

**UN Committee on the Rights of the Child - 2021 Day of General Discussion**

**‘Children’s Rights and Alternative Care’**

**First Rights, Equal Justice for Migrant Children**

1. Equal Justice for Migrant Children, part of the First Rights programme of Methoria,[[1]](#footnote-1) is a project which aims to promote a model of justice for migrant children by building upon the rights acquired under the UN Convention on the Rights of the Child (CRC). Central to this aim is the need to uphold the principle of the best interests of the child (BIC) by putting children’s rights considerations at the centre of all decision-making processes. Equal Justice for Migrant Children is leading an effort to establish a specialised court for unaccompanied migrant children (UMC) in the UK with the hope that this court will eventually serve all young people, regardless of their protection or immigration status, in relation to all legal questions in their lives.

1. The First Rights Programme was founded by Catriona Jarvis and Syd Bolton and is supported by Ciaran King, Europe Litigation Officer at the AIRE Centre. Catriona Jarvis is a former judge of the United Kingdom Upper Tribunal (Immigration and Asylum Chamber), former children’s lawyer and former teacher. Syd Bolton is a children’s rights lawyer, a qualified (now non-practicing) UK solicitor and former legal and policy advocacy officer. Between them they have lengthy experience in legal practice, judicial and policy work including internationally on refugee and human rights training, research and advocacy, especially in relation to the rights of migrant and refugee women and children as well as more recently the rights of missing and bereaved migrants.[[2]](#footnote-2)
2. This submission is respectfully made by First Rights to assist the Committee on the Rights of the Child (the Committee) in its Day of General Discussion on ‘Children’s Rights and Alternative Care’. First Rights would like to bring to the Committee’s attention the particular needs of UMC[[3]](#footnote-3) and the ways in which the rights and interests of these children are overlooked in alternative care arrangements. While UK based, First Rights emphasises that its submissions apply equally to other States Parties to the CRC. Moreover, First Rights highlights the key view of the Committee that all rights contained under the CRC are indivisible and should be read in conjunction with one another.

**Recognising the vulnerability of UMC in alternative care arrangements**

1. In the UK, the exact number of children in care of local authorities with unresolved issues regarding their immigration status is unknown, however, First Rights posits that UMC are overrepresented in care proceedings.[[4]](#footnote-4) Home Office statisticsshow that just over 7000 children sought asylum in the UK in 2020, including those children who had been separated from their families and applied as unaccompanied children seeking asylum.[[5]](#footnote-5)
2. In these circumstances, First Rights emphasises that UMC are some of the most vulnerable individuals in society and, by nature of their precarious protection status, are at a heightened risk of further abuse. The CRC,[[6]](#footnote-6) the International Covenant on Civil and Political Rights (‘ICCPR’)[[7]](#footnote-7) and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’)[[8]](#footnote-8) all acknowledge the specific vulnerability of children and the extreme vulnerability of unaccompanied children.
3. The European Court of Human Rights (ECtHR) has similarly observed that UMC are in a position of “extreme vulnerability” [[9]](#footnote-9) and without a family or support network may be potential victims of human trafficking and other forms of exploitation. The 2010 UN Guidelines for the Alternative Care of Children provide various standards in relation to the vulnerability of UMC, including the requirement for States to take steps to ensure the care and protection of vulnerable children.[[10]](#footnote-10) The Guidelines further state that UMC should also benefit from the same level of care as national children in the country concerned[[11]](#footnote-11) and that “[p]articular attention needs to be paid to the age, maturity and degree of vulnerability of each child”.[[12]](#footnote-12) **First Rights submits that respect for the enhanced vulnerability of children seeking international protection,[[13]](#footnote-13)as bothchildren *and* as protection seekers, must take precedence over their irregular migration status.[[14]](#footnote-14)**

**Relevant legal standards**

1. The preamble of the CRC makes it clear that the family environment is natural for the growth and well-being of children and, as such, is important for the full and harmonious development of a child’s personality.[[15]](#footnote-15) The rights of the Convention shall also apply to *all* children without discrimination.[[16]](#footnote-16)
2. Article 20(2) CRC provides for alternative care arrangements as a form of special protection and assistance required by children deprived of their family environment.[[17]](#footnote-17) However, any arrangements for alternative care and special protection should focus not only on the logistical measures and steps to be taken to secure adequate care, but also on the steps taken to ensure that *all* children are treated with dignity and respect and that their well-being and views are taken into consideration.[[18]](#footnote-18)
3. First Rights respectfully submits that considerations for the rights of UMC in care arrangements are widely overlooked. As per the views of this Committee, UMC are too often not recognised as children and are consequently accommodated in inappropriate facilities with adults.[[19]](#footnote-19) In *M.B v Spain* the Committeemade clear that the State failed to provide adequate protection, despite the applicant’s request that they be placed in the care of child protection services.[[20]](#footnote-20) Moreover, the State’s failure, *inter alia,* to appoint a guardian to support and defend the interests of the child, constituted a failure of the State and a violation under Article 3 CRC.[[21]](#footnote-21)
4. The ECtHR has similarly ruled on the absence of protection by State authorities in *Khan v France* where it held, with reference to a Contracting Parties’ obligations under Article 3 ECHR as well as the State’s obligations under Article 20 CRC, that a State must take steps to protect and care for UMC. In light of these obligations, the ECtHR noted that the provision of care for a child applicant could be regarded as an automatic obligation imposed on authorities.[[22]](#footnote-22) The absence of such protection provided by the State was found by the ECtHR to have resulted in a child living in an environment manifestly unsuited to their status as a child.[[23]](#footnote-23)
5. In pursuit of this aim, First Rights emphasises that Article 4 CRC requires that States undertake measures for the implementation of rights to the maximum extent of their available resources. CRC General Comment No. 5 notes that States have an obligation to implement the rights of the Convention within their own jurisdiction and to contribute to the global implementation of rights.[[24]](#footnote-24) The underfunding of care arrangements for UMC is particularly problematic in the pursuit of treating all children with dignity and respect. In the UK, several local authority councils have declared that they have ‘reached capacity’ and are unable to take children into care, nor do they have the financial resources to do so.[[25]](#footnote-25) The jurisprudence of the ECtHR similarly makes it clear that the circumvention of relevant safeguards under international law cannot be justified by financial and logistical constraints.[[26]](#footnote-26) **As such, and in accordance with CRC General Comment No. 5,[[27]](#footnote-27)** **First Rights respectfully submits that a lack of resources, financial or otherwise, can hamper the implementation of rights and, in respect of UMC, would fail to adequately ensure their care.**
6. UMC, including those who arrive irregularly in a country, should not, in principle, be deprived of their liberty solely for having breached any law governing access or right to stay within the territory.[[28]](#footnote-28) As soon as an unaccompanied migrant child is identified, States are strongly encouraged to appoint a guardian or, where necessary, a representative responsible for their care and well-being to accompany the child throughout the status determination and decision-making process.[[29]](#footnote-29) As soon as UMC are taken into care, all reasonable efforts should be made to trace their family and re-establish family ties when this is in the BIC and would not endanger those involved.[[30]](#footnote-30)
7. **First Rights respectfully submits that in such circumstances, while not in public care or designated child protection services, UMC are in the *de facto* and *de jure* care of the State. First Rights emphasises the extreme vulnerability of UMC and reiterates that all efforts must be made, from the moment that the presence of a child comes to the attention of the State, or ought to have come to its attention, to ensure their rights, care, and protection are met.**

**Best interests and the right to be heard in alternative care arrangements**

1. For the purposes of this submission, First Rights reiterates the importance of the principle of the BIC (Article 3 CRC; Article 21 CRC); the right of the child to express their views (Article 12 CRC); and the right to provisions of alternative care (Article 20 CRC). The identification of children is a pre-requisite to the enjoyment of rights guaranteed by the CRC and, as such, where there is a doubt as to the age of a child, they should be afforded the benefit of the doubt and continue to benefit from rights guaranteed under the Convention.[[31]](#footnote-31)
2. Article 3(1) CRC is supplemented by CRC General Comment No. 6 which states that any best interests determination requires a clear and comprehensive assessment of the child’s identity as well as their particular vulnerabilities and protection needs.[[32]](#footnote-32) It is observed that CRC General Comment No. 14 states that there is no hierarchy of rights in the Convention and that all rights provided for are in the child's best interests and that no right could be compromised by a negative interpretation of these interests.[[33]](#footnote-33) Article 21 CRC states, in the case of adoption, one possible alternative care arrangement, that the BIC are *the* paramount consideration. This has been further recognised in the jurisprudence of the ECtHR where it held that children have the right to have their best interests assessed and taken as a primary, and in some contexts, paramount consideration.[[34]](#footnote-34)
3. In its Best Interests Guidelines 2021, UNHCR notes that a State has a positive obligation to protect and ensure alternative care for all children where the child’s own family is unable to provide adequate care for the child.[[35]](#footnote-35) Migrant children, just as any other child requiring care from the State, “need to be provided with temporary alternative care that is in their best interests until they are reunited with their family or previous caregiver, or a new permanent solution is identified”*.*[[36]](#footnote-36)
4. In line with UNHCR guidance, First Rights submits that arrangements for family reunification should be the priority when considering the BIC.[[37]](#footnote-37) **It is submitted that decisions taken with regards to the development, potential, and future prospects of children, particularly those concerning arrangements for their care, must be taken within an appropriate timeframe so that they may continue to benefit from the enjoyment of rights guaranteed under the Convention.[[38]](#footnote-38)**
5. First Rights wishes to emphasise the connection between the BIC and the child’s right to have their views heard. The Committee, in its General Comment No.12, has emphasised that adequate measures to guarantee the right to be heard should be implemented in the context of international migration.[[39]](#footnote-39)
6. States should adopt solutions that fulfil the BIC, along with their rights to liberty and family life to allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and their best interests are assessed.[[40]](#footnote-40) When a migrant child is first detected by immigration authorities, child protection or welfare officials should immediately be informed and be in charge of screening the child for protection, shelter and other needs while taking into consideration their best interests as a paramount consideration in all decisions.
7. The UK has signed and ratified the CRC and although this has not been incorporated, either wholly or directly including through its devolved nations, into UK law, the decision of the Supreme Court in the case of *ZH (Tanzania)*, has established that Article 3 CRC requires that in all actions concerning children, including those taken by local authorities, courts or administrative or legislative bodies, the BIC child shall be a primary consideration.[[41]](#footnote-41) In addition, the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to ensure that any action carried out in relation to immigration, asylum or nationality must be discharged having regard to the need to safeguard and promote the welfare of children,[[42]](#footnote-42) including arrangements for the alternative care of UMC.
8. **First Rights submits that UMC should be placed in the national/local alternative care system, rather than be accommodated in the *de facto* care of the State, and preferably in family-type care with members of their own family where possible, or otherwise in community care. These decisions have to be taken within a child-sensitive due process framework, including the child’s right to be heard, to have access to justice and to challenge before a judge any decision that could deprive him or her of liberty, and should take into account the vulnerabilities and needs of the child, including those based on their gender, disability, age, mental health, pregnancy or other conditions.**

**Recommendations**

**First Rights makes the following recommendations for the Committee’s consideration:**

1. **The rights guaranteed under the Convention should be read in conjunction with all other rights and international agreements to which States are party. In respect of alternative care arrangements for UMC, States should take measures to ensure that the rights of the Convention are implemented to the maximum extent of their available resources (Article 4 CRC).**
2. **The extreme vulnerability of UMC must be identified and taken into account in relation to alternative care arrangements, particularly in light of States Parties obligations under Article 2 CRC.**
3. **Pursuant to Article 3 CRC, the BIC should be a primary consideration in all decisions affecting a child’s life. Where this decision is taken in respect of the child’s care, their interests should be *the* paramount consideration (Article 21 CRC). Adequate measures should be taken to ensure that UMC are able to express their views on the outcome of all decisions affecting their lives, including arrangements for their care (Article 12 CRC).**
4. **In light of Article 20 CRC, family reunification should be the priority when this is assessed to be in the child’s best interest. Where family reunification is not immediately possible, First Rights recommends that States take steps to appoint a legal guardian with parental responsibility until definitive care arrangements can be made**.
5. **To the maximum extent possible, UMC should not at any stage be kept in temporary or unresolved situations that would be both contrary to the provisions of the Convention and detrimental to their development.**
6. **There must be effective remedies available to redress rights violations with particular consideration for the interests and views of UMC. First Rights recommends that a specialised court for children, capable of adopting a multi-disciplinary and cooperative approach and which puts the best interests of *all* children at the centre of its decision making, will better guarantee the rights of UMC to access an effective remedy.**
1. UK Registered Charity 1188043 (<http://www.firstrights.net/>). [↑](#footnote-ref-1)
2. In 2012, both made submissions to and participated in the UN Committee on the Rights of the Child General Day Of Discussion in Geneva (on behalf of the Coram Children’s Legal Centre); In 2015 they founded The Last Rights Project and subsequently the charity Methoria to pursue pro bono advocacy work on behalf of missing and bereaved migrants, including children, in particular focusing on international human rights standard setting and best practice advocacy; In 2017 Catriona Jarvis participated in proceedings at the United Nations General Assembly 72nd Session in relation to proposals by the Last Rights Project on the rights of bereaved migrants; In 2018 Catriona Jarvis and Syd Bolton convened a global civil society working group (including INGO and UN participants) on the island of Lesvos, Greece to draft and publish “The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families” a landmark document in an area of developing human rights interest. This submission has been prepared with the assistance of Ciaran King, Europe Litigation Officer at the AIRE Centre and consultant facilitator of the First Rights, Equal Justice for Migrant Children project. [↑](#footnote-ref-2)
3. The term unaccompanied migrant children is intended to be inclusive and reflective of the many unaccompanied children in mixed migration flows in need of alternative care arrangements. As well as children seeking international protection there are also those who have been separated from their family; children who have been trafficked; children who have become stateless; children who have been sent to the UK under private fostering arrangements including those that break down; migrant children who are adopted in the UK or who come to the UK as adoptees or are beneficiaries of special guardianship; children affected by the treatment of those who arrived on the Windrush; children who are looked after or are in the care of local authorities, whose immigration status has not been regularized; children involved in private law family proceedings; and children whose age has been challenged. [↑](#footnote-ref-3)
4. Sukhchandan Kaur, Research in Practice, ‘Immigration and nationality for children in care’, 24 February 2021, available at: <https://bit.ly/3y1jBnL>. [↑](#footnote-ref-4)
5. Asylum Information Database 2020, Update for the United Kingdom, (2021) <https://bit.ly/3jrr2Rc> p. 9-10. [↑](#footnote-ref-5)
6. Articles 2(1), 22(1) and 39, The United Nations Convention on the Rights of the Child (UNCRC). Treaty Series, 1577, 3. [↑](#footnote-ref-6)
7. Article 24, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999. [↑](#footnote-ref-7)
8. Article 10, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993. [↑](#footnote-ref-8)
9. *Rahimi v. Greece,* No. 8687/08 (ECtHR) (5 April 2011), §58. [↑](#footnote-ref-9)
10. United Nations General Assembly, *Guidelines for the Alternative Care of Children*, 18 December 2009, A/RES/64/142, § 9 (b): This includes unaccompanied and separated children, internally displaced and refugee children and children of asylum seeking parents. [↑](#footnote-ref-10)
11. Ibid., §141 [↑](#footnote-ref-11)
12. Ibid., § 92. [↑](#footnote-ref-12)
13. *M.S.S v. Belgium and Greece* [GC]*,* No. 30696/09(ECtHR)(21 January 2011)*,* § 232. [↑](#footnote-ref-13)
14. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium,* No. 13178/03 (ECtHR) (12 October 2006), § 55. [↑](#footnote-ref-14)
15. UNCRC, preamble § 5 and § 6. [↑](#footnote-ref-15)
16. Article 2 (1) and (2), UNCRC. [↑](#footnote-ref-16)
17. John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (2019, OUP), p. 743-744. [↑](#footnote-ref-17)
18. Ibid., 756-757. [↑](#footnote-ref-18)
19. *M.B v Spain*, (28 September 2020), CRC/C/85/D/28/2017, §9.16. [↑](#footnote-ref-19)
20. Ibid., § 5.2. [↑](#footnote-ref-20)
21. Ibid., § 9.12-9.14. [↑](#footnote-ref-21)
22. *Khan v France*, No. 12267/16 (ECtHR) (28 February 2019), §44-46.  [↑](#footnote-ref-22)
23. Ibid., § 85. See also: *Sh.D and Others v Greece*, No.14165/16 (ECtHR) (13 June 2019), § 55 and 56. [↑](#footnote-ref-23)
24. UNCRC, General Comment No. 5 on General measures of implementation of the Convention on the Rights of the Child(2003)**,** CRC/GC/2003/527,§ 6 and 7. [↑](#footnote-ref-24)
25. Asylum Information Database 2020, Update for the United Kingdom, (2021) <https://bit.ly/3jrr2Rc> p. 81. [↑](#footnote-ref-25)
26. *Orchowski v. Poland*, No. 17885/04 (ECtHR) (22 October 2009), § 120 & § 153. See also: *N.H and Others v. France,* No. 28820/13 (ECtHR) (2 July 2020*),* § 182. [↑](#footnote-ref-26)
27. See: 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, § 42. [↑](#footnote-ref-27)
28. UNGA, *Guidelines for the Alternative Care of Children*, Op. Cit., § 143. See also: UNCRC, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14. [↑](#footnote-ref-28)
29. Ibid., § 145. [↑](#footnote-ref-29)
30. Ibid., § 146. [↑](#footnote-ref-30)
31. *R.Y.S v Spain*, (4February 2021), CRC/C/86/D/76/2019, § 8.3. [↑](#footnote-ref-31)
32. UNCRC General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (2005), § 20. [↑](#footnote-ref-32)
33. UNCRC General Comment 14, Op. Cit., § 4. [↑](#footnote-ref-33)
34. *Neulinger and Shuruk v. Switzerland*, No. 41615/07 (ECtHR) (6 July 2010), § 135; *Yousef v. Netherlands*, No. 33711/96 (ECtHR) (5 February 2003) § 73; *Wagner and J.M.W.L. v. Luxembourg*, No.76240/01 (ECtHR) (28 September 2007) § 133. [↑](#footnote-ref-34)
35. UNHCR, *Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child,* (2021), p. 137. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Ibid., p. 134. [↑](#footnote-ref-37)
38. ECRE, ‘ECRE/ELENA Legal Note on Ageing Out and Family Reunification’, 2018, p. 4. [↑](#footnote-ref-38)
39. UNCRC General Comment No. 12 on the right of the child to be heard (2009), CRC/C/GC/12, § 123. [↑](#footnote-ref-39)
40. 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, § 11. [↑](#footnote-ref-40)
41. *ZH Tanzania* [2011] UKSC 4, § 33 and 34. [↑](#footnote-ref-41)
42. s.55 Borders, Immigration and Citizenship Act 2009. [↑](#footnote-ref-42)