

# Provisions on Child Asylum Seekers in Selected Jurisdictions

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# Provisions on Child Asylum Seekers

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## **I. Introduction**

This report surveys the laws of eight democratic foreign jurisdictions with respect to whether there are special laws concerning children asylum-seekers, particularly unaccompanied children. Covered jurisdictions include the countries of Australia, Canada, France, Germany, Italy, Sweden, and the United Kingdom, as well as the European Union (EU).

As discussed more fully in the jurisdictional surveys, all of the jurisdictions covered in this report have provisions treating asylum-seeking minors differently from asylum-seeking adults. The EU requires Member States to make protecting the best interests of the child a primary consideration when applying asylum law. Member States must provide unaccompanied minor asylees with legal guardians or representatives; must make the health, including mental health, a primary concern; and may detain minors only in exceptional circumstances as a last resort in age-appropriate accommodations. Australian law requires a legal guardian or custodian be appointed for unaccompanied children seeking asylum, and provides that they should be accommodated within the community wherever possible. Canadian law mandates consideration of a child's best interests in immigration matters, and minors are to be detained only as a measure of last resort. In France, unaccompanied alien children may stay in France without a residency permit until they reach eighteen years of age, and France's general law for child protection services applies to them. Germany's asylum law requires protection of the best interests of the child, which entails, among other things, temporary custody and services by the Youth Welfare Services agency of the German state in question. Italy has a specific law for asylum and humanitarian protection of unaccompanied foreign minors that establishes extensive protective measures. Under Swedish permanent law, unaccompanied minors, unlike adults, generally qualify as in need of "other protection" and are eligible for permanent residence permits, as well as significant protections for children; even under a temporary law enacted in response to the 2015 refugee crisis, unaccompanied minors are generally allowed to remain in Sweden until adulthood. In the UK, a specific provision requires the government to safeguard and promote the welfare of children when discharging all functions associated with immigration and asylum.

## II. Jurisdictional Surveys

### Australia

All noncitizens who enter Australia without a valid visa, including child asylum seekers, are subject to mandatory detention under the Migration Act 1958 (Cth),<sup>1</sup> although the legislation states that the detention of minors must be a measure of last resort.<sup>2</sup> An additional law does apply to unaccompanied minors, being the Immigration (Guardianship of Children) Act 1946 (Cth).<sup>3</sup> This law provides for the Minister of Immigration and Border Protection to be the legal guardian<sup>4</sup> of unaccompanied children who arrive under Australia's humanitarian immigration program or seek asylum upon arriving in Australia, although this role is generally delegated to state and territory child welfare agencies along with certain officers in the Department of Home Affairs.<sup>5</sup> The legislation also allows the Minister to appoint custodians to care for such children.<sup>6</sup>

In previous years, a number of unaccompanied asylum-seeking minors were detained in immigration detention centers or at the offshore processing center in Nauru.<sup>7</sup> According to figures provided by the Australian Parliamentary Library, in the 2012–13 fiscal year the number of such children in detention facilities reached as many as 1,900.<sup>8</sup> Under current policies, community-based accommodation is found for nearly all unaccompanied children; in the 2015–16 fiscal year there were fewer than five unaccompanied children in detention facilities.<sup>9</sup> According to the Department of Home Affairs,

[w]here an unaccompanied minor is held in detention, including in an Alternative Place of Detention, we ensure that appropriate support services are available. These are provided

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<sup>1</sup> Migration Act 1958 (Cth) pt 2 divs 6 & 7, <https://www.legislation.gov.au/Details/C2017C00384>, archived at <https://perma.cc/G352-J98X>.

<sup>2</sup> *Id.* s 4AA.

<sup>3</sup> Immigration (Guardianship of Children) Act 1946 (Cth) (IGOC Act), <https://www.legislation.gov.au/Details/C2016C00988>, archived at <https://perma.cc/JW85-CM3F>; Immigration (Guardianship of Children) Regulations 2001 (Cth), <https://www.legislation.gov.au/Details/F2012C00174>, archived at <https://perma.cc/M99W-852Q>.

<sup>4</sup> IGOC Act s 6.

<sup>5</sup> *Id.* s 5; *Immigration (Guardianship of Children) Act*, DEPARTMENT OF HOME AFFAIRS, <https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/igoc-act> (last visited May 15, 2018), archived at <https://perma.cc/ZH7H-8DZH>. See also *Who is Responsible for an Unaccompanied Minor?*, DEPARTMENT OF HOME AFFAIRS, <https://www.homeaffairs.gov.au/lega/lega/form/immi-faqs/who-is-responsible-for-an-unaccompanied-minor> (last visited May 17, 2018), archived at <https://perma.cc/4DX7-6WDL>.

<sup>6</sup> IGOC Act s 7.

<sup>7</sup> *Information about Children in Immigration Detention*, AUSTRALIAN HUMAN RIGHTS COMMISSION, <https://www.humanrights.gov.au/information-about-children-immigration-detention> (last updated Jan. 6, 2016), archived at <https://perma.cc/6G2C-4YPX>.

<sup>8</sup> Janet Phillips, *Immigration Detention in Australia: A Quick Guide to the Statistics*, Table 2 (Australian Parliamentary Library, Mar. 21, 2017), [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/ImmigrationDetention](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/ImmigrationDetention), archived at <https://perma.cc/6ZAA-TSUN>.

<sup>9</sup> *Id.*

by departmental case managers, mental health support teams, medical staff, interpreting services and education staff.

Australian Government policy is that unaccompanied minors are accommodated in the community wherever possible. We move unaccompanied minors and vulnerable families from detention facilities into community-based accommodation until their immigration status is resolved.

In line with community standards, unaccompanied minors in community detention attend schools, have access to health care and are supported to take part in after school activities such as soccer clubs, art or music classes and other recreational or creative activities.<sup>10</sup>

## Canada

Canada's current immigration and refugee law is the Immigration and Refugee Protection Act (IRPA), 2001.<sup>11</sup> There is no minimum age at which a refugee application or claim can be made in Canada.<sup>12</sup> There does not appear to be provisions in the IRPA that provide for specific procedures or criteria for dealing with the claims of children that are different from those applicable to adult refugee claimants<sup>13</sup> under the In-Canada Asylum Program (which works to provide refugee protection to people who have entered Canada).<sup>14</sup> There appear to be general provisions such as section 167(2), which provides that “[i]f a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.”<sup>15</sup> The law also allows every minor child in Canada, other than the child of a temporary resident not authorized to work or study, to study at the preschool, primary, or secondary level.<sup>16</sup> However, as of 2017 “there is no

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<sup>10</sup> *How Do We Care for Unaccompanied Minors Until Their Immigration Status Is Resolved?*, DEPARTMENT OF HOME AFFAIRS, <https://www.homeaffairs.gov.au/lega/lega/form/immi-faqs/how-do-we-care-for-unaccompanied-minors-until-their-immigration-status-is-resolved> (last visited May 17, 2018), archived at <https://perma.cc/KQ3U-EW9A>. See also *Unaccompanied Humanitarian Minors Programme*, DEPARTMENT OF HOME AFFAIRS, <https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/uhm-programme> (last visited May 17, 2018), archived at <https://perma.cc/ZWF8-SALV>.

<sup>11</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, <http://laws.justice.gc.ca/eng/acts/i-2.5/FullText.html>, archived at <https://perma.cc/62PT-EMVS>.

<sup>12</sup> *Processing in Canada Claims for Refugee Protection of Minors and Vulnerable Persons*, IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/canada/processing-claims-refugee-protection-minors-vulnerable-persons.html> (last updated Feb. 25, 2013), archived at <https://perma.cc/4AEF-JXV3>.

<sup>13</sup> *Id.*

<sup>14</sup> *How Canada's Refugee System Works*, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/refugees/canada.asp> (last updated Apr. 3, 2017), archived at <https://perma.cc/N5TK-K9CT>; *Refugees and Asylum*, GOVERNMENT OF CANADA, <https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees.html> (last updated Aug. 31, 2017), archived at <https://perma.cc/8JKQ-NN5Q>.

<sup>15</sup> See Immigration and Refugee Protection Act, § 167(2).

<sup>16</sup> *Id.* § 30(2).

integrated federal strategy on how to deal with separated and unaccompanied child migrants in Canada.”<sup>17</sup>

The Canadian Bar Association (CBA) notes that there are sections in the IRPA that mandate “a consideration of a child’s best interests,”<sup>18</sup> particularly in the grant of permanent residency on humanitarian and compassionate grounds.<sup>19</sup> The CBA also notes that while the Supreme Court of Canada<sup>20</sup> “has made clear that close attention must be given to a child’s interests and needs in certain immigration decisions, there are no *overriding* best interests considerations in immigration and refugee law.”<sup>21</sup> For example, section 60 stipulates that “it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.”<sup>22</sup>

The Chairperson of the Immigration and Refugee Board of Canada (IRB), the administrative tribunal on refugee and immigration matters, has issued nonmandatory guidelines, which “provide guiding principles for adjudicating and managing cases.”<sup>23</sup> One of these guidelines is called *Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues*<sup>24</sup> and “address[es] the specific procedural issue of the designation of a representative and the more general procedural issue of the steps to be followed in processing claims by unaccompanied children. The Guidelines also address the evidentiary issues of eliciting evidence in a child’s claim and assessing that evidence.”<sup>25</sup>

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<sup>17</sup> *Child Migration to Canada: Unaccompanied Minors in Canada’s Asylum System*, HISTORICA CANADA (Mar. 3, 2017), [http://www.thecanadianencyclopedia.ca/en/article/child-migration-to-canada/#h3\\_jump\\_2](http://www.thecanadianencyclopedia.ca/en/article/child-migration-to-canada/#h3_jump_2), archived at <https://perma.cc/4VTD-8L5W>.

<sup>18</sup> *Immigration and Refugee Law*, THE CANADIAN BAR ASSOCIATION, <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/legalAreas/Immigration-and-Refugee-Law> (last visited May 18, 2018).

<sup>19</sup> See, e.g., Immigration and Refugee Protection Act, § 25(1) (humanitarian and compassionate considerations at the request of foreign national), § 25.1(1) (humanitarian and compassionate considerations at the Minister’s own initiative), § 28(2)(c) (humanitarian and compassionate considerations in regard to a permanent resident seeking to retain their status despite a breach of the residency requirements).

<sup>20</sup> *Kanthasamy v. Canada* (Citizenship and Immigration), 2015 SCC 61, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15665/index.do>, archived at <https://perma.cc/9HW3-GEZ4>.

<sup>21</sup> THE CANADIAN BAR ASSOCIATION, *supra* note 18 (emphasis in original).

<sup>22</sup> Immigration and Refugee Protection Act, § 60.

<sup>23</sup> The IRB website notes that “[w]hile they [the Guidelines] are not mandatory, decision-makers are expected to apply them or provide a reasoned justification for not doing so.” See *Chairperson’s Guidelines*, IMMIGRATION AND REFUGEE BOARD OF CANADA, <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/index.aspx> (last updated May 1, 2017), archived at <https://perma.cc/66ZB-244N>.

<sup>24</sup> IMMIGRATION AND REFUGEE BOARD OF CANADA, CHAIRPERSON GUIDELINE 3: CHILD REFUGEE CLAIMANTS: PROCEDURAL AND EVIDENTIARY ISSUES (Sept. 30, 1996), <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir03.aspx>, archived at <https://perma.cc/L75T-6T9V>.

<sup>25</sup> *Chairperson’s Guidelines*, *supra* note 23.

## European Union

The European Union's (EU) asylum legislation contains special provisions for minors and unaccompanied minors to protect the best interests of the child. Protecting the best interests of the child, which includes in particular awarding full respect for the principle of family unity, must be a primary consideration of the EU Member States when applying and implementing the legislation.

The Dublin III Regulation of the EU establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application and is directly applicable in the EU Member States without any implementing national legislation needed. It defines "minor" as a third-country national or stateless person below the age of eighteen and "unaccompanied minor" as a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her.<sup>26</sup> Other EU asylum legislation contains the same definitions. Article 6 of the Dublin III Regulation includes certain guarantees for minors so that Member States act in the best interests of the minor. The European Commission is obligated to draw up a specific leaflet for unaccompanied minors containing information on the asylum procedure.<sup>27</sup> Article 8 describes the specific procedure that has to be followed for the asylum application of an unaccompanied minor.

The 2001 Directive on Temporary Protection sets up special procedures to deal with mass influxes of displaced persons, but has not yet been triggered.<sup>28</sup> It provides specific rules for minors in article 13, paragraph 4 and article 16. Article 16 states that Member States must ensure the necessary representation of unaccompanied minors (for example legal guardianship) and must place them with adult relatives, a foster-family, in reception centers with special provisions for minors, or with the person who looked after the child when fleeing during the period of temporary protection.

The Qualification Directive provides common grounds to grant international protection in the EU.<sup>29</sup> It mentions minors and unaccompanied minors as a vulnerable group.<sup>30</sup> Member States must

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<sup>26</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-country National or a Stateless Person (recast) (Dublin III Regulation), art. 2(i) & (j), 2013 O.J. (L 180) 31, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN>, archived at <http://perma.cc/WY27-24C4>.

<sup>27</sup> *Id.* art. 4, para. 3.

<sup>28</sup> Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof (Temporary Protection Directive), 2001 O.J. (L 212) 12, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF>, archived at <http://perma.cc/Y6B2-T2JB>.

<sup>29</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) (Qualification Directive), 2011 O.J. (L 337) 9, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN>, archived at <http://perma.cc/B7BH-KDBM>.

<sup>30</sup> *Id.* art. 20, para. 3.

ensure that the family unit can be maintained.<sup>31</sup> Minors that have special needs due to abuse, torture, or the like are eligible to receive adequate healthcare under the same conditions as nationals of the respective Member State. Article 31 specifically deals with unaccompanied minors and their needs. Member States must provide unaccompanied minors with a legal guardian or representative as soon as possible after asylum status is granted. The legal guardian is obligated to act in the best interests of the child.<sup>32</sup>

The Asylum Procedures Directive creates a common asylum system in the EU.<sup>33</sup> Article 25 deals with procedural guarantees for unaccompanied minors, in particular the appointment of a representative and medical examinations to determine the age of a minor. Personal interviews must be conducted in a child-appropriate manner.<sup>34</sup>

The Reception Conditions Directive establishes common standards of conditions of living for asylum seekers.<sup>35</sup> It addresses minors and unaccompanied minors in articles 11, 21, 22, 23, and 24. Minors are identified as a vulnerable group.<sup>36</sup> National authorities are therefore, for example, obligated to make the health, including mental health, of minors in detention a primary concern and only detain them as a last resort, in exceptional circumstances, and in age-appropriate accommodations.<sup>37</sup> Family units should be preserved as far as possible when housing is provided.<sup>38</sup>

The Return Directive lays down common standards and procedures for returning illegal immigrants.<sup>39</sup> Like other directives, the Return Directive obligates Member States to maintain the family unit with family members present during the period for voluntary departure.<sup>40</sup> Article 10 focuses on the return and removal of unaccompanied minors. Member States must ensure that an unaccompanied minor will be returned to a member of his or her family, a guardian, or an adequate reception facility in the country of return. Article 17 deals with detention of minors and families.

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<sup>31</sup> *Id.* art. 23.

<sup>32</sup> *Id.* art. 30, para. 2.

<sup>33</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Asylum Procedures Directive), 2013 O.J. (L 180) 60, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=EN>, archived at <http://perma.cc/WD6N-AEX5>.

<sup>34</sup> *Id.* art. 15, para. 3(e).

<sup>35</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Reception Conditions Directive), 2013 O.J. (L 180) 96, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>, archived at <http://perma.cc/T284-3EAW>.

<sup>36</sup> *Id.* arts. 11, 21.

<sup>37</sup> *Id.* art. 11.

<sup>38</sup> *Id.* art. 12.

<sup>39</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Return Directive), 2008 O.J. (L 348) 98, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>, archived at <http://perma.cc/3JFK-DC9K>.

<sup>40</sup> *Id.* art. 14, para. 1(a).

Member States must again ensure that family unity is maintained and that minors have access to basic education for the duration of their stay.

## France

In France, certain special rules apply to unaccompanied alien children. France has ratified the Convention on the Rights of the Child, which declares that “a child temporarily or permanently deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the State.”<sup>41</sup> The Cour de cassation (France’s highest court for civil matters) has ruled that the Convention is directly applicable in French law.<sup>42</sup> Furthermore, France is bound by European directives and regulations, with the latter being directly applicable in French law.<sup>43</sup>

Additionally, several French domestic provisions apply to unaccompanied alien children. The requirement that foreigners have a residency permit in order to stay in France for a period of over three months only applies to persons eighteen years of age or older.<sup>44</sup> An unaccompanied alien child may therefore stay in France without a residency permit until he or she reaches the age of eighteen. Upon reaching eighteen years of age, he or she must obtain a residency permit, but a child who has been placed under the protection of the French child welfare services before the age of fifteen may be granted French citizenship upon his or her request.<sup>45</sup>

The Code de l’action sociale et des familles (Social Action and Family Code) provides that child protection measures apply to minors “temporarily or permanently deprived of their family’s protection,” which includes isolated foreign minors.<sup>46</sup> Consequently, unaccompanied alien

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<sup>41</sup> UN General Assembly, Convention on the Rights of the Child, art. 20, Nov. 20, 1989, 1577 U.N.T.S. 3, <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf>, archived at <https://perma.cc/C9CP-5MC3>.

<sup>42</sup> Cass. Civ. 1, 18 May 2005, No. 02-20613, <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007050072&dateTexte>, archived at <https://perma.cc/M3AT-4NUV>.

<sup>43</sup> Consolidated Version of the Treaty on the Functioning of the European Union, arts. 2 & 4, 2012 O.J. (C 326) 50–51, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF>, archived at <https://perma.cc/Q6DD-PY5A>; *The Direct Effect of European Law*, EUR-LEX-EUROPA.EU (legal portal of the European Union) (Jan. 14, 2015), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISUM:114547&from=FR>, archived at <https://perma.cc/W2L8-VZ3D>.

<sup>44</sup> CODE DE L’ENTRÉE ET DU SÉJOUR DES ÉTRANGERS ET DU DROIT D’ASILE [C.E.S.E.D.A.] [CODE OF FOREIGNERS’ ENTRY AND STAY AND OF THE RIGHT OF ASYLUM], art. L311-1, <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006070158&idArticle=LEGIARTI000006335030>, archived at <https://perma.cc/B5V8-AWLV>.

<sup>45</sup> *Mineurs isolés étrangers* [Isolated Foreign Minors], *Questions-réponses « infos migrants »* [“Migrant Info” FAQ], FRANCE TERRE D’ASILE, <http://www.france-terre-asile.org/mineurs-isoles-etrangeurs-col-280/infos-migrants/mineurs-isoles-etrangeurs> (last visited May 18, 2018), archived at <https://perma.cc/M94T-4DWR>.

<sup>46</sup> CODE DE L’ACTION SOCIALE ET DES FAMILLES [SOCIAL ACTION AND FAMILY CODE], art. L112-3, [https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=3F9B3139D6B6D0725817B6D528DC7D55.tplgfr29s\\_2?idArticle=LEGIARTI000032207276&cidTexte=LEGITEXT000006074069&dateTexte=20180518](https://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=3F9B3139D6B6D0725817B6D528DC7D55.tplgfr29s_2?idArticle=LEGIARTI000032207276&cidTexte=LEGITEXT000006074069&dateTexte=20180518), archived at <https://perma.cc/V4HQ-S8VD>; *Mineurs isolés étrangers (MIE) : quels sont vos droits ?* [Isolated Foreign Minors (IFM): What Are Your Rights?], ATD QUART MONDE (Jan. 5, 2015), <https://www.atd-quartmonde.fr/mineurs-isoles-etrangeurs-mie-quels-sont-vos-droits/#sdfnote1sym>, archived at <https://perma.cc/L7B7-7GG5>.

children are generally placed under the protection of the Aide sociale à l'enfance (A.S.E., child welfare services).<sup>47</sup> They are legally entitled to education and health care.<sup>48</sup>

## Germany

Germany's asylum legislation contains special provisions for minors and unaccompanied minors to protect the best interests of the child.

As a Member State of the European Union (EU), the Dublin III Regulation, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application, is directly applicable in Germany.<sup>49</sup> The guarantees for minors codified in it must be respected by German authorities, in particular the obligation to appoint a legal representative for all procedures.<sup>50</sup>

The German Asylum Act states that an asylum application filed by a parent will automatically include the minor child.<sup>51</sup> If refugee status has been granted to a minor unmarried child, the child's parents may be granted asylum status upon application if certain conditions are met.<sup>52</sup> Staff members working in reception centers who are in regular contact with minors must submit their criminal history report prior to being hired and at regular intervals thereafter.<sup>53</sup> Furthermore, the Act tries to ensure that the family unit is maintained and that minors are not separated from their families when housing decisions are made.<sup>54</sup>

The German Residence Act provides that the German authorities must ensure that an unaccompanied minor will be returned to a member of his or her family, a guardian, or an adequate reception facility in the country of return.<sup>55</sup> A legal representative must file all necessary

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<sup>47</sup> *Mineurs isolés étrangers (MIE): quels sont vos droits ?*, ATD QUART MONDE, *supra* note 46.

<sup>48</sup> *Id.*

<sup>49</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-country National or a Stateless Person (recast) (Dublin III Regulation), 2013 O.J. (L 180) 31, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN>, archived at <http://perma.cc/WY27-24C4>.

<sup>50</sup> See EU survey for an overview of the specific provisions for minors contained in the Dublin III Regulation.

<sup>51</sup> Asylgesetz [AsylG] [Asylum Act], Sept. 9, 2008, BUNDESGESETZBLATT [BGBL.] [FEDERAL LAW GAZETTE] I at 1798, as amended, § 14a, [http://www.gesetze-im-internet.de/asylvfg\\_1992/AsylG.pdf](http://www.gesetze-im-internet.de/asylvfg_1992/AsylG.pdf), archived at <http://perma.cc/66TY-FVK5>, unofficial English translation available at [http://www.gesetze-im-internet.de/englisch-asylvfg/englisch\\_asylvfg.pdf](http://www.gesetze-im-internet.de/englisch-asylvfg/englisch_asylvfg.pdf) (English version updated through Mar. 11, 2016), archived at <http://perma.cc/E46Y-7F9K>.

<sup>52</sup> *Id.* § 26, para. 3.

<sup>53</sup> *Id.* § 44, para. 3.

<sup>54</sup> *Id.* § 47, para. 2.

<sup>55</sup> Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet [Aufenthaltsgesetz] [AufenthG] [Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory] [Residence Act], Feb. 25, 2008, BGBL. I at 162, as amended, § 58, para. 1a, [http://www.gesetze-im-internet.de/aufenthg\\_2004/AufenthG.pdf](http://www.gesetze-im-internet.de/aufenthg_2004/AufenthG.pdf), archived at <http://perma.cc/FQ8T-R3GE>, unofficial English translation

applications on behalf of the foreign minor.<sup>56</sup> Minors and families with minors should only be detained in exceptional circumstances and only for as long as necessary without endangering the well-being of the child.<sup>57</sup> Families should be detained together and separately from other persons.<sup>58</sup> The needs of minors awaiting deportation must be taken into account in accordance with the provisions of the Return Directive of the EU.<sup>59</sup>

The Asylum Seeker Benefits Act provides that people with special needs, such as unaccompanied minors, are eligible to receive appropriate health care and related care.<sup>60</sup>

The Eighth Book of the German Social Security Code contains a specific chapter on unaccompanied minors.<sup>61</sup> The Youth Welfare Services of the German state in which an unaccompanied minor first registers will take the minor temporarily into custody.<sup>62</sup> That includes placing the minor with a foster family or in an appropriate reception center. The Youth Welfare Services are authorized to perform legal acts on behalf of the minor and are obligated to submit an application for asylum immediately.<sup>63</sup> The best interests of the minor must be determined, including whether relatives are in the country and whether the health of the minor permits the allocation to a reception center in a German state.<sup>64</sup> Siblings must generally not be separated.<sup>65</sup>

The individual German states have provisions in their respective refugee acts that obligate the authorities to take the needs of vulnerable groups as detailed in the applicable EU directives, including unaccompanied minors, into account when making asylum decisions.<sup>66</sup>

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available at [http://www.gesetze-im-internet.de/englisch\\_aufenthg/englisch\\_aufenthg.pdf](http://www.gesetze-im-internet.de/englisch_aufenthg/englisch_aufenthg.pdf) (English version updated through Oct. 30, 2017), archived at <http://perma.cc/TXU9-GHQL>.

<sup>56</sup> *Id.* § 80.

<sup>57</sup> *Id.* § 62.

<sup>58</sup> *Id.* § 62a, para. 1.

<sup>59</sup> *Id.* § 62a, para. 3; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Return Directive), 2008 O.J. (L 348) 98, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN>, archived at <http://perma.cc/3JFK-DC9K>.

<sup>60</sup> Asylbewerberleistungsgesetz [AsylbLG] [Asylum Seeker Benefit Act], Aug. 5, 1997, BGBL. I at 2022, as amended, § 6, para. 2, <http://www.gesetze-im-internet.de/asylblg/AsylbLG.pdf>, archived at <http://perma.cc/H62W-Y3LT>.

<sup>61</sup> Sozialgesetzbuch (SGB) - Aches Buch (VIII) - Kinder- und Jugendhilfe [SGB 8] [Social Security Code – Eighth Book (VIII) – Children and Youth Welfare] Sept. 11, 2012, BGBL. I at 2022, as amended, §§ 42–42f, [http://www.gesetze-im-internet.de/sgb\\_8/SGB\\_8.pdf](http://www.gesetze-im-internet.de/sgb_8/SGB_8.pdf), archived at <http://perma.cc/S68C-N8XA>.

<sup>62</sup> *Id.* § 2, para. 3, no. 2, § 42, para. 1, no. 3, § 42a.

<sup>63</sup> *Id.* § 42, para. 2, § 42a, para. 3.

<sup>64</sup> *Id.* § 42a, para. 2.

<sup>65</sup> *Id.* § 42b, para. 5.

<sup>66</sup> *See, e.g.*, for the German State of Baden-Württemberg, Gesetz über die Aufnahme von Flüchtlingen [Flüchtlingsaufnahmegesetz] [FlüAG] [Act on the Reception of Refugees] [Refugee Reception Act], Dec. 19, 2013, GESETZBLATT [GBL.] [STATE LAW GAZETTE] 2013 at 493, as amended, § 5, <http://www.landesrecht-bw.de/jportal/>

## Italy

Italy's legislation governing asylum and humanitarian protection includes Law No. 47 of 2017 on unaccompanied foreign minors.<sup>67</sup> Law No. 47 of 2017<sup>68</sup> defines “unaccompanied foreign minors” as minors who are not Italian or EU citizens, who for whatever reason are found in Italian territory or are subject to Italian jurisdiction, and who lack the assistance or representation of their parents or other adults who would be responsible for them according to Italian legislation.<sup>69</sup> Law No. 47 contains the following protective measures for the benefit of these minors:

- Recognition of same rights as Italian and European Union minors<sup>70</sup>
- Prohibition of rejection of entry at the border, *refoulement*, or expulsion;<sup>71</sup>
- Provision of immediately necessary humanitarian assistance, including first aid and specially-dedicated hospitality facilities<sup>72</sup>
- Identification of the minor by the public security authorities, aided by cultural mediators in the presence of the guardian assigned to the minor, at the administrative hearing held to determine his identity<sup>73</sup>
- Designation of foster families by local government entities to whom juvenile courts may entrust their care<sup>74</sup>
- Granting of their right to health and education, even before they receive a residence permit<sup>75</sup>

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[jsessionid=523B22C75F838799E951EAE4308423A1.jp90?quelle=jlink&query=FI%C3%BCAG+BW&psml=bsba wueprod.psml&max=true&aiz=true#jlr-FI%C3%BCAGBW2014pP4](http://www.loc.gov/law/foreign-news/article/italy-protection-of-unaccompanied-foreign-minors/), archived at <http://perma.cc/3BYL-CYTL>.

<sup>67</sup> Dante Figueroa, *Italy: Protection of Unaccompanied Foreign Minors*, GLOBAL LEGAL MONITOR (May 16, 2017), <http://www.loc.gov/law/foreign-news/article/italy-protection-of-unaccompanied-foreign-minors/>, archived at <https://perma.cc/832M-KZCV>.

<sup>68</sup> Legge 7 aprile 2017, n. 47 Disposizioni in materia di Misure di Protezione dei Minori Stranieri non Accompagnati [Law No. 47 of April 7, 2017, Provisions on Protective Measures of Foreign Unaccompanied Minors], (Law No. 47), GAZZETTA UFFICIALE [G.U.] (June 5, 2017), <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2017-04-7:47>, archived at <https://perma.cc/U9GD-SLN8>.

<sup>69</sup> Law No. 47, art. 2(1).

<sup>70</sup> *Id.* art. 1(1).

<sup>71</sup> *Id.* art. 3(1)(a) & b).

<sup>72</sup> *Id.* arts. 4(1) & 5(3).

<sup>73</sup> *Id.* art. 5(3).

<sup>74</sup> *Id.* art. 7(1).

<sup>75</sup> *Id.* art. 14(1).

- Recognition of their right to be heard in all judicial and administrative proceedings affecting them,<sup>76</sup> to appoint legal counsel and receive funds for the payment of their legal fees<sup>77</sup>
- Reception of adequate assistance from the authorities when the minor has been the victim of human trafficking<sup>78</sup>

Under existing legislation, authorities must grant residence permits to the following asylum-seeking unaccompanied foreign minors:

- Those found by themselves in the national territory<sup>79</sup>
- Those who are fourteen years of age or younger, based on family-reunion grounds<sup>80</sup>
- Those subject to the custody of an Italian citizen with whom they live<sup>81</sup>
- Those older than fourteen years of age who are in the custody of and living with foreigners who are legal residents of Italy<sup>82</sup>

Outside of the aforementioned situations, unaccompanied foreign minors are subject to the general legislation on immigration and the status of foreigners in Italy.<sup>83</sup>

Additionally, the National Information System for Foreign Unaccompanied Minors under the Ministry of Labor and Social Policies<sup>84</sup> maintains a special archive with information for each unaccompanied foreign minor.<sup>85</sup> Finally, current legislation declares the intention of the Italian Republic to join international cooperation efforts underway in order to protect unaccompanied foreign minors who might enter the national territory.<sup>86</sup>

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<sup>76</sup> *Id.* arts. 2-ter & 15(1).

<sup>77</sup> *Id.* art. 16(1).

<sup>78</sup> *Id.* art. 17(2).

<sup>79</sup> *Id.* art. 10(1)(a).

<sup>80</sup> *Id.* art. 10(1)(b).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Decreto Legislativo 25 luglio 1998, n. 286 Testo Unico delle Disposizioni concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero [Legislative Decree No. 286 of July 25, 1998, Consolidated Text of the Provisions on Immigration and the Norms on the Status of Foreigners], G.U. No. 191 (Aug. 18, 1998), <http://www.gazzettaufficiale.it/eli/id/1998/08/18/098G0348/sg>, archived at <http://perma.cc/DF6Y-ZFS3>.

<sup>84</sup> Law No. 47, art. 9(1).

<sup>85</sup> *Id.* art. 9(2).

<sup>86</sup> *Id.* art. 20(1).

## Sweden

In Sweden, asylum applicants who are unaccompanied minors are subject to different rules than other such applicants.

The present rules in Sweden were affected by the 2015 refugee crisis.<sup>87</sup> In response to that crisis, Sweden adopted temporary rules to cope with the large influx of asylum seekers.<sup>88</sup> Prior to this change, there were three categories of asylum: refugees, persons deemed in need of subsidiary protection, and “persons in need of other protection” (*övrig skyddsbehövande*).<sup>89</sup> The latter category applied to a person who did not fall within the other two categories but was “in need of protection due to external or internal military conflict, or because of other tensions in the country, [who] feels a well-founded fear of being subjected to encroachment, or [who] cannot return to his or her homeland because of an environmental disaster.”<sup>90</sup> The new temporary law eliminated the latter form of protection.<sup>91</sup> In addition, the new law changed the rules on the duration of the residence permits for the other two categories from permanent to thirteen-month temporary permits that are renewable.<sup>92</sup> The law applies to decisions made between July 20, 2016, and July 19, 2019, when the temporary law will expire.<sup>93</sup>

Under Sweden’s permanent asylum law, most unaccompanied minors generally received permanent residence permits in Sweden, regardless of the grounds for protective status.<sup>94</sup> Adult asylum seekers, in contrast, only receive permanent resident permits if they fall within either refugee or subsidiary protection. The most common ground for protection for unaccompanied

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<sup>87</sup> During 2015, Sweden received the highest number of unaccompanied minors among European Union (EU) Member States—40% of the total. Press Release 87/2016, Eurostat, Almost 90,000 Unaccompanied Minors Among Asylum Seekers Registered in the EU in 2015 (May 2, 2016), <http://ec.europa.eu/eurostat/documents/2995521/7244677/3-02052016-AP-EN.pdf/>, archived at <https://perma.cc/C9EH-528L>.

<sup>88</sup> Lag om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige [Act on Temporary Limits to the Possibility of Receiving Residency Permits in Sweden] (SVENSK FÖRFATTNINGSSAMLING [SFS] 2016:752), [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av\\_sfs-2016-752](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2016752-om-tillfalliga-begransningar-av_sfs-2016-752), archived at <https://perma.cc/AVU8-5V9C>.

<sup>89</sup> *Id.* 4 §.

<sup>90</sup> 4 kap. 2a § UTL.

<sup>91</sup> 1 kap. 3§ UTLÄNNINGSLAGEN (UTL) [ALIENS ACT] (SFS 2005:716), [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716\\_sfs-2005-716](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/utlanningslag-2005716_sfs-2005-716), archived at <https://perma.cc/K67C-LTGU>.

<sup>92</sup> *Id.* 5 §.

<sup>93</sup> Övergångsbestämmelser Lag om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

<sup>94</sup> See Lagrådsremiss: Stärkt skydd för ensamkommande barn [Law Council Referral: Special Protections for Unaccompanied Minors] 51 (Feb. 24, 2005), <https://www.regeringen.se/49bb74/contentassets/ae87c29d1c10431aa7a98a8ffdbda68b/starkt-skydd-for-ensamkommande-barn>, archived at <https://perma.cc/FD2L-3KAM>; see also EMN, POLICIES, PRACTICES AND DATA ON UNACCOMPANIED MINORS IN 2014: SWEDEN 10 (2014), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/unaccompanied-minors/27a\\_sweden\\_uam\\_national\\_report\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/unaccompanied-minors/27a_sweden_uam_national_report_en.pdf), archived at <https://perma.cc/MCB8-FVXU>.

minors under the permanent law is the “persons in need of other protection” category, which currently is not allowed under the temporary law.<sup>95</sup>

Even under the temporary law, unaccompanied minors who do not qualify as refugees or in need of subsidiary protection nonetheless are generally allowed to remain in Sweden until they become adults. Legally, to deport an unaccompanied minor the state must ensure that there is a parent or guardian that will meet them.<sup>96</sup> Sweden reportedly has made unsuccessful attempts to deport unaccompanied minors to Afghanistan and to Morocco, which failed on this basis.<sup>97</sup>

Sweden has made efforts to protect the residency status of unaccompanied minors that arrived during the refugee crisis. For example, Sweden has adopted special rules for high school students who have had their asylum applications denied, allowing them to stay in Sweden and complete their high school education after turning eighteen.<sup>98</sup> Completing their high school education would also qualify them for work-based permanent residency, if they found a job in Sweden, as persons younger than twenty-five years old must have a high school education to be eligible for work-based permanent residence permits.<sup>99</sup> In addition, in March of 2018, the government presented legislation that would allow unaccompanied minors who arrived before November 25, 2016 (the date of the announcement of the new rules) to reapply for asylum, if they have turned eighteen during the application process and the application process has taken more than fifteen months, thereby causing the applicants to age out of the asylum provision that allows minors to receive permanent residence.<sup>100</sup> The law is expected to grant some 9,000 individuals a residence permit.<sup>101</sup> The law has been criticized by the Swedish Law Council for being complex, and therefore hard to

<sup>95</sup> See Prop. 2017/2018:252 Extra ändringsbudget för 2018 – Ny möjlighet till uppehållstillstånd [Additional Amendment to the Fiscal Budget Bill for 2018 – New Opportunity to Receive Residency Permit], at 22, <https://data.riksdagen.se/fil/8FF331D5-AE34-4C86-A13C-8AE21A77B3E8>, archived at <https://perma.cc/L6D7-T6D9>.

<sup>96</sup> 12 kap. 3a § UTL.

<sup>97</sup> Johanna Karlsson, *Regeringen gör allt för att bli av med dem – pojkarna har bestämt sig för att stanna* [Government Does All It Can to Get Rid of Them – The Boys Have Decided to Stay], EXPRESSEN (Mar. 25, 2017), <https://www.expressen.se/nyheter/qs/afghanerna/regeringen-gor-allt-for-att-bli-av-med-dem--pojkar-har-bestamt-sig-for-att-st/>, archived at <https://perma.cc/3F9R-K3K7>; Katarina Helmersson, *Svårt att få marockanska gatubarn att återvända* [Difficult to Make Homeless Moroccan Children Return], SVERIGESRADIO (Sept. 7, 2016), <https://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=6512167>, archived at <https://perma.cc/9KDH-DJ3C>.

<sup>98</sup> LAG OM UPPEHÅLLSTILLSTÅND FÖR STUDERANDE PÅ GYMNASIAL NIVÅ [ACT ON RESIDENCE PERMITS FOR HIGH SCHOOL STUDENTS] (SFS 2017:353), [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2017353-om-uppehallstillstand-for\\_sfs-2017-353](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2017353-om-uppehallstillstand-for_sfs-2017-353), archived at <https://perma.cc/RU95-QANV>; see also Elin Hofverberg, *Sweden: Parliament Votes to Grant Migrants Extended Residence Permits to Complete High School*, GLOBAL LEGAL MONITOR (June 9, 2017), <http://www.loc.gov/law/foreign-news/article/sweden-parliament-votes-to-grant-migrants-extended-residence-permits-to-complete-high-school/>, archived at <https://perma.cc/V8Z5-R4U5>; Prop. 2016/17:133 on Amendments to the Temporary Act on Residence Permits Regarding High School Education, <https://www.regeringen.se/492dc9/contentassets/72fca419b0984f1aaa991ec3e5ca5a7c/kompletteringar-av-den-tillfalliga-lagen-for-uppehallstillstand-rorande-studier-pa-gymnasieniva-prop.-201617133> (in Swedish), archived at <https://perma.cc/L4EH-WW9R>.

<sup>99</sup> 17 § 3 st Lag om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige.

<sup>100</sup> Prop. 2017/2018:252, *supra* note 95.

<sup>101</sup> *Id.* at 54.

enforce and predict, as well as unfair for failing to treat similar situations similarly, only relying upon the length of the application process.<sup>102</sup> The legislation appears likely to pass later this year.<sup>103</sup>

Unaccompanied minors and adults are treated differently during the asylum process as well as with regard to the right to remain in Sweden. As mentioned above, under Sweden's permanent law, unaccompanied minors generally qualify as in need of "other protection" and are eligible for permanent residence permits. Even under the temporary law that eliminates this category of protection, unaccompanied minors who are not considered refugees or in need of subsidiary protection are generally allowed to remain in Sweden until they reach adulthood. There are also differences in housing requirements. Whereas housing for asylum applicants who are minors is provided by the municipalities, the state is responsible for housing for asylum applicants who are adults.<sup>104</sup> Moreover, minors receive free schooling and free dental and universal health care, whereas adults only receive urgent dental and health care.<sup>105</sup> A guardian must also be appointed for unaccompanied minors.<sup>106</sup> Whereas adults may only register their applications in Malmö, Gothenburg, or Stockholm, unaccompanied minors may register their applications in an additional five cities.<sup>107</sup>

## United Kingdom

The United Kingdom has detailed laws governing asylum and humanitarian protection.<sup>108</sup> The Home Office, the government department with primary responsibility for most aspects relating to immigration including asylum, is specifically required by section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children in the UK whenever

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<sup>102</sup> LAGRÅDET, NY MÖJLIGHET TILL UPPEHÅLLSTILLSTÅND 3, 5 (Mar. 28, 2018), <http://www.lagradet.se/yttranden/Ny%20mojlighet%20till%20uppehallstillstand.pdf>, archived at <https://perma.cc/394Q-7SAY>.

<sup>103</sup> Passage seems likely after receiving support from the Centerpartiet, one of the opposition parties. See My Rohwedder, *C stödjer lag om ensamkommande*, SVERIGESRADIO (Apr. 24, 2018), <https://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=6937947>, archived at <https://perma.cc/54QX-2XDP>.

<sup>104</sup> 2 § LAG OM MOTTAGANDE AV ASYLSÖKANDE M.FL. [LAW ON RECEIPT OF ASYLUM APPLICANTS AND OTHERS] (SFS 1994:137), [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994137-om-mottagande-av-asylosokande-mfl\\_sfs-1994-137](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1994137-om-mottagande-av-asylosokande-mfl_sfs-1994-137), archived at <https://perma.cc/EA6K-B627>.

<sup>105</sup> 5 and 6 §§ LAG OM HÄLSO- OCH SJUKVÅRD ÅT ASYLSÖKANDE M.FL. [ACT ON HEALTH CARE FOR ASYLUM APPLICANTS AND OTHERS] (SFS 2008:344), [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008344-om-halso--och-sjukvard-at\\_sfs-2008-344](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2008344-om-halso--och-sjukvard-at_sfs-2008-344), archived at <https://perma.cc/R23R-ATQE>.

<sup>106</sup> LAG OM GOD MAN FÖR ENSAMKOMMANDE BARN [ACT ON GUARDIANS FOR UNACCOMPANIED CHILDREN] (SFS 2005:429), [https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2005429-om-god-man-for-ensamkommande-barn\\_sfs-2005-429](https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2005429-om-god-man-for-ensamkommande-barn_sfs-2005-429), archived at <https://perma.cc/2HTY-37B3>.

<sup>107</sup> *Fortsatt god tillgänglighet för ensamkommande barn trots färre ansökningsenheter*, MIGRATIONSVERKET (Jan. 29, 2018), <https://www.migrationsverket.se/Andra-aktorer/Gode-man/Nyhetsarkiv/Nyheter-for-gode-man/2018-01-29-Fortsatt-god-tillganglighet-for-ensamkommande-barn-trots-farre-ansokningsenheter.html>, archived at <https://perma.cc/CVB3-WAKL>.

<sup>108</sup> CLARE FEIKERT-AHALT, LAW LIBRARY OF CONGRESS, REFUGEE LAW AND POLICY: UNITED KINGDOM (2016), <https://www.loc.gov/law/help/refugee-law/unitedkingdom.php>, archived at <https://perma.cc/AJ6F-EB4V>.

it discharges its functions.<sup>109</sup> The enactment of this provision followed the UK's withdrawal in 2008 of a general reservation on immigration matters to the United Nations Convention on the Rights of the Child.<sup>110</sup> A statutory guidance document by the UK Border Agency issued under section 55 spells out the application of this duty.<sup>111</sup> Safeguarding and promoting the welfare of children means

- protecting children from maltreatment;
- preventing impairment of children's physical or mental health or physical, intellectual, emotional, social, or behavioral development;
- ensuring children grow up in circumstances in which they can receive safe and effective care; and
- enabling children to have optimum life chances and successfully enter adulthood.<sup>112</sup>

The guidance document states that the section 55 duty does not create new functions or override existing functions, but it requires the Border Agency to carry out its existing functions in a manner that takes into account the need to safeguard and promote children's welfare.<sup>113</sup>

The section 55 duty must inform the government's interactions and decision-making with a child asylum-seeker at all stages, from the time of the initial interview to determining whether to grant permission to remain in the UK.<sup>114</sup>

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<sup>109</sup> Borders, Citizenship and Immigration Act 2009, c. 11, § 55, <http://www.legislation.gov.uk/ukpga/2009/11>, archived at <https://perma.cc/5879-RQ7R>.

<sup>110</sup> Ayesha Christie, *The Best Interests of the Child in UK Immigration Law*, 22 NOTTINGHAM L.J. 16 (2013) (available on HeinOnline). The Convention on the Rights of the Child provides in part that "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status . . . shall, whether unaccompanied or accompanied . . . receive appropriate protection and humanitarian assistance." United Nations Convention on the Rights of the Child, art. 22(1), Nov. 20, 1989, 1577 U.N.T.S. 3, <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf>, archived at <https://perma.cc/3E3M-FZP2>. While all countries in the world other than the United States have ratified this convention, some states parties made reservations regarding the asylum provisions similar to that withdrawn by the UK. United Nations Treaty Collection, Convention on the Rights of the Child, Declarations and Reservations, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) (last visited May 19, 2018), archived at <https://perma.cc/75Z6-4TES>.

<sup>111</sup> HOME OFFICE, UK BORDER AGENCY, DEPARTMENT FOR CHILDREN, SCHOOLS AND FAMILIES, EVERY CHILD MATTERS: CHANGE FOR CHILDREN (2009), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257876/change-for-children.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf), archived at <https://perma.cc/8S4L-ENJ9>.

<sup>112</sup> *Id.* para. 1.4 (citing H.M. GOVERNMENT, WORKING TOGETHER TO SAFEGUARD CHILDREN (updated 2007), current (2015) version available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/592101/Working\\_Together\\_to\\_Safeguard\\_Children\\_20170213.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592101/Working_Together_to_Safeguard_Children_20170213.pdf), archived at <https://perma.cc/EAD9-R2R9>, which is the statutory guidance for applying, *inter alia*, section 11 of the Children Act 2004, [http://www.legislation.gov.uk/ukpga/2004/31/pdfs/ukpga\\_20040031\\_en.pdf](http://www.legislation.gov.uk/ukpga/2004/31/pdfs/ukpga_20040031_en.pdf), archived at <https://perma.cc/NC2X-5HJZ>).

<sup>113</sup> *Id.* para. 2.3.

<sup>114</sup> HOME OFFICE, CHILDREN'S ASYLUM CLAIMS 43, 56-57 (Oct. 9, 2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/650514/children\\_s-asylum-claims-v2\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650514/children_s-asylum-claims-v2_0.pdf), archived at <https://perma.cc/W2YR-54XZ>.

If an unaccompanied asylum-seeking child does not qualify for refugee status, humanitarian protection, or discretionary leave to remain, the government must consider whether there are safe, adequate and sustainable reception arrangements in the child's home country. If not, a limited leave to remain in the UK is granted for 30 months or until the child reaches 17.5 years of age, whichever is shorter.<sup>115</sup>

Courts have addressed the importance of the duty to safeguard and promote children's welfare in the immigration context. The UK Supreme Court held that in deciding whether to deport a parent, a child's best interests must be a primary consideration.<sup>116</sup> With respect to asylum, section 55 and related law has been invoked in a ruling that the government has an obligation to trace the family members of an asylum-seeking unaccompanied child.<sup>117</sup> The section 55 duty has also been found to require the government to consider the best interests of the child when determining the form of humanitarian protection to be afforded a child.<sup>118</sup>

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<sup>115</sup> *Id.* at 61.

<sup>116</sup> *ZH (Tanzania) v. Sec'y of State for the Home Dep't*, [2011] UKSC 4, ¶¶ 22–26, <https://www.supremecourt.uk/cases/docs/uksc-2010-0002-judgment.pdf>, archived at <https://perma.cc/U3D5-TTGY>.

<sup>117</sup> *KH (Afghanistan) v Sec'y of State for the Home Dep't*, [2012] EWCA Civ 1014, ¶¶ 23–25, available at <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1014.html>, archived at <https://perma.cc/DWH7-W7LD>.

<sup>118</sup> *R (ABC (a minor) (Afghanistan)) v. Sec'y of State for the Home Dep't*, [2011] EWHC 2937 (Admin), ¶¶ 50–62, [http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/UK\\_051%20Judgment.pdf](http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/UK_051%20Judgment.pdf), archived at <https://perma.cc/D7EF-D2DQ>.