



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *M.S. v. Slovakia and Ukraine* (Appl. No 17189/11) before the
European Court of Human Rights**

1. Introduction*

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for refugees.¹ Moreover, UNHCR is responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 29 April 2016.

1.2. In this submission, UNHCR briefly addresses the risk of persecution faced by persons associated with the Afghan National Directorate of Security (NDS) as well as their family members, to provide the context in which the decision of the authorities in Slovakia and Ukraine must be situated (part 2). It then addresses the domestic legislative frameworks and practice applicable to the treatment of unaccompanied and separated asylum-seeking children (part 3) before providing UNHCR's interpretation of the relevant international refugee and human rights law standards (part 4).

2. Risk of persecution by the Taliban faced by persons associated with the Afghan NDS and their family members

2.1. At the material time, in March 2011, a significant number of reliable and objective sources were publicly available, which consistently documented the risk of ill-treatment by the Taliban faced by children and family members of persons associated with the Afghan NDS.

2.2. In December 2010, UNHCR published the '*UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*'.³ In these Guidelines, UNHCR reported that there was a systematic and sustained campaign by armed anti-Government groups to target civilians associated with, or perceived as supporting, the Afghan Government or the international community, particularly in areas where such groups were active.⁴ Thus, 'individuals associated with, or perceived as supportive of, the government and the international community, including the international security assistance force (ISAF)' was specifically identified as a category at risk on account of their (imputed) political opinion, meriting a particularly careful examination of their asylum claims,⁵ including those submitted by children.

2.3. The Guidelines also provided that in the south-eastern and central regions of Afghanistan, the number of assassinations and executions allegedly committed by armed anti Government groups in 2010 increased in comparison to 2009. Such targeted attacks rose dramatically in parts of the southern region, particularly in Kandahar, where the Taliban had been conducting a systematic and targeted assassination campaign since the beginning of 2010. An average of 21 assassinations per week (compared to seven per week during the same period in 2009) was recorded from June to mid-September 2010, mostly in the southern and south-eastern regions.⁶

2.4. In UNHCR's view, persons associated with, or perceived as supportive of, the Government and the international

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibid.* para. 8(a).

³ *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December 2010, HCR/EG/AFG/10/04, <http://www.refworld.org/docid/4d0b55c92.html>.

⁴ *Id.*, p. 7.

⁵ *Id.*, p. 3.

⁶ *Id.*, pp. 7-8.

community and forces, including their family members and their children⁷ might therefore have been at risk at the material time on account of their (imputed) political opinion, particularly in areas where armed anti-Government groups were operating or had control.⁸

3. The legislative framework and practice in Slovakia and Ukraine

3.1. The legislative framework and practice in Slovakia⁹

3.1.1. Foreigners who have submitted an asylum application at the border shall have access to the territory of the Slovak Republic.¹⁰ If foreigners entered through the official border crossing points and express their wish to seek asylum or they are apprehended somewhere in the 'green border' and express intention to seek asylum, they are sent to the competent police station for registration of their claims. Subsequently the asylum-seeker is transferred to the Humenne Reception Centre for lodging an asylum application with the Migration Office.¹¹

3.1.2. When an asylum-seeker claims to be an unaccompanied or separated child, he/she is obliged to undergo a medical examination in order to assess his/her age in accordance with Article 49(5) of the Aliens Act unless it is obvious that s/he is a minor. If the alleged child refuses to undergo a medical examination, then he/she is treated as an adult.¹²

3.1.3. Article 80(a) of the Aliens Act requires the Police to notify and hand over the unaccompanied child to the relevant Office of Labour, Social Affairs and Family (LSAF).¹³ Once confirmed as a minor and handed over to the LSAF Office the general district court must appoint a guardian in accordance with Article 16(2) of the Asylum Act.¹⁴ The rights and obligations of the appointed guardian are defined in the Family Act to ensure the best interests of the child.- Subsequently, pursuant to Article 3(1) of the Asylum Act, the guardian or legal representative appointed by the court will lodge the asylum application on behalf of the minor.

3.1.4. Under the Aliens Act, detention of foreigners in Slovakia is applied for the purpose of removal (Article 62(1)). However, pursuant to Article 62(7) such detention shall not apply to a minor.¹⁵

⁷ As the UNHCR *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (hereafter 'Child Guidelines') states, 'dismissing a child's claim based on the assumption that perpetrators would not take a child's views seriously or consider them a real threat could be erroneous.' (Para.11). The Child Guidelines go on to acknowledge that 'children are also more sensitive to acts that target close relatives. Harm inflicted against members of the child's family can support a well-founded fear in the child. For example, a child who has witnessed violence against, or experienced the disappearance or killing of a parent or other person on whom the child depends, may have a well-founded fear of persecution even if the act was not targeted directly against him/her.' (Para 17).

⁸ *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 17 December 2010, HCR/EG/AFG/10/04, p. 7, <http://www.refworld.org/docid/4d0b55c92.html>.

⁹ At the material time (September 2010), the following legislation was in force: Act no. 48/2002 Coll. on Residence of the Aliens (hereafter *the Aliens Act*); Act no. 480/2002 Coll. on Asylum (hereafter *the Asylum Act*); and Act no. 36/2005 Coll. Family Code (hereafter *the Family Act*).

¹⁰ The Aliens Act, Article 7(1).

¹¹ The Asylum Act, Article 3(1). The Aliens Act, Article 63 also obliges the Police to provide foreigners with information on the possibility of contacting non-governmental organisations and UNHCR.

¹² The relevant section provides: "Cudzinec, ktorý o sebe vyhlási, že je maloletý bez sprievodu, je povinný podrobiť sa lekárskeho vyšetreniu na určenie jeho veku; to neplatí, ak je celkom zjavné, že ide o maloletého cudzinca. Ak sa cudzinec odmietne podrobiť lekárskeho vyšetreniu, považuje sa na konanie podľa tohto zákona za plnoletú osobu." Available at: <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/48/20110720?ucinost=23.09.2010>. Unofficial translation: "A foreigner who declares to be an unaccompanied child is obliged to undergo a medical examination in order to assess his/her age. If a foreigner rejects to undergo a medical examination, the Aliens Act provided that he/she would be treated as an adult."

¹³ The relevant section provides: "Policajný útvar oznámi nájdenie a bezodkladne odovzdá maloletého cudzinca na území Slovenskej republiky úradu práce, sociálnych vecí a rodiny, v ktorého územnom obvode sa maloletý cudzinec našiel." Unofficial translation: "The police department shall immediately notify and hand over the minor found on the territory of the Slovak Republic to the relevant Office of Labour, Social Affairs and Family in whose territory the minor was found."

¹⁴ The Asylum Act, Article 3(1). The Aliens Act, Article 63 also obliges the Police to provide foreigners with information on the possibility of contacting non-governmental organisations and UNHCR.

¹⁵ The relevant section provides: "Ustanovenie odseku 1 sa nevzťahuje na maloletého cudzinca, ktorý nemá zákonného zástupcu. Iné zraniteľné osoby možno zaistiť len v nevyhnutnom prípade a na čo najkratší čas." Unofficial translation: "Provision of the section 1 shall not apply in respect of a minor who does not have his/her legal representative. The other vulnerable persons may be detained only where it is necessary and for the shortest period."

3.1.5. In addition to the above national legislation, Slovakia is also bound by the EU Reception Conditions Directive¹⁶ and the Asylum Procedures Directive (hereafter “the APD”)¹⁷ which contains a number of specific safeguards regarding the treatment of unaccompanied and separated children. The APD notably provides that “the best interests of the child shall be a primary consideration for Member States when implementing” those safeguards.

3.1.6. While the Slovak authorities cooperated with UNHCR on the monitoring of border practices, there were reports of serious procedural shortcomings in the border procedures during 2010,¹⁸ such as the unavailability of information on the possibility to seek international protection, the lack of access to legal aid, the lack of proper interpretation into a language understood by the person concerned and the absence of individualized interviews at the border. It was reported that some of the shortcomings stem from the restrictions prescribed in the Asylum Act, namely, that not all the Office of Alien and Border Police (OABP) departments situated along the border were responsible for processing and registering individuals who had expressed their intention of seeking asylum. Shortcomings in skills and appropriate attitude of police officers to identify asylum seekers within the mixed migration flows were also identified. UNHCR communicated these shortcomings directly to the OABP on numerous occasions.

3.2. The legislative framework and practice in Ukraine¹⁹

3.2.1. The 2001 Law on Refugees recognizes and defines ‘children separated from their family’.²⁰ However, this definition does not fully correspond to the definition of unaccompanied and separated children in international law.²¹ Pursuant to Article 1 of the 2001 Law on Refugees, the expression “children separated from their family” does not include children accompanied by relatives other than their previous legal or customary primary caregiver. Furthermore, this incomplete definition contained in the 2001 Law on Refugees was only incorporated later in the Law on Child Protection (governing the general legal regime applicable to children) in 2012.

3.2.2. According to the 2001 Law on Refugees, children separated from their family shall be appointed a legal representative to ensure that the child’s rights and interests are well respected during the asylum procedure. However, these legal representatives do not have specific training and qualifications as they are staff members of the care and guardianship institutions.²² The 2001 Law on Refugees does not provide for any time limits by which such legal representative shall be appointed, which has left a number of children in limbo. In UNHCR’s experience, the delay in appointing a legal representative ranges from three months to two and a half years. In 2011, the Committee on the Rights of the Child, expressed its concerns in 2011, regarding the “restrictions in access to the asylum procedure of unaccompanied and undocumented asylum-seeking children due to the failure of the State party to appoint legal representatives to them.”²³

¹⁶ European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC, <http://www.refworld.org/docid/3ddcfda14.html>.

¹⁷ European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, available at: <http://www.refworld.org/docid/4394203c4.html>

¹⁸ Human Rights Watch, “Buffeted in the Borderland: The treatment of Asylum Seekers and Migrants in Ukraine”, 16 December 2010, <https://www.hrw.org/report/2010/12/16/buffeted-borderland/treatment-asylum-seekers-and-migrants-ukraine>); Border Monitoring Project Ukraine (BMPU), “Access to Protection Denied – Refoulement of Refugees and Minors on the Eastern Borders of the EU – the case of Hungary, Slovakia and Ukraine, 2010, <http://bordermonitoring-ukraine.eu/files/2010/11/refoulement-report.pdf>.

¹⁹ The main law applicable at the material time in 2010 and 2011 in Ukraine was the ‘Law on Refugees’ which was enacted in 2001 (hereafter the “2001 Law on Refugees”), <http://zakon3.rada.gov.ua/laws/show/2557-14>.

²⁰ Pursuant to Article 1 of the Law on Refugees, ‘children separated from their family’ are those who arrive unaccompanied either by both parents, or by their caregivers. It should be noted that this definition did not fully correspond to the definition of unaccompanied or separated children in the international law.

²¹ UN Committee on the Rights of the Child (CRC), *General Comment No. 6 (2005), Treatment of Unaccompanied and Separated Children outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 7-8, <http://www.refworld.org/docid/42dd174b4.html>.

²² Danish Refugee Council, *A Refugee, a Minor, and Alone in Ukraine: Recommendations for improved protection mechanisms*, December 2011, http://unhcr.org.ua/img/uploads/A%20refugee,%20a%20minor%20and%20alone%20in%20Ukraine--%20recommendations_ENG.pdf.

²³ Concluding observations: Ukraine, Committee on the Rights of the Child, 21 April 2011, CRC/C/UKR/CO/3-4, para. 72, <http://www.refworld.org/docid/4dcb87f22.htm>

3.2.3. The responsibilities of the legal representatives are significantly limited. Besides the representation of the child's rights and interests during the asylum procedure, the legal representatives were only responsible, together with the Migration Service, for placing the child into a relevant child institution or family on a temporary basis.²⁴ Neither the 2001 Law on Refugees nor any other regulatory acts provided for competencies other than those mentioned above. In the absence of any regulatory act governing the coordination of the various authorities in charge of assisting and caring for separated children seeking asylum, significant disparities were observed in the treatment of separated children in different regions of Ukraine. As a result, refugee or asylum-seeking separated children were in practice deprived of access to a whole range of services (e.g. accommodation in appropriate facilities, access to education, etc.). The same findings were confirmed by a 2011 research report associated with UNHCR²⁵ and by a 2010 Human Rights Watch (HRW) report.²⁶ In particular, HRW asserted that:

“Unaccompanied children face particular obstacles to access the asylum procedure and receive documentation because they can only file a claim with a legal representative and the authorities in some regions refuse to appoint legal representatives for them. There is only one known case of an unaccompanied child being granted refugee status. Decision-making is slow, and many children become adults before their asylum applications are decided, which works against their claims.

... There are no age assessment guidelines, and some officials contest children's declarations of being underage, registering them as adults instead. Others coerce children into declaring themselves as adults by threatening to keep them in detention otherwise. As a result, some children have been detained for six months. Despite the abysmal treatment these children receive in Ukraine, both Slovakia and Hungary have returned unaccompanied children under their readmission agreements. In practice, they were returned on the same basis as adults, without consideration of their vulnerability and lack of protection in Ukraine. Some returned children alleged ill-treatment, including torture and arbitrary detention by Ukrainian officials.”²⁷

3.2.4. Furthermore, at the material time, according to the 2001 Law on Refugees, the Migration Service could reject the asylum application at the stage of lodging of the application (in cases of identity fraud or repeat applications) or at the stage of processing documents for further deciding on the claim (in cases of manifestly unfounded or repeat applications). No explicit exemption from these provisions was included for unaccompanied and separated children, and so their asylum applications could also be rejected at these two stages. In addition, in practice, some applications by unaccompanied and separated children were not examined on the merits due to improper age assessment or on account of alleged identity fraud. Pursuant to the new Law on Refugees adopted in July 2011,²⁸ asylum claims of unaccompanied and separated children cannot be rejected on admissibility grounds (unlike applications submitted by adults),

3.2.5. The 2001 Law on Refugees also lacks sufficient safeguards regarding the interviewing of separated children. The obligatory participation of a lawyer during the interview with the child was only included into the new Law “On Refugees and People in Need of Complementary or Temporary Protection” in 2011.²⁹ The participation and assistance of a psychologist and/or educator during the interview was not provided for in any legislation or regulatory acts in Ukraine in 2011.

3.2.6. In cases where the age of an unaccompanied or separated child was disputed or lacked supporting documentation, the 2001 Law on Refugees did not provide for any age-assessment procedure.

²⁴ The Law of Ukraine “On Refugees” 2011, Art.9, para 3, <http://zakon3.rada.gov.ua/laws/show/2557-14>

²⁵ UN High Commissioner for Refugees (UNHCR), *Between a rock and a hard place: unaccompanied children seeking asylum in Ukraine.*, October 2011, available at: <http://www.refworld.org/docid/4fe02e042.html>.

²⁶ Human Rights Watch, *Buffeted in the Borderland: The treatment of migrants and asylum seekers in Ukraine*, available at <https://www.hrw.org/report/2010/12/16/buffedted-borderland/treatment-asylum-seekers-and-migrants-ukraine>

²⁷ *Id.*

²⁸ The July 2011 Law of Ukraine On Refugees and Persons in Need of Complementary or Temporary Protection in Ukraine (No. 3671-VI)

²⁹ *Id.*

3.2.7. The readmission agreement³⁰ between Ukraine and the EU, which came into force on 1 January 2010, provides that third country nationals shall be readmitted to Ukraine if they had illegally entered an EU Member State coming directly from the territory of Ukraine. Importantly, however, this agreement is to be implemented without prejudice to EU Member States' and Ukraine's obligations under other international conventions, including the 1951 Convention.³¹ In the implementing Instructions for the readmission agreement,³² Ukrainian agencies implementing a readmission are required to obtain information about whether the individual being readmitted has made any asylum claim in the EU Member State from which he/she is being readmitted and the outcome of this claim. Thus, although a person who has claimed asylum in an EU Member State may still be readmitted to Ukraine, this must be without prejudice to their right to seek asylum.

3.2.8. According to Article 204(1) of the *Code for Administrative Offences*, illegal border crossing is punishable by a fine or administrative arrest of up to 15 days. However, these penalties shall not apply to persons with the intention to seek asylum. According to Article 32 of the Law on Legal Status of Aliens and Stateless Persons,³³ foreigners and stateless persons may be detained for illegal stay in a center for temporary stay of foreigners for the period required to carry out their removal from Ukraine, but not more than 6 months. While in detention, border guards are obliged to provide detainees with written information on their rights, including the right to seek asylum. Detainees also have the right to meet with UNHCR staff and a lawyer.³⁴ However, it is clearly provided that children of foreigners and stateless persons separated from their families shall not be placed in detention, but should be placed in "shelters of juvenile services for minors".³⁵ Children older than 10 years may be placed in detention only if they are in the company of close relatives and consent to the detention.³⁶ However, in practice, UNHCR is aware of numerous cases where unaccompanied and separated children were placed in detention, often due to lack of adequate age assessment, and were also unable to access the asylum procedure while in detention, as detailed below.

3.2.9 During the 2011 research associated with UNHCR, researchers interviewed 21 children and young people, including on conditions in detention centres once arrested attempting to cross the border or readmitted to Ukraine. A number of testimonies from Afghan and Somali children showed a pattern of detention of minors and bureaucratic obstacles to accessing asylum for minors, including lack of legal representation, and subsequent risks of deportation back to their countries of origin.³⁷ The HRW Reports of December 2010 also alleges that persons readmitted, including unaccompanied minors, had been subjected to mistreatment when in detention in Ukraine.³⁸

4. Relevant principles and standards regarding the treatment of unaccompanied children seeking asylum in international and European refugee and human rights law

4.1. Principles of non-refoulement in international refugee law

4.1.1. The right to seek and enjoy asylum is supported by the legal framework including the 1951 Convention and its 1967 Protocol, to which Slovakia and Ukraine are State parties, and derives from Article 14(1) of the Universal Decla-

³⁰ Agreement between the European Community and Ukraine on the Readmission of Persons, ratified by the Law of Ukraine No.116-VI dated 15 January 2008 On the Ratification of the Agreement between the European Community and Ukraine on the Readmission of Persons, http://mfa.gov.ua/mediafiles/sites/ukraine-eu/files/on_the_readmission_of_persons.pdf, ber 2010.

³¹ See Preamble.

³² Instruction on Procedures of Actions by the Agencies of Internal Affairs and Agencies of the State Border Guards for the Implementation of the Provisions of the Agreement between the European Community and Ukraine on the Readmission of Persons, approved through SBGS Order No.552/862 dated 12 Novem

³³ Law No. 3930-XII of 1994 on Legal Status of Foreigners and Stateless People [Ukraine], 4 February 1994, available at: <http://www.refworld.org/docid/44a275ff4.html>.

³⁴ Instruction on procedures of keeping persons administratively detained by the State Border Service of Ukraine for infringement of laws of Ukraine on the state border of Ukraine and those who have allegedly committed crimes, approved by SBGS Administration through Order No. 494 dated 30 June 2004.

³⁵ Model Regulation on Center for temporary stay of foreigners and stateless persons who illegally stay in Ukraine, approved by CoM Resolution #1110 dated 17.07.2003.

³⁶ *Id.*

³⁷ UN High Commissioner for Refugees (UNHCR), *Between a rock and a hard place: unaccompanied children seeking asylum in Ukraine.*, October 2011, available at: <http://www.refworld.org/docid/4fe02e042.html>

³⁸ *Id.*

ration of Human Rights 1948.³⁹ Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as part of customary international law.⁴⁰ Article 33(1) prohibits States from expelling or returning a refugee in any manner whatsoever, to a territory where s/he would be at risk of threats to life or freedom.⁴¹

4.1.2. Importantly, given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature. It follows that the prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.⁴² Accordingly, States are obliged not to return or expel an asylum-seeker pending a final determination of his or her status.

4.1.3. Furthermore, the prohibition on *refoulement* applies not only with respect to return to the country of origin but also with regard to forcible removal to any other – third – country where a person has reason to fear persecution, serious human rights violations or other serious harm, or from where he or she risks being sent to his or her country of origin (indirect or chain *refoulement*).⁴³ Under the obligations of *non-refoulement*, States have a duty to establish, prior to implementing any removal measure, that the person whom they intend to remove from their territory or jurisdiction is not at risk of such harms covered by the prohibition on *refoulement*. If such a risk exists, the State is precluded from forcibly removing the individual concerned.⁴⁴

4.1.4. UNHCR also considers that the removing State must assess, prior to the removal and subject to procedural safeguards, the appropriateness of the removal for each person individually.⁴⁵ In order to be compatible with international law the removing State must ensure that the third country will treat the person in line with internationally accepted standards,⁴⁶ will ensure protection against *refoulement*, and will allow the person to seek and enjoy asylum.⁴⁷ The duty to ensure that conditions in the third country meet these requirements, as held also by the Court in its judgments *Hirsi and others v. Italy* and *M.S.S. v. Belgium and Greece*, rests on the removing State. Even if the third State is a party to

³⁹ Article 14(1) provides that “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

⁴⁰ See: *Hirsi Jamaa and Others v. Italy*, (hereafter *Hirsi Jamaa*) Application No. 27765/09, 23 February 2012, para. 114, <http://www.refworld.org/docid/4f4507942.html>; Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi* p. 42; UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, at para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html>; UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>

⁴¹ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*, 29 March 2011, Application No. 27765/09, para. 4(1)(1), <http://www.refworld.org/docid/4d92d2c22.html>.

⁴² Executive Committee of the High Commissioner’s Programme (ExCom), Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras. 26-31, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

⁴³ UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4.

⁴⁴ *Ibid.*, para. 22.

⁴⁵ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, paras. 3(v) and (vi), <http://www.refworld.org/docid/51af82794.html>.

⁴⁶ *Id.*; See also, ExCom Conclusion No. 8 (XXVIII), 1977; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, <http://www.unhcr.org/refworld/docid/3b36f2fca.html>. ExCom Conclusion No. 85 (XLIX), 1998, para. (aa); ExCom Conclusion No. 58 (XL), 1989, para. (f); UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, <http://www.unhcr.org/refworld/docid/3fe9981e4.html>. UNHCR, *T.I. and the United Kingdom. Submission by the United Nations High Commissioner for Refugees*, 4 February 2000, Application No. 43844/98, para. 14, <http://www.refworld.org/docid/42f7737c4.html>.

⁴⁷ ExCom Conclusion No. 85 (XLIX), 1998, para. (aa).

the 1951 Convention or other relevant human rights instruments, it cannot be assumed that such protections are in place.⁴⁸

4.1.5. While the 1951 Convention does not govern the asylum procedure of all State Parties *per se*, it is accepted that, as a general rule, in order to give effect to their obligations under the 1951 Convention, including the prohibition on *refoulement*, States will need to admit asylum-seekers to their territory and grant them access to fair and efficient procedures, without discrimination.⁴⁹ Furthermore, according to the Executive Committee of the High Commissioner's Programme (ExCom),⁵⁰ the asylum procedures in question entail a number of minimum safeguards.⁵¹

4.1.6. In addition to the above, ExCom has recommended States, UNHCR and other relevant agencies and partners to “develop child and gender-sensitive national asylum procedures, [...] prioritized processing of unaccompanied and separated child asylum-seekers, qualified, free legal or other representation for unaccompanied and separated children, and consider an age and gender-sensitive application of the 1951 Convention”. In this regard, UNHCR has issued Guidelines on Child Asylum Claims offering substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner.

4.2. Principles on Detention in international refugee law

4.2.1. The detention of asylum-seekers is, in the view of UNHCR, inherently undesirable, a measure of last resort, and can only be applied where it has been determined that it is necessary in an individual case and otherwise meets international standards. Children who are seeking asylum should, in principle, not be detained at all.⁵² An ethic of care – not detention – needs to govern all interactions with asylum-seeking children, with the best interests of the child a primary consideration.⁵³

4.2.2. As UNHCR's Detention Guidelines state:

“Detention cannot be justified based solely on the fact that the child is unaccompanied or separated, or on the basis of his or her migration or residence status. Where possible they should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements,

⁴⁸ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(viii), <http://www.refworld.org/docid/51af82794.html>.

⁴⁹ ExCom Conclusion No. 82 (XLVIII) 1997, para. (d) (iii).

⁵⁰ The Executive Committee of the High Commissioner's Programme was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia*, that it is “to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office”. This includes issuing Conclusions on International Protection (often referred to as “ExCom Conclusions”), which address issues in the field of refugee protection and serve as “international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues”. See UNHCR, General Conclusion on International Protection, 13 October 1989, No 55 (XL) - 1989, para. (p). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 98 States are Members of the Executive Committee.

⁵¹ The ExCom recommended in its Conclusion No. 8 (XXVIII) 1977 (para. (e)) that “procedures for the determination of refugee status should satisfy the following basic requirements:

(i) The competent official (e.g. immigration officer or border police officer) to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might fall within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-*refoulement* and to refer such cases to a higher authority;

(ii) The applicant should receive the necessary guidance as to the procedure to be followed;

(iii) There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance;

(iv) The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR;

(v) If the applicant is recognized as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status;

(vi) If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing stem;

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.”

⁵² UNHCR, Detention Guidelines, Guideline 9.2.

⁵³ *Id.*

such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision. A primary objective must be the best interests of the child.⁵⁴

Children who are detained benefit from the same minimum procedural guarantees as adults, but these should be tailored to their particular needs. An independent and qualified guardian as well as a legal adviser should be appointed as soon as possible for all unaccompanied or separated children including those in detention. During detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play, including with other children, which is essential to a child's mental development and will alleviate stress and trauma. All efforts, including prioritisation of asylum processing, should be made to allow for the immediate release of children from detention and their placement in other forms of appropriate accommodation.⁵⁵

4.3. Standards regarding unaccompanied and separated children seeking asylum and age-assessments

4.3.1. The 1989 Convention on the Rights of the Child (hereinafter "CRC") provides a comprehensive framework for the responsibilities of its States Parties to all children within their jurisdiction, including asylum-seeking and refugee children. The CRC sets out a number of principles regarding the protection of children which apply throughout all stages of displacement⁵⁶, including:

- The best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking and refugee children (Article 3 in conjunction with Article 22);
- There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, or on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members (Article 2);
- Each child has a fundamental right to life, survival and development to the maximum extent possible (Article 6);
- Children should be assured the right to express their views freely and their views should be given "due weight" in accordance with the child's age and level of maturity (Article 12);⁵⁷
- Asylum-seeking and refugee children are entitled to receive appropriate protection and humanitarian assistance in line with the CRC and other international instruments (Article 22).

4.3.2. With a view to securing effective access to the rights set out in the CRC and the 1951 Geneva Convention as well as the specific substantive and procedural safeguards highlighted above, it is essential to ensure proper and timely identification of concerned children. It follows that States have a duty to identify children as children, and also whether they are separated or unaccompanied, as soon as their presence in the country becomes known to the authorities.⁵⁸ As the Detention Guidelines acknowledge, ensuring accurate age assessments of asylum-seeking children is a specific challenge in many circumstances, which requires the use of appropriate assessment methods that respect human rights standards.⁵⁹ Inadequate age assessments can lead to the arbitrary detention of children.⁶⁰ It can also lead to

⁵⁴ UNHCR, Detention Guidelines, Guideline 9.2.

⁵⁵ UNHCR, Detention Guidelines, Guideline 9.2.

⁵⁶ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 12-30, <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

⁵⁷ UNHCR, *Best Interests Determination Children – Protection and Care Information Sheet*, June 2007, <http://www.unhcr.org/refworld/docid/46a076922.html>; UNHCR *Guidelines on Determining the Best Interests of the Child*, May 2008, para. 20, <http://www.unhcr.org/refworld/docid/48480c342.html>; UNHCR, *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011, <http://www.unhcr.org/refworld/docid/4e4a57d02.html>; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, paras. 5, 22 December 2009, HCR/GIP/09/08, <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

⁵⁸ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 31(i), <http://www.refworld.org/docid/42dd174b4.html>. See also: ExCom, *Conclusion on Children at Risk*, 5 October 2007, No. 107 (LVIII) - 2007, para. (c), <http://www.unhcr.org/refworld/docid/471897232.htm>.

⁵⁹ UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, <http://www.unhcr.org/refworld/docid/3ae6b3360.html>.

⁶⁰ UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, February 1997, <http://www.refworld.org/docid/3ae6b3360.html>.

the housing of adults with children. Age- and gender-appropriate accommodation needs to be made available.”⁶¹

4.3.3. It is accepted that identification measures to be carried out by States with respect to unaccompanied or separated children may include an age assessment.⁶² However, the following principles and safeguards should be taken into account in carrying out such assessments:⁶³

- i. Age assessments are conducted only in cases when a child’s age is in doubt and need to be part of a comprehensive assessment that takes into account both the physical appearance and the psychological maturity of the child.⁶⁴ This is because no method can determine age definitively. Most experts agree that age assessment is not a determination of chronological age but an estimated guess. Scientific methods currently available, including medical examinations based on dental or wrist bone x-rays, can only *estimate* age. Hence, there will always be a margin of error.⁶⁵
- ii. Where doubts remain about the child’s age after an assessment, the asylum-seeker is to be given the benefit of the doubt and assumed to be a child.⁶⁶
- iii. Age assessment must be carried out in a safe, child- and gender-sensitive manner with due respect for human dignity.⁶⁷
- iv. The child shall be assisted by legal representation throughout the asylum procedure.⁶⁸
- v. Age assessments also need to take into account the ethnic and cultural background of the child.⁶⁹
- vi. A person claiming to be under the age of 18 should be treated as a child and benefit from the rights of a child unless this would be clearly unreasonable. The rationale of this presumption - that *inter alia* flows from the best interests of the child principle - is the need to ensure the rights guaranteed by the CRC and the 1951 Refugee Convention, notably the right to liberty (Art. 37(b), (c) and (d)) and the right to receive appropriate protection and humanitarian assistance (Art. 22).⁷⁰
- vii. In most cases, age can properly be established *via* a personal interview and/or other available documentary evidence. The interview as a basis for the identification of the child is also in line with *the child’s right to express his or her views freely*, as stipulated in Article 12 of the CRC.
- viii. Age assessments are never to be used as a matter of routine. This is particularly the case where the age assessment relies on medical examinations involving invasive techniques.
- ix. Age assessment should not be carried out immediately upon arrival of separated or unaccompanied children in border areas and/or on the territory since time is crucial in building trust and allows for proper recollection and sharing of information about the child’s own story which is useful in establishing his or her age.⁷¹

4.4. Relevant ECtHR’s case law

4.4.1. Drawing from the relevant provisions of the CRC highlighted above, the Court set out a number of important principles and standards regarding unaccompanied or separated children and stated that, “[t]he States’ interest in foiling attempts to circumvent immigration rules must not deprive aliens of the protection afforded by these conventions

⁶¹ UNHCR, Detention Guidelines, Guideline 9.2.

⁶² CRC General Comment No. 6, para 31(i)

⁶³ CRC General Comment No. 6, para 31

⁶⁴ See, CRC General Comment No. 6, Para. 31(i); UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/0 para. 75, (“Child Asylum Claims Guidelines”) <http://www.refworld.org/docid/4b2f4f6d2.html>.

⁶⁵ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012, page 8, available at: <http://www.refworld.org/docid/4ff535f52.html>

⁶⁶ UNHCR, Child Asylum Claims Guidelines, para 75; see also: Recast APD, Article 25(5).

⁶⁷ UNHCR, Child Asylum Claims Guidelines, para. 75

⁶⁸ UNHCR, Child Asylum Claims Guidelines, para. 69; see also: Recast APD, Article 25(1)(a).

⁶⁹ UNHCR, *Safe and Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: <http://www.refworld.org/docid/5423da264.html>.

⁷⁰ Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, p. 12.

⁷¹ *Ibid*, p. 15.

or deprive foreign minors, especially if unaccompanied, of the protection their status warrants.”⁷² The Court went on to recognize that the detention of unaccompanied or separated children in the same conditions as adults was at variance with Article 5(1) ECHR because of the “extremely vulnerable situation” they find themselves in as illegal immigrants in a foreign land.⁷³

4.4.2. This was further confirmed and expanded in its *Rahimi* ruling.⁷⁴ The Court emphasised that, owing to the applicant’s particular situation as an unaccompanied Afghan asylum-seeking minor of 15 years old, he belonged “undoubtedly to the category of the most vulnerable persons of the society” and that the Greek authorities had a positive obligation under Article 3 ECHR to take care of him through adequate measures.⁷⁵ In addition, drawing from Article 19 of the Receptions Conditions Directive and the relevant provisions of the CRC, the Court further recognized a large consensus, including in international law, about the primacy of the best interests of the child.⁷⁶ As a result, in the Court’s view, the authorities’ disregard for such principle in relation to the applicant’s detention and notably their failure to consider any alternative to detention raised doubts about their good faith.⁷⁷

4.4.3. In subsequent judgments, the Court confirmed that the State’s failure to verify that the detention of children, whether accompanied⁷⁸ or not,⁷⁹ was a measure of last resort and to consider less severe alternatives deemed such detention arbitrary in breach of Article 5(1) ECHR.

5. Conclusion

5.1. In light of the above and in keeping with the relevant standards of international and European refugee and human rights law and the Court’s own jurisprudence, UNHCR considers that protection from *refoulement* and access to a fair and efficient asylum procedure, including at the border and in detention, are of paramount importance to unaccompanied and separated children seeking asylum. Furthermore, unaccompanied and separated children seeking asylum are entitled to special protection, including specific procedural safeguards, owing to their particular vulnerability, and their best interest should be a primary consideration, including in having their age assessed. Lastly, UNHCR believes that the general principles relating to detention elaborated above, apply *a fortiori* to children who should in principle not be detained at all.

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⁷² *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 13178/03, Council of Europe: European Court of Human Rights, 12 October 2006, para. 81, <http://www.refworld.org/docid/45d5cef72.html>

⁷³ *Ibid.*, para. 55 and para. 103.

⁷⁴ *Rahimi v. Greece*, 8687/08, Council of Europe: European Court of Human Rights, 5 April 2011, <http://www.refworld.org/docid/4d9c3e482.html>.

⁷⁵ *Ibid.*, para. 87.

⁷⁶ *Idem.*, para. 108.

⁷⁷ *Idem.*, para. 109

⁷⁸ *Popov v. France*, 39472/07 and 39474/07, Council of Europe: European Court of Human Rights, 19 January 2012, para. 119, <http://www.refworld.org/pdfid/4f1990b22.pdf>

⁷⁹ *Yoh-Ekale Mwanje v. Belgium*, 10486/10, Council of Europe: European Court of Human Rights, 20 December 2011, para. 124, <http://www.refworld.org/pdfid/520a18c64.pdf>