

Fundamental rights of refugees, asylum applicants and migrants at the European borders

Council of Europe (CoE) and European Union (EU) Member States have an undeniable sovereign right to control the entry of non-nationals into their territory. While exercising border control, states have a duty to protect the fundamental rights of all people under their jurisdiction, regardless of their nationality and/or legal status. Under EU law, this includes providing access to asylum procedures. In recent weeks, states in Europe have taken measures to protect their borders to address public order, public health, or national security challenges.

This note summarises some key safeguards of European law as they apply at the EU's external borders, bearing in mind that relevant CoE instruments apply to all borders.

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Duty to control European borders

While exercising border control, states have to comply with international and EU law.

These rights and obligations are stemming from the rich body of case law of the European Court of Human Rights (ECtHR). The Court acknowledged that states enjoy an “undeniable sovereign right to control aliens’ entry into [...] their territory”,¹ but it emphasised that they must exercise this right in line with the provisions of the [European Convention on Human Rights \(ECHR\)](#).²

As regards border control, the EU [Schengen Borders Code](#) (Regulation (EU) 2016/399) lays down rules governing border control of people crossing the EU’s external borders:

- Article 5 – external borders may be crossed only at border crossing points and during the fixed opening hours;
- Article 13 – EU countries have to put in place an effective border surveillance system to prevent unauthorised entry;
- Articles 3 – border control measures must be without prejudice to the rights of refugees and other people requesting international protection, in particular as regards the principle of *non-refoulement*;
- Article 4 – EU countries must respect fundamental rights when carrying out border controls.

Use of force to protect the borders

Under the [European Convention on Human Rights \(ECHR\)](#), use of force is allowed only as a last resort, if it is necessary, proportionate and justified to achieve a legitimate aim.

States have an obligation to protect people against loss of life and inhuman or degrading treatment or punishment. This includes disproportionate violence.

Excessive use of force may result in violations of Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the ECHR. It can also lead to violations of the right to life, the right to integrity and the protection from ill-treatment enshrined under the [EU Charter of Fundamental Rights \(EU Charter\)](#).

Whenever Articles 2 and 3 of the ECHR are violated, States must carry out an effective official investigation.³

To be effective, an investigation must be prompt, expeditious and capable of leading to the identification and punishment of those responsible:

- investigation must be thorough and must make a serious attempt to find out what happened;

¹ See, *inter alia*, ECtHR, *Saadi v. United Kingdom* [GC], No. 13229/03, 29 January 2008; ECtHR, *Chahal v. the United Kingdom* [GC], No. 22414/93, 15 November 1996.

² ECtHR, *Amuur v. France* [GC], No. 19776/92, 25 June 1996, para. 41.

³ ECtHR, *Mocanu v. Romania* [GC], No. 10865/09, 17 September 2014, paras. 315-326.

- people responsible for the investigation or carrying it out must be practically independent from those implicated in the events; there must be no hierarchical or institutional connection;
- victims should be able to effectively participate in the investigation and the next of kin of the victim must be involved to the extent necessary to safeguard their legitimate interests.⁴

Checks at border crossing points

Under EU law, to cross the EU external borders, third-country nationals must fulfil the conditions for entry or exit. If entry is refused, authorities must issue a decision stating the precise reasons for the refusal (Article 14 of the [Schengen Borders Code](#), Regulation (EU) 2016/399).

The Schengen Borders Code requires that:

- Article 14 (3) – people refused entry have a right to appeal;
- Article 4 – border control tasks have to be carried out in full respect of human dignity.

This means that checks at border crossing points must be carried out in a way which does not discriminate against a person on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Persons who cross the border unlawfully

Under Article 13 of the [Schengen Borders Code](#) (Regulation (EU) 2016/399), a person who has crossed a border unlawfully, and who has no right to stay on the territory of the Member State concerned, must be apprehended and made subject to return procedures.

When doing so, authorities must respect the requirements of the [Return Directive](#) (2008/115/EC). Member States need to:

- issue an individual written return decision to the person concerned;
- inform them that they will be removed and give them the possibility to present arguments why the return would be in breach of international or European law.

Article 2 (2) (a) of the Return Directive allows Member States not to apply certain provisions to people apprehended in connection with their irregular border crossing. Notwithstanding this exception, every person must receive an individual decision.

In addition, under EU law as well as CoE law, the principle of *non-refoulement* forbids States to send back people who would face persecution or serious harm (see ‘Bars to removal’ below).

⁴ ECtHR, *ibid.*, and *Armani da Silva v. the United Kingdom* [GC], No. 5878/08, 30 March 2016, paras. 229-239.

Bars to removal

Under the [European Convention on Human Rights \(ECHR\)](#), states cannot send back people if their removal would result in breach of their rights guaranteed by Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment).⁵

Article 15 of the ECHR further clarifies that these rights are absolute and cannot be derogated from even in time of emergency.

In some exceptional cases, states also cannot remove people who would suffer from a flagrant breach of Article 5 (right to liberty) or Article 6 (right to a fair trial) of the ECHR in the country of destination.⁶

In addition to the absolute bars to removal, under the [1951 Refugee Convention](#) and under the EU [Qualification Directive](#) (2011/95/EU), refugees and subsidiary protection status holders can only be removed in extremely exceptional situations and only when this does not conflict with the absolute bars deriving from the ECHR.

Procedural safeguards to examine bars to removal

The [European Convention of Human Rights \(ECHR\)](#) (Article 13) requires states to independently and rigorously scrutinise claims, which raise substantive grounds for fearing a real risk of torture, inhuman or degrading treatment or punishment upon return.

Where a person has an “arguable complaint” that his removal would expose him or her to treatment breaching Article 2 (right to life) or Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the ECHR, he or she must have an effective remedy which suspends his or her removal (automatic suspensive effect).⁷

Under EU law, some of the requirements elaborated in the European Court of Human Rights (ECtHR) case law have been included in the [Asylum Procedures Directive](#) (2013/32/EU). The directive sets out very detailed rules on common procedures for granting and withdrawing international protection. It applies to asylum claims made in the territory of EU Member States, including at borders, in territorial waters and in transit zones (Article 3).

For people who do not request international protection, the [Return Directive](#) (2008/115/EC) provides for certain safeguards on the issuance of return decisions.

Access to asylum procedures

Unable to obtain a valid travel document, people seeking asylum often reach the border without valid documents or cross it in an irregular manner. Regardless of where they are detected or apprehended, if people express the wish to seek asylum, they must have access to effective asylum procedures. This includes remedies capable of suspending a removal during the appeals process.

⁵ ECtHR, *Saadi v. Italy* [GC], No. 37201/06, 28 February 2008.

⁶ See an overview of forms of “flagrant denial of justice” in ECtHR, *Harkins v. the United Kingdom (dec.)* [GC], No. 71537/14, 15 June 2017, paras. 62-65.

⁷ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011, paras. 288 and 291,; for an overview of the Court’s case-law as to the requirements under Article 13 taken in conjunction with Articles 2 or 3 in removal cases, see, in particular, *ibid.*, paras. 286-322.

The [European Convention of Human Rights \(ECHR\)](#) does not provide for the right to asylum as such. However, turning away an individual and thereby putting them at risk of torture or other forms of inhuman or degrading treatment or punishment is prohibited by the principle of *non-refoulement*.

To be protected from arbitrary removal, people should have access to fair and efficient asylum procedures and get sufficient information on the relevant procedures in a language they understand, as well as a right to legal advice. The European Court of Human Rights (ECtHR) has also emphasised the importance of interpretation to ensure access to asylum procedures.⁸

[Article 18 of the EU Charter](#) explicitly guarantees the right to asylum.

Under Article 4 of the [Schengen Borders Code](#) (Regulation (EU) 2016/399), border control activities must fully comply with the requirements of the [1951 Refugee Convention](#) and the obligations related to access to international protection, in particular the principle of *non-refoulement*.

Article 6 of the [Asylum Procedures Directive](#) (2013/32/EU) requires Member States to register an asylum application within established deadlines. Under Article 8 of the directive, Member States must provide asylum applicants with information on the possibility to lodge their claims.

The principle of *non-refoulement*

The principle of *non-refoulement* is a cornerstone of international refugee and human rights law.

For refugees, the principle of *non-refoulement* as laid down in Article 33 of the [1951 Refugee Convention](#), prohibits the return of refugees and asylum applicants to countries where they would risk persecution.

For all people, regardless of their legal status, the principle of *non-refoulement* is a core component of the prohibition of torture and cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the 1966 United Nations (UN) [International Covenant on Civil and Political Rights](#) and Article 3 of the 1984 UN [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#).

Such obligations are absolute: they do not allow for any derogation, exception or limitation. The prohibition of *refoulement* applies both at the border and within the territory of a state.⁹

Under the [European Convention of Human Rights \(ECHR\)](#), Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) prohibit

⁸ ECtHR, *M.S.S. v. Belgium and Greece* [GC], No. 30696/09, 21 January 2011; *M.A. and Others v. Lithuania*, No. 59793/17, 11 December 2018.

⁹ Executive Committee of the High Commissioner's Programme, *Conclusion No. 6 (XXVIII) – 1977 [Non-Refoulement]*, 12 October 1977, para. c).

any return of an individual who would face a real risk of treatment contrary to those provisions. States are liable for breaches of their obligations enshrined in the ECHR.¹⁰

The principle of *non-refoulement* is also applicable in the context of non-admission and rejection at the borders.¹¹

When it comes to the EU's fundamental rights regime, the principle of *non-refoulement* also takes centre stage. It is reflected in Article 78 (1) of the Treaty on the Functioning of the EU. Articles 18 and 19 of the EU Charter also encompass the prohibition of *refoulement*, which is further specified in secondary EU law and applies to refugees, asylum applicants and migrants in an irregular situation. Essentially, these provisions mirror international human rights obligations undertaken by EU Member States.

Under Articles 3 and 4 of the [Schengen Borders Code](#) (Regulation (EU) 2016/399), border control has to respect the rights of refugees and people requesting international protection.

Under Article 9 of the [Asylum Procedures Directive](#) (2013/32/EU), asylum applicants can remain in the territory of an EU Member State until a decision is made on their application. Return procedures have to be implemented taking into account the best interests of the child, family life, the state of health of the person concerned and the principle of *non-refoulement* (Article 5 of the [Return Directive](#), 2008/115/EC).

Collective expulsion

Collective expulsion is prohibited under Article 4 of [Protocol No. 4 to the European Convention of Human Rights \(ECHR\)](#), and Article 19 of the [EU Charter](#). Such prohibition applies also at high seas,¹² and in the context of non-admission and rejection at the borders.¹³

The term 'expulsion' refers to any forcible removal of a foreigner from the territory, irrespective of the lawfulness and length of stay, the location of apprehension, the person's status or conduct.¹⁴

An expulsion is characterised as "collective" when there is no reasonable and objective examination of the particular case of each individual within the group. The size of the group expelled is not relevant: even two persons may be sufficient to form a group.¹⁵

The persons concerned must have the opportunity to put forward their arguments to the competent authorities on an individual basis.

¹⁰ ECtHR, *M.A. v. France*, No. 9373/15, 1 February 2018; ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, 11 January 2007, para. 135; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991.

¹¹ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, para. 178.

¹² ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

¹³ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, paras. 185 and 187.

¹⁴ ECtHR, *N.D. and N.T. v. Spain* [GC], Nos. 8675/15 and 8697/15, 13 February 2020, para. 185.

¹⁵ *Ibid.*, paras. 193-194, 202-203.

However, the degree of individual examination of the personal circumstances of each member of the expelled group depends on several factors.

- People must have a genuine and effective possibility of raising arguments against their expulsion.¹⁶
- They must make use of lawful ways to reach the country, if they exist and are effective.
- If they do not make use of such possibility, enter the country in a violent way and do not have an arguable claim under Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the ECHR, they may lose such right.¹⁷

Suspending asylum in case of large numbers of arrivals

Under Article 15 of the [European Convention of Human Rights \(ECHR\)](#), states can derogate from various provisions of the ECHR, but no derogation are possible from Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment). The protection from *refoulement* is an absolute right.

Under EU law, the [Asylum Procedures Directive](#) (2013/32/EU) requires Member States to register and examine all asylum applications.

In 2001, the EU adopted the [Temporary Protection Directive](#) (2001/55/EC) for situations of mass influx of displaced persons. The directive requires a decision by the Council of the EU to be operational, which has not happened by 2020.

In case of a large number of arrivals, Article 6 of the [Asylum Procedures Directive](#) allows to extend the deadlines for registering and examining asylum applicants.

However, authorities are not allowed to deny people the right to seek asylum.

Special measures in case of pandemic

States' sovereign right to manage their borders includes measures to manage risks to public health in case of a pandemic. Under the [Schengen Borders Code](#) (Regulation (EU) 2016/399), such measures must be non-discriminatory and proportionate. In addition, they may not prevent people from seeking protection from persecution or ill-treatment (recital (36) and Articles 3 (b) and 7).

Under Articles 18 and 19 of the [EU Charter](#), Member States have to give access to asylum procedures for people who seek international protection.

Protection needs cannot be set aside while implementing measures to address public health considerations at the borders.

Refusing entry of all asylum applicants, or of those of a particular nationality, does not comply with the right to seek asylum and could lead to a risk of violating the principle of *non-refoulement*.

¹⁶ ECtHR, *Khlaifia and Others v. Italy* [GC], No. 16483/12, 15 December 2016, paras. 237-254.

¹⁸ CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, CPT/Inf(2020)13, 20 March 2020.

Under Article 15 of the [European Convention of Human Rights \(ECHR\)](#), states can derogate from various provisions of the ECHR. Any derogation needs to comply with the law, and be necessary and proportionate to its pursued aim. Any derogation from the principle of *non-refoulement* (Articles 2 and 3 of the ECHR) is invalid.

While acknowledging the clear imperative to take firm actions to combat a pandemic, the [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\)](#) pointed out the absolute nature of the prohibition of torture and inhuman or degrading treatment or punishment. Protective measures must never result in ill-treatment of persons deprived of their liberty. States should continue to guarantee access for monitoring bodies to all places of detention, including places where people are kept in quarantine. All monitoring bodies should however take every precaution to observe the 'do no harm' principle.¹⁸

The [European Social Charter](#) sets out the right to health and provides for the right to medical assistance (Articles 11 and 13), which are applicable to migrants in an irregular situation.¹⁹ States have an obligation to prevent epidemics and provide the means of combatting epidemic diseases.

In case of pandemic, alternative measures such as testing, isolation and quarantine may enable authorities to manage the arrival of asylum applicants in a safe and orderly manner, while respecting the right to asylum and the protection from *refoulement* and providing the necessary healthcare to those in need.

Return to a country where an asylum applicant would be safe

Under the [European Convention of Human Rights \(ECHR\)](#), Member States must not expose a person to a real risk of death penalty, torture or inhuman or degrading treatment or punishment, persecution, or serious violation of other fundamental rights.

This also applies when returning an asylum applicant to a transit country that may be categorised as a "safe third country" but does not itself offer sufficient guarantees against *refoulement*.

The expelling state cannot merely assume that the individual will be treated in the receiving third country in conformity with the ECHR standards. Authorities must carry out a rigorous and up-to-date assessment, notably of the accessibility and functioning of the receiving country's asylum system and the safeguards in practice.²⁰

Under international as well as EU law, a state may refuse to grant asylum to a person who had already found safety in a third country. Articles 36-39 of the [Asylum Procedures Directive \(2013/32/EU\)](#) define the requirements and safeguards. Under Article 36 of the directive, rejecting an applicant because he or she had found protection in a third country must, however, be established after having examined the individual case.

¹⁸ CPT, *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*, CPT/Inf(2020)13, 20 March 2020.

¹⁹ ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 3 November 2004, para. 30.

²⁰ ECtHR, *Ilias and Ahmed v. Hungary* [GC], No. 47287/15, 21 November 2019, paras. 124-141.

Punishment for unlawful crossing of the border

Under Article 31 of the [1951 Refugee Convention](#), States must not sanction refugees who enter without authorisation if they:

- come directly from a territory where their life or freedom was threatened;
- present themselves to the authorities without delay.

Pursuant to Article 5 of the [2000 United Nations Anti-Smuggling Protocol](#), migrants must not become liable to criminal prosecution if they have become victims of smuggling.

Under EU law, criminal sanctions must not undermine the effectiveness of the [Return Directive](#) (2008/115/EC).

According to the Court of Justice of the EU, criminal law sanctions may be applied to irregular migrants subject to return. However, they must not hamper or delay the removal procedure. Therefore, national legislation can permit the imprisonment of persons in return procedures only after the administrative measures envisaged in the Return Directive have been exhausted.²¹

Deprivation of liberty

Under Article 5 (right to liberty and security) of the [European Convention of Human Rights \(ECHR\)](#), detention of migrants and asylum applicants must be based on law, non arbitrary and comply with appropriate safeguards.

Notably, it must be:

- provided for by national law;
- carried out in good faith;
- closely connected to the legitimate aim pursued.

The conditions of detention should be appropriate and the length of the detention should not exceed what is reasonably required.

Proceedings must be carried out with due diligence and there must be a realistic prospect of removal.

According to European Court of Human Rights case law, the specific situation of detained persons and any particular vulnerability (such as health, age, special needs, etc.) may render detention unlawful. If the aim pursued by detention can be achieved by other less coercive measures, detention is not lawful.²²

When children are involved, the authorities must demonstrate that detention is necessary and that other less coercive measures cannot be applied instead. Maintaining family unity

²¹ CJEU, C-61/11, *El Dridi, alias Soufi Karim*, 28 April 2011; CJEU, C-329/11, *Achughbabian v. Prefet du Val-de-Marne*, 6 December; and CJEU, C-430/11, *Criminal proceedings against Md Sagor*, 6 December 2012.

²² ECtHR, *S.D. v. Greece*, No. 53541/07, 11 June 2009, paras. 57-67; *Rahimi v. Greece*, No. 8687/08, 5 April 2011, paras. 102-110; *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011.

does not justify detention: the principle of the best interests of the child requires that alternatives should be considered for the entire family.²³

The extreme vulnerability of children has consequences not only in the context of protection against arbitrariness under Article 5 (1) (f) of the ECHR, but also for Article 3 (prohibition of torture and other forms of ill-treatment) of the ECHR. Even if conditions of detention are appropriate, detaining children might still violate Article 3 of the ECHR.²⁴

Under the EU asylum and return law, detention solely on grounds of seeking asylum, or mere irregular entry or stay is prohibited.

Detention of people seeking international protection and people in return procedures must be:

- necessary and proportionate;
- based on an individual assessment of the circumstances of each case;
- applied only if it has been established that other less coercive measures cannot be implemented instead.

To avoid arbitrary detention, authorities need to meet additional requirements, such as giving reasons for any detention and allowing the detainee to have access to speedy judicial review ([Reception Conditions Directive](#), 2013/33/EU, Articles 8-11 and [Return Directive](#), 2008/115/EC, Articles 15-17).

In addition, asylum and pre-removal detention must be as short as possible. When deprived of their liberty, people must be treated in a humane and dignified manner.

Immigration detention of children must be a measure of last resort, for the shortest period of time and after it has been established that alternative measures cannot be applied effectively.

Unaccompanied children can be detained only in exceptional circumstances.

Persons in a vulnerable situation

Under Article 3 of the [European Convention of Human Rights \(ECHR\)](#), states are required to take adequate measures to provide care and protection to the most vulnerable, such as children, victims of torture, violence or human trafficking, persons with health issues and others in a vulnerable situation.

This includes an obligation to take active steps to detect vulnerabilities at the earliest stage possible through effective vulnerability assessment procedures, and to ensure that individuals are informed about such procedures.²⁵

Under EU law, Member States must take into account the special needs of vulnerable people seeking international protection ([Reception Conditions Directive](#) (2013/33/EU), Article 21) or subject to a return procedure ([Return Directive](#), 2008/115/EC, Article 3 (9)).

²³ ECtHR, *Popov v. France*; *A.B. and Others v. France*; *R.K. and Others v. France*; *Bistieva and Others v. Poland*.

²⁴ ECtHR, *R.M. Others v. France*, No. 33201/11, 12 July 2016.

²⁵ ECtHR, *Rahimi v. Greece*, No. 8687/08, 5 April 2011; *Thimothawes v. Belgium*, No. 39061/11, 4 April 2017; *Abdi Mahamud v. Malta*, No. 56796/13, 3 May 2016.

Under the Reception Conditions Directive, Member States are obliged to assess within a reasonable period of time whether applicants for international protection have special reception needs.

Member States are also required to indicate the nature of such needs and ensure that they are taken into account throughout the duration of an asylum procedure, while adequate support and appropriate monitoring of their situation is provided.

The Return Directive also requires that detailed attention be paid to their particular situation when adopting and implementing a return decision, including in the context of pre-removal detention.

Children

Children are extremely vulnerable and states have the obligation to protect them under Article 3 of the [European Convention of Human Rights \(ECHR\)](#). Such obligations take precedence over any considerations relating to the child's status as an irregular migrant.²⁶

The best interests of the child must always be a primary consideration.²⁷ States thus have to provide special protection and care to children, including putting in place reasonable measures to prevent ill-treatment.²⁸ This means that reception conditions should be appropriate and adapted to the child's age. Children should not be held in places that are "ill-adapted to the presence of children"²⁹ and conditions should "not create for them a situation of stress and anxiety with particularly traumatic consequences".³⁰

The [EU Charter](#) stipulates that the best interests of the child must be a primary consideration in all actions concerning them.

Such obligation is replicated in the EU asylum law and the [Return Directive \(2008/115/EC\)](#). As a general principle, Member States have to take into account the specific situation of children and to ensure an adequate standard of living for the child's physical, mental, spiritual, moral and social development.

Unaccompanied and separated children

Under the [European Convention of Human Rights \(ECHR\)](#), states need to put in place special safeguards for unaccompanied and separated children.³¹

²⁶ ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 55; *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, 19 January 2010, paras. 56-58; *Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012, para. 91.

²⁷ ECtHR, *Rahimi v. Greece*, para. 108; *Popov v. France*, para. 140.

²⁸ ECtHR, *Rahimi v. Greece*, paras. 60 and 62; *Khan v. France*, No. 12267/16, 28 February 2019, para. 73.

²⁹ ECtHR, *Popov v. France*.

³⁰ ECtHR, *Tarakhel v. Switzerland [GC]*, para. 119; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, 12 October 2006, para. 50.

³¹ ECtHR, *Rahimi v. Greece*.

National authorities should identify such children as soon as possible and take measures to ensure they are placed in adequate accommodation. This applies even if the children do not apply for asylum, but intend to do so elsewhere, or to join family members there.³²

A guardian and/or legal representative should also be appointed. Any failure or inaction to provide assistance and accommodation may amount to a degrading treatment under Article 3 of the ECHR.³³

Under EU law, asylum seeking unaccompanied children (which also include separated children, meaning those separated from their parents/guardians but not from other relatives) should be placed in non-custodial settings, with adult relatives, a foster family, or in accommodation centres with special provisions for children ([Reception Conditions Directive](#), 2013/33/EU, Articles 19 (2) and 24 (2)).

In accordance with the EU asylum law, they have to be provided with a representative/guardian as soon as they have applied for asylum.

Under Article 10 of the [Return Directive](#) (2008/115/EC), when removing an unaccompanied child from a Member State's territory, the authorities must be sure that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the state of return.

There is no absolute ban on returning unaccompanied children, but the decision to return must give due consideration to the best interests of the child, with the assistance of appropriate bodies other than the return-enforcing authorities.

³² ECtHR, *Khan v. France, Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, No. 14165/16, 13 June 2019.

³³ ECtHR, *Rahimi v. Greece*, paras. 90-95; *Khan v. France*, paras. 92-95.

Further information:

FRA and ECtHR (2014), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office of the European Union

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