

What one would expect to see in the Protection Bill 2015 from a child-rights perspective

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Explicit reference to certain rights of the child should be made in the Protection Bill 2015. This paper explains the legal obligation to do so and sets out what rights should feature in the bill.

The legal obligation to refer to certain rights of the child

The obligation to refer explicitly to certain rights of the child in the Protection Bill derives from a number of different sources.

Firstly, Ireland is a state party to the seminal child-rights instrument – the UN Convention on the Rights of the Child, 1989 (CRC). This Convention is binding on Ireland as a matter of international law even if not directly justiciable before the Irish courts. In other words Ireland has undertaken to reflect the rights in the Convention in its domestic law, policy and practice. Key rights in the Convention include the principle of the best interests of the child, the right of the child to be heard and the right of the refugee and asylum seeking child to appropriate protection and assistance.

Secondly, the Protection Bill 2015 must conform to the rights in the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR). At first glance, the rights in the ECHR are not especially child-friendly. However, over the past decade, the ECtHR has developed a practice of interpreting certain substantive Convention rights in the light of the principle of the best interests of the child. Thus, in the seminal case of *Neulinger and Shuruk v Switzerland*, the Court held that ‘there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.’¹ The Courts adopts a rights-

¹ *Neulinger and Shuruk v Switzerland*, Appl. No. 41615/07, Judgment of 6 July 2010, para. 52.

based approach to the best interests principle, interpreting the principle in light of relevant rights of the child as stated in the CRC.

Thirdly, certain rights of the child, including the principle of the best interests of the child and the right of the child to be heard, are restated in Article 24 of the EU Charter of Fundamental Rights, which became legally binding in 2009. All EU secondary legislation and national measures that implement EU law must conform to the rights in the Charter. The Protection Bill 2015, when enacted, will implement the Dublin Regulation (Dublin III), the Asylum Procedures Directive (APD I) and the Qualification Directive (QD I) – instruments which make up Ireland’s commitment to the Common European Asylum System.

Fourthly, the relevant EU secondary legislation itself – Dublin III, the APD I and the QD I, makes reference to certain rights of the child. These rights should be reflected in the domestic implementing legislation. Moreover, the APD I and QD I have recently been recast and the APD II and QD II contain more robust references to the rights of the child. Although Ireland has declined to opt into the recast directives, the enhanced protection they offer to the child arguably reflect the obligations in the Charter and therefore apply to Ireland in any event.

Accordingly, the legal obligation for the Protection Bill 2015 to reflect certain key rights of the child emanates from international human rights law (the CRC), regional human rights law (the ECHR), the EU Constitutional level (in the form of the Charter) and EU secondary legislation (relevant instruments of the CEAS). All this is without prejudice to a possible Constitutional imperative to conform to certain rights of the child.

Key rights of the child that should be reflected in the Protection Bill 2015

It is submitted that four rights, in particular, should be explicitly mentioned in the Protection Bill 2015 viz. the principle of the best interests of the child, the right of the child to make a protection application, the right of the child to be heard, and the right of the child to have his/her rights as a child regarded as protection relevant. The following sections address each of these rights in turn, outlining the source(s) and meaning of the right, what the relevant CEAS instruments have to say on the matter, and a proposal for inclusion in the Protection Bill 2015.

1. The principle of the best interests of the child

The principle of the best interests of the child derives from Article 3(1) of the CRC, which provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or **legislative bodies**, the best interests of the child shall be a primary consideration.

As previously mentioned, the principle is also reflected in Article 24 of the EU Charter of Fundamental Rights and the CEAS instruments. These provisions will be outlined below. However, first, it is important to say a few words about the scope, meaning and weight of this much-misunderstood concept.

The best interests principle has a broad scope, in terms of actions to which the principle applies, actors obligated and beneficiaries. The principle applies ‘in all actions concerning children’. The UN Committee on the Rights of the Child (Com. RC) has interpreted the term ‘concerning’ to encompass not only actions that are explicitly or exclusively directed at children, but also actions that have a direct or indirect impact on children.² This means that all refugee law that is applied to children, and not just the child-specific provisions thereof,

² Com. RC, General Comment No. 14 (2013), *The right of the child to have his or her best interests taken as a primary consideration (art. 3, para.3)*, UN Doc. CRC/C/GC/14, paras 19 & 20.

falls within the scope of the best interests principle. In terms of actors obligated, Article 3(1) enumerates a broad list: 'public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'. This list arguably covers all asylum-related functionaries. In terms of beneficiaries, the wording of Article 3(1) combines the concept of the best interests of the child (singular) with actions relating to children (plural). Clearly, the principle applies each time a decision has to be made concerning an individual child: the various interests of the child have to be assessed and the best interests determined. But the principle also has a collective application. Thus, Com. RC refers to the 'best interests of [...] children as a group or constituency [whereby] all law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle.'³ In the asylum context, this means that refugee law must not only make reference to the best interests principle, but must itself be in the best interests of children. This raises the question of what the best interests concept means.

When it comes to the meaning of the best interests of the child, there can be no grand or universal approaches, since the assessment and determination will depend on the context and circumstances of the individual child. Similarly, when it comes to what is in the best interests of children as a group, much will depend on the particular policy area. However, the meaning of 'best interests' must be guided by relevant rights of the child.⁴ It follows that it is not possible to present a course of action as being in the best interests of the child if it runs counter to a relevant right of the child.⁵ Furthermore, the best interests principle brings a rights-perspective to bear even when the decision at hand does not appear to be based on any right that the child has. Thus, in the asylum context, while the child has no right to be recognised as a refugee solely on the basis of being a child or, it goes without

³ Com. RC, General Comment No. 7 (2005), *Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1 para. 13.

⁴ Thus, the Com. RC has stated that 'assessment and determination [of the child and children's best interests] should be carried out with full respect for the rights contained in the Convention and Optional Protocols.' General Comment No. 14, para. 32.

⁵ According to the Com. RC, 'there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests.' General Comment No. 14, para. 4. For a forceful rejection of the proposition that the best interests of the child could conceivably justify violating a right of the child, see Com. RC, General Comment No. 8 (2006), *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*, UN Doc. CRC/C/GC/8, para 26.

saying, on the basis of the best interests principle *per se*, the best interests principle draws attention to the rights of the child that are relevant to the status-determination context, such as child-specific forms of persecution or the right of the child to be heard.

In short, the principle of the best interests of the child is something of a Trojan Horse of a principle, bringing to bear all the rights of the child that are relevant to the particular context. Linking back to the collective dimension of the best interests principle, the intimate connection between the best interests of the child and the rights of the child effectively means that all asylum law and policy must be ‘proofed’ to ensure that it is consistent with relevant rights of the child, or, put differently, that relevant rights of the child must be integrated into all asylum law and policy. Thus, the Com. RC states that:

[...] ensuring that the best interests of the child are a primary consideration in legislation and policy development [...] demands a continuous process of child-rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child-rights impact evaluation to evaluate the impact of implementation.⁶

Finally, as to the weight attached to the principle, the best interests of the child must be ‘a primary consideration’, although not, notably, the paramount consideration.⁷ The danger in the asylum context is that the State’s interest in immigration control will habitually override the best interests of the child. Here, the Com. RC has provided useful guidance, stating that ‘the child’s interests have high priority and [are] not just one of several considerations. Therefore a larger weight must be attached to what serves the child best [than competing interests].’⁸ Indeed, the Committee has indicted that only rights-based competing interests can be balanced against the best interests of the child, and that ‘non rights-based

⁶ Com. RC, General Comment No. 14, para. 35.

⁷ This contrasts with the wording of the precursor to Article 3(1) CRC, namely, Principle 2 of the 1959 UN Declaration on the Rights of the Child, which referred to the best interests of the child as ‘the paramount consideration’. It also contrasts with other, stronger formulations of the best interests principle in the context of specific rights in the CRC and in other international legal instruments.

⁸ Com. RC, General Comment No. 14, para. 39.

arguments, such as those relating to migration control, cannot override best interests considerations.’⁹

The following are the references to the best interests principle in the CEAS legislation:

Dublin III:

Under a new article titled ‘Guarantees for minors’, the Regulation provides that the best interests of the child shall be a primary consideration for Member States with respect to *all procedures* provided for in the regulation, and an illustrative list is provided of factors to be taken into account in assessing the best interests of the child.

Previously, under Dublin II, the only reference to the principle of the best interests of the child was in the context of one of the criteria in the hierarchy which related to unaccompanied minors with a family member present in another EU Member State. However, the Court of Justice of the EU held in *MA, BT and DA* that the best interests principle applied beyond just this provision.¹⁰ This has implications for the apparent narrow scope of the principle in the APD I and the QD I, outlined below and supports the contention, made earlier, that the APD II and QD II should be the benchmarks in this regard.

APD I:

An article titled ‘Guarantees for unaccompanied minors’ establishes a requirement for Member States to make the best interest of the child a primary consideration when implementing the article.

APD II:

Member States are obliged to make the best interests of the child a primary consideration when implementing not just the article on unaccompanied minors, as previously, but the directive as a whole. Thus the principle applies to all children, not just unaccompanied minors, and to all procedures in the directive.

⁹ Com. RC, General Comment No. 6, para. 86.

¹⁰ *MA, BT and DA*, Case C-648/11, Judgment of 6 June 2013.

QD I:

In a chapter titled 'Content of International Protection', which outlines the rights to which beneficiaries of international protection are entitled, it is stated that the best interest principle must be a primary consideration for Member States when implementing the provisions of the chapter that involve minors.

QD II:

The scope of the best interests provision remains unchanged but some direction on factors to consider in assessing the best interests of the child is located in a recital to the directive.

It is submitted that the Protection Bill 2015 should contain a general statement that the best interests of the child is a primary consideration in the implementation of all provisions of the bill that directly or indirectly affect children.

2. The right of the child to make a protection application

Consistent with the traditional lack of an explicit right to seek asylum in international human rights law, the CRC does not establish any express right of the child to seek asylum. However, Article 22 relating to special measures of protection for refugee and asylum seeking children provides guarantees for children who are (already) seeking asylum, which implies a prior right to seek asylum. Article 22(1) provides:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with the applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The term 'humanitarian instruments' includes the 1951 Convention relating to the Status of Refugees, which establishes the right of the refugee to *non-refoulement* and, implicitly, (since refugee status is declaratory rather than constitutive) a right to seek asylum. The term 'other

international human rights [...] instruments' includes the Convention Against Torture, the ICCPR and the ECHR all of which establish a right of *non-refoulement* in the specific context of torture (and in the case of the latter two also in the context of inhuman and degrading treatment or punishment) that is absolute and not limited to refugees.¹¹ The right of *non-refoulement* in the torture context is reiterated in Article 19 of the EU Charter of Fundamental Rights, and the ECJ held in *Elgafaji* that 'the fundamental right guaranteed under Article 3 ECHR forms part of the general principles of Community law, observance of which is ensured by the Court'.¹²

It is submitted that the link in Article 22(1) CRC between the child who is seeking refugee status and the protection rights in other international human rights or humanitarian instruments establishes that the child has a right to seek asylum, broadly understood as the right to seek some form of protection recognized under international law. This is confirmed in General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, in which the Com. RC stipulates that '[a]sylum-seeking children, including those who are unaccompanied or separated, shall enjoy access to asylum procedures and other complementary mechanisms providing international protection irrespective of their age'.¹³

If the child has a right of access to the procedure, it follows that he/she must have the right to lodge an application for international protection. While this is clearly the position as regards the unaccompanied or separated child, who stands in an unmediated relationship with the asylum procedure, the situation of the *accompanied* child is more ambiguous: is he/she entitled to lodge an independent application or is it enough that his/her claim be subsumed into that of his/her parent?¹⁴ In the case of the former option, the child acquires his/her own status; in the case of the latter, the child derives his/her status from that of his/her parent. In this regard, at least three scenarios can be distinguished: a) the parent is the principal applicant and there are no separate elements relating to the child's risk of persecution or serious harm; b) the child is the principal applicant in that it is the child (not the parent) who is at risk of persecution or serious harm; c) both parent and child are at risk of persecution or serious harm and there are separate elements to their

¹¹ See Article 3, 7 and 3 respectively.

¹² ECJ, *Elgafaji*, Case C-465/07, Judgment of the Court (GC) of 17 February 2009, para. 28.

¹³ Com. RC, General Comment No. 6, (2005), *Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc CRC/GC/2005/6, para. 66.

¹⁴ Or subsumed into both parents' claims.

claims or their claims warrant separate evaluation.¹⁵ Here the wording of Article 22(1) CRC is instructive: the child who is seeking refugee status, whether unaccompanied or *accompanied by his or her parents* must receive *appropriate protection*. Only in the case of scenario a) above is it appropriate to subsume the child's claim into that of his/her parent. It follows that the accompanied child must have the possibility of lodging an independent asylum application or, at the very least, of making separate submissions in the context of his/her parent's claim.¹⁶

In brief, the right of the child to seek asylum is the right of both the unaccompanied or separated child and the accompanied child.

The following are the references to the right of the child to seek international protection in the relevant CEAS instrument, the ADP:

APD I:

Article 6(4) provides that:

Member States may determine in national legislation:

- (a) the cases in which a minor can make an application on his/her own behalf;
- (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 17(1)(a);
- (c) the cases in which the lodging of an application for asylum is deemed to constitute also the lodging of an application for asylum for any unmarried minor.

APD II:

While the provision of APD I that permits Member States to determine in national legislation whether and when a minor can make an application on his/her own behalf is retained in the recast (Article 7(5)), this is supplemented by new Article 7(3), which provides:

Member States *shall* ensure that a minor has the right to make an application for international protection either on his/her own behalf, if he/she has the legal capacity to act

¹⁵ Of course, there may be cases in which the risk of persecution emanates from the parent, underscoring the importance of the option of making a separate claim.

¹⁶ These options are foreseen in, UNHCR, 'Guidelines on International Protection, 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', *HCR/GIP/09/08 (2009)*, para. 9.

in procedures according to the national law of the Member State concerned, or through his/her parents or other adult family members, or an adult responsible for him/her, whether by law or by national practice of the Member State concerned, or through a representative.¹⁷

It is submitted that the Protection Bill should contain a clear statement that all children have the right to lodge an application for international protection directly or through a representative which, in the case of accompanied children, may be the parent(s) if this is appropriate in the circumstances of the case.

3. The right of the child to be heard

Article 12 CRC provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 is restated in Article 24 of the Charter of Fundamental Rights and various dimensions of the right are dealt with in the APD I and II. There are a number of dimensions of the right of the child to be heard in the asylum context. These include the right to a hearing and guarantees relating to the conduct of the hearing. These will be discussed in turn and the position in the APD I and II set out.

The right to a hearing

It follows from Article 12(2) that the child who is capable of forming his/her own views must be provided the opportunity to be heard at all stages of the asylum procedure (i.e. first instance and

¹⁷ Emphasis added.

appeal) and in all aspects of the procedure (e.g. Dublin, admissibility, manifestly unfounded, substantive etc). According to the Com. RC the reference to the child's capacity to form views:

[...] should not be seen as a limitation, but rather as an obligation for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States Parties cannot begin with the assumption that a child is incapable of expressing his or her own views. On the contrary, States Parties should presume that a child has the capacity to form his or her own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.¹⁸

In view of this presumption of capacity, the Committee considers that the imposition of fixed-age thresholds on the right of the child to express his or her views is inappropriate: a presumption of capacity constitutes the point of departure, and this can only be rebutted in the individual case. As regards the meaning of capacity, the Com. RC challenges the predominant adult notion of capacity as being equivalent to a complete understanding of the matter at hand and an ability to express oneself fluently through the medium of language. It is enough that the child has sufficient understanding to be able to have a view on the matter and an ability to communicate his or her view by some means. Thus, the Committee provides that 'full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communicating including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences'.¹⁹ The Committee also draws attention to the importance of Article 12 for children who experience difficulties in making their views heard, such as children with disabilities, migrant children and other children who do not speak the majority language. These children must be facilitated in expressing their views.

The child may express his/her views directly or through a representative. An unaccompanied minor would usually be appointed an independent representative whereas an accompanied minor would usually be represented by his/her parent(s). However, as previously discussed, there may be cases in which an accompanied minor cannot be properly represented by his/her parent(s) for conflict of interest or other reasons. In such cases, it may be necessary to appoint an independent representative to an unaccompanied minor.

¹⁸ Com. RC, General Comment No. 12 (2009), *The right of the child to be heard*, UN Doc. CRC/C/GC/12, para. 20.

¹⁹ Com. RC, General Comment No. 12, para. 21.

The following are the provisions of the APD I and II relating to the right of the child to a hearing.

APD I:

Article 12 (Personal interview) of Chapter II of the APD provides in paragraph 1 that:

Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview.

[...]

Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview.

APD II:

The above provision is unchanged.

It is recommended that the Protection Bill 2015 contain a provision that all children who are capable of forming their own views are entitled to be interviewed, either directly or through a representative.

The conduct of the hearing

Article 12(1) establishes the right of the child with the requisite capacity to express views ‘freely’. In terms of the hearing itself, this right requires that the hearing be conducted in an age-appropriate manner. Thus, the CJEU stated in *Zarraga v Pelz* that the right of the child to be heard in Article 24 of the Charter ‘require[s] the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child’s best interests and the circumstances of each individual case, in order to ensure the effectiveness of [Article 24], and to offer the child *a genuine and effective opportunity to express his or her views*.’²⁰ Similarly, but more concretely, the Com. RC observes that:

²⁰ CJEU, *Zarraga v Pelz*, Case C-491/10, Judgment of 22 December 2010, para. 66 (emphasis added).

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms [and] clothing of judges and lawyers [...].²¹

Indeed, there is a wealth of soft law guidance on how to adapt the status determination interview to the needs of children, which ranges from guidance on the lay-out of hearing rooms to child-friendly questioning.²² On the issue of child-friendly questioning, the Com. RC notes from experience that ‘the situation should have the format of a talk rather than a one-sided examination’,²³ an observation consistent with the findings of research into the interviewing of children for the purposes of refugee status determination.²⁴ However, a balance must be struck between the need for a ‘soft’ approach to interviewing children and the need for a comprehensive hearing. The interviewer must enable the child to be heard by using child-friendly interview techniques, including lines and modes of questioning that are appropriate to the child, while facilitating a full ventilation of the claim by giving the child the opportunity to rebut any presumptions and challenge any negative inferences that are likely to be held against him/her when making the decision. After all,

²¹ Com. RC, General Comment No. 12, para. 34.

²² See generally, UNHCR, ‘Guidelines on International Protection, 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’, *HCR/GIP/09/08 (2009)* (hereinafter, ‘UNHCR Child Guidelines’); Separated Children in Europe Programme, ‘Statement of Good Practice’, 4th revised ed. (2009); UNHCR, ‘Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum’ (1997). More detailed guidance can often be found in administrative guidance or practice instructions to asylum institutions at the national level. See, for example, Canadian Immigration and Refugee Board, ‘Child Refugee Claimants: Procedural and Evidentiary Issues’ (1996); US Department of Justice, Immigration and Naturalisation Service, ‘Guidelines for Children’s Asylum Claims’ (1998) ; Finnish Migration Board, Directorate of Immigration, ‘Guidelines for Interviewing (Separated) Minors’ (2002). For academic commentary on the importance of such guidance, see J. Bhabha and W. Young, ‘Not adults in miniature: Unaccompanied child asylum seekers and the new U.S. guidelines’, *International Journal of Refugee Law* 11, 1999, 84-125.

²³ Com. RC, General Comment No. 12, para. 43.

²⁴ For example, O. Keselman *et al.*, ‘Mediated communication with minors in asylum seeking hearings’, *Journal of Refugee Studies* 21, 2008, 103-116; and more generally, G. Smith, ‘Considerations when interviewing children’, *Children’s Legal Rights Journal* 12, 1991, Special Report 1-7.

the child has a right pursuant to Article 22(1) to ‘appropriate protection’ – something the child is unlikely to get if the claim is not thoroughly explored.

In order that the hearing be conducted in an age-appropriate manner, staff involved in the hearing must be trained and competent to work with children. By now, it should be apparent just how difficult it is to interview children sensitively but thoroughly for the purposes of status determination. It is not something that can be done in the absence of specialized training.²⁵ The need for training is especially pronounced in the case of children who, because of their age, stage of development, disability or psychological state, cannot express themselves easily. Indeed, it is quite likely that the intervention of specialists will be required in respect of such children.²⁶ Thus, in its General Comment No. 12, the Com. RC notes that it is incumbent on States Parties to provide training on Article 12 and its application in practice to all professionals working with, and for, children, including lawyers, judges, police, social workers, psychologists, caregivers, residential and prison officers, civil servants, public officials and asylum officers. The obligation of staff training derives from Article 3(3) CRC, which provides: ‘States Parties shall ensure that the institutions, services and facilities responsible for the care or *protection* of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and *suitability of their staff*, as well as *competent supervision*.’²⁷

The following are the provisions of the APD I and II dealing with the conduct of the hearing:

ADP I

²⁵ The need for specialized training for eligibility officers working with children has been stressed by the Com. RC in a number of concluding observations to EU Member States. For example, in its Concluding Observations to Austria in 2005, the Committee recommended that Austria ‘ensure that all interviews with unaccompanied and separated asylum seeking children are carried out by professionally qualified and trained personnel.’ *UN Doc. CRC/C/15/Add.251 (2005)*, para. 48. Similarly, in its Concluding Observations to Finland in 2000, it recommended ‘that the State Party ensure adequate resources for the training of the officials who receive refugee children, in particular in child interviewing techniques.’ *UN Doc. CRC/C/15/Add.132 (2000)*, para. 52. Training materials on interviewing asylum-seeking children have been developed in a number of different fora. For example, Separated Children in Europe Programme (SCEP), ‘Training Guide’, UNHCR and Save the Children, 2001.

²⁶ See F. Gutierrez, ‘Psychological evaluation of children and families in the immigration context’, *Children’s Legal Rights Journal* 19, 1999, 17-25.

²⁷ Emphasis added.

Article 17 APD (Guarantees for unaccompanied minors) stipulates in paragraph 4 that personal interviews of unaccompanied minors (where they take place) and decisions on the applications of unaccompanied minors must be conducted/taken by a person ‘with the necessary knowledge of the special needs of minors’. No equivalent provision is made in respect of accompanied minors.

ADP II

In the recast, the above-mentioned guarantee for unaccompanied minors subsists unchanged, but some cases child-specific standards are established in relation to staff competence and training, the examination of applications and the personal interview.

Thus, Article 4(3) provides that ‘Member States shall ensure that the personnel of the determining authority are properly trained. To that end, Member States shall provide for relevant training which shall include the elements listed in Article 6(4)(a)-(e) of [the EASO Regulation]. Member States shall also take into account the training established and developed by the European Asylum Support Office.’ Of particular note for our purposes, Article 6(4)(b) of the EASO Regulation provides for training on issues related to the handling of asylum applications from minors and vulnerable persons with specific needs, while sub-paragraph (c) provides for training on interview techniques.²⁸

Article 10 (d) obliges Member States to ensure that ‘the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues such as [...] child-related [...] issues.’

Article 13(3)(e) obliges Member States to ‘ensure that interviews with minors are conducted in a child-appropriate manner.’

It is submitted that the Protection Bill 2015 should contain a provision stating that decision-makers who take decisions in relation to children should have received and continue to receive appropriate procedural and substantive training.

²⁸ Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office.

4. The right of the child to have the rights of the child considered as protection-relevant

The contemporary understanding of ‘persecution’ in the refugee definition and ‘serious harm’ in the definition of subsidiary protection is informed by human rights violations. In other words, human rights law provides a yardstick by which alleged persecution and serious harm can be evaluated. It follows that the rights of the child as enumerated in the CRC are potentially relevant to international protection. The rights in the CRC fall into three basic categories (see typology at the end of this document): civil and political rights, socio-economic rights and child-specific protection rights.²⁹

As regards the first category, some 21 of the rights in the CRC can be classified as civil and political rights. These include such typical civil and political rights as freedom of expression; freedom of thought, conscience and religion; privacy; freedom from arbitrary arrest and detention; and freedom from torture or other cruel, inhuman, degrading treatment or punishment. The fact that all children have these rights confirms not only their civil and political status (which is not always apparent to decision-makers who may have a ‘Western’ idealised view of childhood as apolitical), but also the fact that children suffer egregiously from violations of these rights. Moreover, none of the rights in the CRC is subject to derogation (suspension) in times of public emergency.

As regards the second category, some 16 of the rights in the CRC can be classified as economic, social and cultural rights. Such rights include the right to survival and development (which, together with the right to life, is one of the general principles of the Convention), the right to health (which incorporates an obligation to abolish harmful traditional practices such as female genital mutilation), the right to education and the right to an adequate standard of living. UNHCR stresses the importance of such rights to determining whether the child has an international protection need, stating:

Children’s socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs.

Deprivation of economic, social and cultural rights, thus, may be as relevant to the

²⁹For a broader discussion on this tripartite classification of rights in the CRC, see Ciara Smyth, *European Asylum Law and the Rights of the Child*, Routledge: Oxford and New York, 2014.

assessment of a child's claim as that of civil and political rights. It is important not to automatically attribute greater significance to certain violations than to others but to assess the overall impact of the harm on the individual child.³⁰

As regards the third category, some 23 of the rights in the CRC are most appropriately classified as protection-related rights and are *child-specific*. They include such rights as protection from physical, mental and sexual violence; special protection for the child deprived of family; appropriate protection and humanitarian assistance for the refugee and asylum-seeking child; protection from exploitation and sexual abuse; protection against trafficking; protection against under-age recruitment; and the right to recovery and reintegration of the child victim of, *inter alia*, armed conflict. The subject-matter of these rights (i.e. protection) is particularly relevant to the question of international protection.

It is important that *all* the rights of the child in the CRC be regarded as potentially relevant when determining whether a child has an international protection need. Decision-makers who deal predominantly with adults may not automatically appreciate this.

The QD is the CEAS instrument which speaks to this issue. This is what the QD I (the provisions of the QD II being unchanged on this point) says on the question of children's claims:

QD I

Article 9 QD (Acts of persecution) provides in paragraph 1:

Acts of persecution within the meaning of Article 1(A) of the Geneva Convention must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

³⁰ UNHCR Guidelines on Child Asylum Claims, para. 14.

This provision is important because it links the concept of persecution with human rights and particularly, but not exclusively, with non-derogable rights in the ECHR. Article 9(2) on acts of persecution goes on to state:

Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:

- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (d) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
- (e) acts of a gender-specific or child-specific nature.

While all of the acts as listed are potentially relevant to the claims of children, sub-paragraphs (a) and (e) are of particular interest.

Sub-paragraph (a) covers violence against children (whether physical, mental or sexual). It corresponds to several of the protective rights in the CRC, such as protection against all forms of physical or mental violence, injury or abuse including sexual abuse. It also allows for human trafficking – a contentious issue in the refugee context – to be comprehended as persecution, at least when the victim is a child.³¹ In this regard, UNHCR notes:

The trafficking of a child is a serious violation of a range of fundamental rights and, therefore, constitutes persecution. These rights include the right to life, survival and development, the right to protection from all forms of violence, including sexual exploitation and abuse, and the right to protection from child labour and abduction, sale and trafficking, as specifically provided for by Article 35 of the CRC.³²

³¹ See UNHCR, 'Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked', *HCR/GIP/06/07 (2006)*.

³² UNHCR Guidelines on Child Asylum Claims, para. 26.

Sub-paragraph (e) corresponds, according to the typology advanced earlier, to all the protective rights in the CRC, some of which overlap with economic, social and cultural rights. Furthermore, the reference to gender-specific acts is important because, in the case of the girl-child, there is often an overlap between gender and age in terms of rights violations. The practice of female genital mutilation is a case in point.

It is submitted that the Protection Bill 2015 should contain a statement that the rights of the child as enumerated in the CRC are potentially relevant to evaluating a claim for refugee or subsidiary protection status when the applicant is a child.

Typology of rights in the Convention on the Rights of the Child

| Rights in the CRC | Civil and Political | Economic, Social and Cultural | Protection | Not a right/defies tri-partite classification |
|---|----------------------------|--------------------------------------|---------------------------------|--|
| Art 1 Definition of child | | | | X |
| Art 2 Right to non-discrimination (a general principle of the Convention) | X | X | X | |
| Art 3 Best interests of the child (a general principle of the Convention) | X | X | X | |
| Art 4 Nature of the legal obligation in the CRC | | | | X |
| Art 5 Rights and responsibilities of parents, family etc. | X (right to family life) | | X (responsibilities of parents) | |
| Art 6 Right to life, survival and development (a general principle of the Convention) | X | X | X | |
| Art 7 Name, nationality, right to be cared for by parents | X | | X | |
| Art 8 Preservation of identity, nationality, name, family relations | X | | X | |
| Art 9 Right not to be separated from parents against their will | X | | X | |
| Art 10 Family | X | | X | |

| | | | | |
|--|---|---------------------------------------|--|--|
| reunification | | | | |
| Art 11 Illicit transfer and non-return of children abroad | X | | X | |
| Art 12 Right to be heard (a general principle of the Convention) | X | X | X | |
| Art 13 Freedom of expression | X | | | |
| Art 14 Freedom of thought, conscience and religion | X | | | |
| Art 15 Freedom of association and assembly | X | | | |
| Art 16 Privacy | X | | | |
| Art 17 Mass media | X | | | |
| Art 18 Common responsibilities of parents; appropriate assistance to parents | | X (appropriate assistance to parents) | X (common responsibilities of parents) | |
| Art 19 Protection from all types of violence | | | X | |
| Art 20 Special protection, assistance and alternative care for children deprived of family environment | | | X | |
| Art 21 Adoption | | | X | |
| Art 22 Right of asylum seeking/refugee child to appropriate protection and assistance | X | X | X | |
| Art 23 Rights of the child with disability | X | X | X | |

| | | | | |
|---|---|---|---|--|
| Art 24 Right to health | | X | | |
| Art 25 Care placement for physical or mental health | | X | | |
| Art 26 Right to social security | | X | | |
| Art 27 Right to an adequate standard of living | | X | | |
| Arts 28 & 29 Right to education | | X | | |
| Art 30 Rights of minority children | X | X | | |
| Art 31 Right to rest, leisure, play, recreational activities | | X | | |
| Art 32 Protection from economic exploitation | | X | X | |
| Art 33 Protection from illicit use of narcotic drugs | | | X | |
| Art 34 Protection from exploitation and sexual abuse | | | X | |
| Art 35 & Optional Protocol – Prevention of abduction, sale, traffic in children | | | X | |
| Art 36 Protection from all other forms of exploitation | | | X | |
| Art 37 Prohibition of torture etc | X | | | |
| Art 37 (cont'd) Right to | X | | | |

| | | | | |
|---|-----------|---------------------|-----------|----------|
| liberty and conditions of detention | | | | |
| Art 38 & Optional Protocol – Prohibition of underage recruitment and participation in hostilities | | | X | |
| Art 39 Right to recovery and reintegration of child victim of various forms of ill-treatment | | X (Right to health) | X | |
| Art 40 Juvenile justice | X | | | |
| Art 41 Guarantee clause | | | | X |
| Total number | 21 | 16 | 23 | 3 |