.

⁸¹ *Jucius and Juciuviene v Lithuania* Application No 14414/03, Merits and Just Satisfaction, 25 February 2009; *Sahin v Germany* Application No 30943/96, Merits and Just Satisfaction, 8 July 2003 [Grand Chamber].

⁸² *S.C. v the United Kingdom* Application No 60958/00, Merits and Just Satisfaction, 10 November 2004, at para. 28.

⁸³ Rap and Florescu, ‘Do the views of the child matter? Het horen van jonge kinderen in de internationale kinderontvoeringsprocedure en de asielpprocedure in Nederland’ in Punselie et al. (eds), *De invloed van 30 jaar Kinderrechtenverdrag in Nederland: Perspectieven voor de rechtspraktijk* (2020) 157.

⁸⁴ European Agency for Fundamental Rights, supra n 49.

⁸⁵ Parliamentary Papers II 2003/04, 19637/824 at 14.

⁸⁶ UN Committee on the Rights of the Child, supra n 15 at para 25.

⁸⁷ UN Committee on the Rights of the Child, supra n 55 at para 17(j).

⁸⁸ UN Committee on the Rights of the Child, supra n 53 at para 25.

order for them to understand their situation, the migration process, the content and scope of their entitlement, the way to enforce their rights, to make informed decisions in line with their best interests and to meaningfully engage in the decision-making process.⁸⁹ They should be informed about their rights and the asylum and immigration proceedings in a language they understand and should have access to adequate interpretation.⁹⁰ Explanations should be given of what is expected of the child (where and when he is allowed to give his opinion, how this will be asked and in what setting) and on the content of the case concerned, the possible decisions that can be taken and the consequences of those decisions.⁹¹ Again, receiving such information largely depends upon whether the child is unaccompanied or accompanied by parents. In the latter case, children mostly depend on their parents for receiving adequate information on the proceedings and a (legal) professional is not necessarily available for them to ask questions.⁹²

C. Effective Remedies

As was explained above, access to justice for children should result in child-friendly outcomes and remedies. The CRC Committee reiterates that refugee and migrant children have the right to access administrative bodies and courts that decide on their case, as well as their guaranties and remedies.⁹³ Children ‘should have access to administrative and judicial remedies against decisions affecting their own situation or that of their parents, to guarantee that all decisions are taken in their best interests’.⁹⁴ Moreover, it requires asylum and immigration proceedings to be effective, child-friendly and adapted to the needs and interests of each child.⁹⁵ The UNHCR has recommended that children should be informed about the decisions that are taken ‘in person, in the presence of their guardian, legal representative, and/or other support person, in a supportive and non-threatening environment’.⁹⁶ In the case of a negative decision, particular care should be taken in communicating the message and explaining what the next steps are that can be taken in the procedure.⁹⁷ In addition, refugee and migrant children should be kept aware of any decision concerning them and should have the right of appeal. Therefore, complaint mechanisms

⁸⁹ UN Committee on the Rights of the Child, supra n 15 at para 134(a); UN Committee on the Rights of the Child, supra n 62 at para 35.

⁹⁰ UN Committee on the Rights of the Child, supra n 53 at para 36; UN Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration, 28 September 2012, at paras 30 and 75.

⁹¹ UN Committee on the Rights of the Child, supra n 15 at paras 25, 45; Guidelines on Child-friendly justice, supra n 39 at IV, A.1(a); UNHCR, supra n 68, para 77.

⁹² Rap, ‘The Right to Information of (Un)Accompanied Refugee Children: Improving Refugee Children’s Legal Position, Fundamental Rights’ Implementation and Emotional Well-being in the Netherlands’ (2020) 28(2) *International Journal of Children’s Rights* 322.

⁹³ UN Committee on the Rights of the Child, supra n 62 at paras 14-19.

⁹⁴ Ibid. at para 15.

⁹⁵ UN High Commissioner for Human Rights, supra n 28 at para 4. See also UN Committee on the Rights of the Child, supra n 15 at paras 41-46.

⁹⁶ UNHCR, supra n 68 at para 77.

⁹⁷ Ibid.

should be accessible to children and adapted to them, meaning that they should be represented and informed about the procedure.⁹⁸

At the international level, children have been given another avenue to access justice and to be granted effective remedies through the adoption of the Third Optional Protocol to the CRC. Liefwaard argues that ‘the adoption of this optional protocol has confirmed that a child has the right to an effective remedy, falling within the concept of access to justice’.⁹⁹ Until now, the CRC Committee has dealt with several cases concerning children involved in immigration procedures. For example, it decided that in any decision involving refugee and migrant children, the best interests of the child are of paramount importance and must be the cornerstone of the decision.¹⁰⁰ Moreover, it also considered that Article 12 was breached by the national authorities because the child concerned had not been given the opportunity to express his views in the proceedings.¹⁰¹ In this particular case the CRC Committee urged the state party, Belgium, to reconsider the applicant’s application for a visa, while ensuring that the best interests of the child are a primary consideration and that C.E.’s views were heard. Recently, the CRC Committee stated in its first ‘Follow-up Progress Report on Individual Communications’ that the state party has taken satisfactory measures and the Committee has closed the follow-up procedure in this case.¹⁰² Through this progress report insight is provided on the manner in which the CRC Committee follows up on its decisions and the extent to which the remedies are effectively implemented by states. The CRC Committee applies assessment criteria through which it ranks the compliance of states with the decisions from A to D.¹⁰³

At the European level, the ECtHR has played a crucial role in further defining in its case law the right of refugee and migrant children to access justice and effective remedies.¹⁰⁴ The European Convention on Human Rights recognises the right to an effective remedy in Article 13. The Court has expressly recognised and has called on member states to respect the right to effective remedies for children as well.¹⁰⁵ In its recent case law, it establishes an interesting connection between access to justice and access to effective remedies, and

⁹⁸ Kilkelly et al., supra n 56.

⁹⁹ Liefwaard, supra n 4 at 200.

¹⁰⁰ *C.E. v. Belgium*, 27 September 2018, CRC/C/79/D/12/2017.

¹⁰¹ Ibid. paras 8(6) – 8(9).

¹⁰² UN Committee on the Rights of the Child, Follow-up progress report on individual communications, CRC/C/82/1, 4 October 2019. See also: Liefwaard, [‘First follow-up progress report on individual communications’](#), *Leiden Children’s Rights Observatory*, 1 July 2020 [last accessed 4 September 2020].

¹⁰³ Ibid. ‘A: Compliance: Measures taken are satisfactory or largely satisfactory; B: Partial compliance: Measures taken are partially satisfactory, but additional information or action is required; C: Non-compliance: Reply received but measures taken are not satisfactory or do not implement the Views or are irrelevant to the Views; D: No reply: No cooperation or no reply received’ at 1.

¹⁰⁴ It is also of interest to note that children are included among the persons being able to lodge an application before the ECtHR and that their age cannot be used as an obstacle to this. See: Leskoviku, and Prençe, ‘Access to Justice for Children: An Evolving Concept’ (2015) 6(3) *Mediterranean Journal of Social Sciences* 103.

¹⁰⁵ *Popov v France* Applications Nos 39472/07 and 39474/07, Merits and Just Satisfaction, 19 January 2012, at paras 113; 122-124.

receiving adequate information on the asylum procedure.¹⁰⁶ In the case *Rahimi v Greece* for example, the applicant, an unaccompanied minor seeking asylum, complained *inter alia* that he did not receive adequate information on the reasons for his arrest and placement in detention in Greece (Articles 5(1), 5(2) and 5(4) ECHR) or of any available remedies in that regard (Article 13 ECHR). The ECtHR found that the information brochure referring to the available remedies in Arabic was incomprehensible to him as he was a native Farsi speaker, that the brochure did not contain information on the complaint procedure to be followed and that he had been unable to contact a lawyer. The Court, therefore, concluded that even though remedies could have been effective, the applicant could not have access to them because of this lack of information and legal assistance.

Furthermore, in the cases of *Abdullahi Elmi and Aweys Abubakar v Malta*,¹⁰⁷ concerning the immigration detention of two minors from Somalia in Malta, the lack of procedural safeguards and access to information also played an important role. The two applicants were detained upon arrival in Malta and were given a Return Decision and Removal Order in English. The applicants claimed that they received limited information at the initial stages of the asylum procedure, *inter alia*, about the age assessment procedure, and they did not understand the written information in Arabic. Both applicants claimed that they also did not understand English and that the contents of the decisions were not explained to them. According to the Maltese government the right to appeal was explained verbally and migrants translate for each other in that case. The Court, however, concluded that the lack of support and information must have exacerbated the fears of the two applicants, that they lacked procedural safeguards and were not provided with adequate information to challenge the lawfulness of their detention and seek remedies. Accordingly, violations were found of Articles 3, 5(1) and 5(4) ECHR.

These cases demonstrate that the right to information and the right to legal representation play a crucial role in obtaining access to justice and effective remedies. They also show that the age and level of maturity of the applicants exacerbated their vulnerable position and their ability to obtain and comprehend information and, therefore, their access to justice.

At the national level, apart from filing appeals in asylum and immigration proceedings, it is also possible for children to file a complaint to a national human rights institution, such as a children's ombudsman. In the Netherlands, the Children's Ombudsman investigated a complaint filed by a 17-year-old unaccompanied minor, who applied for asylum in the Netherlands, about his treatment by the Dutch immigration authority.¹⁰⁸ The Children's Ombudsman concluded that during the interview no special attention was paid to the fact that the applicant was a child in the way questions were asked. The Ombudsman concluded that interviews with children until the age of 18 years need to be adapted to the level of

¹⁰⁶ *Rahimi v Greece* Application No 8687/08, Merits and Just Satisfaction, 5 April 2011.

¹⁰⁷ *Abdullahi Elmi and Aweys Abubakar v Malta* Applications Nos 25794/13 and 28151/13, Merits and Just Satisfaction, 22 November 2016.

¹⁰⁸ De Kinderombudsman, '[Rapportbrief: Soufian](#)', KOM002/2019, 16 April 2019 [last accessed 5 October 2020].

maturity, capacities and vulnerabilities of the child. Currently, the Dutch immigration authority is in the process of revising and improving its practices regarding interviewing unaccompanied minors.

5. CONCLUDING REMARKS

Access to justice for children closely relates to the notion of the child as a rights holder, a person entitled to fundamental rights and having legal standing to initiate and act in judicial proceedings. With the adoption of the CRC children have officially been acknowledged as rights holders at the international level : they are entitled to fundamental rights and their age, level of maturity and development should be taken into consideration in order to ensure their meaningful involvement in decisions concerning them. Moreover, in this article it is argued that the concepts of access to justice and child-friendly justice are complementary in upholding the rights of children. Child-friendly proceedings are a necessary requirement for children to be able to access justice and obtain effective remedies, hence are complementary and mutually reinforcing.

This also holds true for children involved in asylum and immigration proceedings. However, it can be observed that the complexity of proceedings, the lack of legal knowledge and the fact that proceedings are not child-specific or child-friendly form barriers for refugee and migrant children to access justice. An important factor that needs to be taken into consideration in relation to this group of children, next to their level of maturity, is whether they have travelled alone and are unaccompanied or separated from their parents or whether they form part of a family applying for asylum. This has substantive implications for the three elements of access to justice that have been analysed in this article. First, legal representation is not automatically available for accompanied children, since often their parents apply for asylum. Second, the right to participate and to receive adequate information is not safeguarded for accompanied children, as it is for unaccompanied children. And third, for all refugee and migrant children accessing effective remedies is challenging, because of the abstract nature and complexity of these types of procedures. Again, it has been shown that the availability of legal representation and adequate information are of vital importance in order to gain access to effective remedies. At the international level a progressive perspective is taken by advocating that both accompanied and unaccompanied children should be entitled to the same rights and safeguards. However, in practice this is a far cry from reality.

It is encouraging to observe that in Europe, both at the EU and the Council of Europe, increased attention is given to making the implementation of children's rights a reality, including refugee and migrant children. At the policy level, especially the concept of child-friendly justice is connected to the position of refugee and migrant children in better protecting their rights. However, the restrictions and barriers as described above hamper the possibilities to access justice for (un)accompanied children. It is upon national states, however, to implement policies that are in line with the international standards they have

voluntarily adopted and the case law emanating from the diverse bodies and tribunals, to make children's rights a lived reality for refugee and migrant children.