'Best Interests of the Child' Assessment in Immigration Detention Proceedings

May 2020

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In addition, the research co-ordinators would like to thank:

- **Professor Anne Davies**, Dean of the Oxford Law Faculty, for her support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Dr Andrew Higgins, Dr Annelen Micus, Professor Catherine O' Regan, Professor Liora Lazarus, Dr Miles Jackson, Professor Sandra Fredman and Dr Shreya Atrey,** and the members of Student Committee, **Ashleigh Barnes, Gayathree Kalliyat Thazhathuveetil**, **Titiksha Mohanty, Monica Arango Olaya, Rahul Bajaj, Sameer Bhat, Daniel Olaniyi and Katarina Foss-Solbrekk** for their support and assistance with the project.

Indemnity

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EXECUTIVE SUMMARY

(a) Introduction

1. OPBP has been asked by the Helsinki Foundation for Human Rights (HFHR) to prepare a report on how certain EU Member States define and assess the best interests of the child (BIC) in immigration detention proceedings.

2. HFHR have advised us that Polish law allows for the detention of refugee and migrant children. At present, detention is used primarily for children with families who have been transferred to Poland from other EU Member States on the basis of the Dublin Regulations III.

3. In 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Bistieva and Others v Poland* [2018] ECHR 310. In this judgment, the ECtHR found a violation of the right to family life by the Polish authorities as they did not examine the BIC properly before deciding on a family's detention. While Polish law requires that the BIC be examined in detention proceedings, there are no specific guidelines on how to define BIC and how to assess it within detention proceedings.

4. The aim of HFHR's project is to create practical guidelines by identifying best practices of other EU Member States in assessing BIC within immigration detention proceedings.

5. To this end, this Report considers how the BIC is defined and assessed in the following countries: Cyprus; Finland; Malta; Sweden; United Kingdom (UK); Estonia; Denmark and Switzerland. The following section briefly sets out the findings of our research.

(b) Research Questions

Question 1: What is the statutory framework for assessing BIC in immigration detention proceedings for accompanied children and unaccompanied children?

1. The statutory framework for assessing BIC in immigration detention proceedings for accompanied children and unaccompanied children differs across the countries considered in this Report.

2. On an international level, Article 3 of the United Nations Convention on the Rights of the Child (UNCRC) provides:

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

3. All jurisdictions in this Report are signatories to the UNCRC and have not entered any reservations to it, except Denmark which has a reservation regarding Article 40. The UK had, but has now withdrawn, a general reservation on immigration matters under the UNCRC.

4. The UK, Cyprus, Denmark, Finland, Sweden, Switzerland, Malta and Estonia have enacted statutory frameworks which regulate the detention of children in immigration and detention proceedings. Such frameworks are primarily of an immigration and asylum nature.

5. Of these frameworks, only the laws of Malta, Cyprus and Finland explicitly provide legislative criteria which should be considered when evaluating the BIC.

6. In the UK, while the statutory framework provides for the general welfare of children in immigration detention proceedings, the content of BIC is explicated through complementary statutory guidance that explain the statutory provisions pertaining to minors in light of BIC requirements. In Estonia, while the statutory framework elucidates the importance of BIC, it does not categorically define the BIC. Rather, a joint reading of its legislations pertaining to minors in asylum proceedings sheds light on what is construed as BIC in the jurisdiction. In Switzerland, a joint reading of the UNCRC, the EU Dublin III Regulations and the Swiss Constitution, and its legislations pertaining to minors in asylum procedures determine the content of BIC. In Sweden, while the BIC principle is not detailed in any specific provision, there exists a general provision that requires authorities to give particular attention to BIC throughout the asylum process for minors. In Denmark, a combination of government policies read in conjunction with the statutory framework determine the content of BIC in the jurisdiction.

Question 2: What is the content of BIC in the jurisdiction?

7. The content of BIC varies across the jurisdictions considered in this Report. Most jurisdictions do not define the concept, but rather, its content is gleaned from legislation, statutory guidance and/or judicial interpretation. Parts A to C deal with elements of BIC assessment that HFHR expressed particular interest in. Other more general BIC factors identified in each jurisdiction are also outlined in the Report under Question 2.

A) What is the weight of the BIC assessment in the jurisdiction?

8. The BIC is not an over-arching determinative factor in every decision relating to immigration and detention proceedings in any of the jurisdictions surveyed.

9. In the UK, the decision in *Zoumbas v SSHD* [2013] UKSC 74 [10] indicates that BIC is a primary consideration, although not determinative of outcome. The UK has generally adopted a broad approach to determining the BIC in immigration contexts, emphasising the importance of a careful examination of all the relevant information and factors. A non-exhaustive list of factors is outlined in the case law in the body of this Report. The approach of the UK courts when interpreting the primacy requirement in the context of immigration proceedings rests on the 'emphatic' assertion that the BIC is a factor that must rank higher than any other. Therefore, whilst the BIC remains a non-determinative factor to be weighed against others, the BIC will customarily dictate the outcome of a case and may only be outweighed by the cumulative effect of other considerations that possess 'substantial moment'.

10. Similarly, in Switzerland, the BIC is not a determinative factor, although it is emphasised in accordance with the UNCRC in Switzerland.

11. In Sweden and Finland, the Aliens Acts require migration authorities to give 'particular attention' and 'special attention' respectively to BIC, but do not consider BIC as the determinative factor.

12. Similarly, the Aliens Law of Cyprus and the Obligation to Leave and Prohibition of Entry Act of Estonia require that BIC be taken into account, without making BIC the paramount or overriding factor. However, the Refugee Law of Cyprus and the Act on Granting

International Protection to Aliens of Estonia do accord higher priority to BIC. Moreover, in Estonia, there do appear to be limited, yet significant, circumstances where the child's interests are paramount. These include:

a. A temporary residence permit to settle the child in Estonia will not be issued if it would damage the child's rights or interests;
b. A temporary residence permit will not be cancelled if it does not correspond with the child's rights or interests; and,
c. A request for extension will not be refused if it does not correspond with the child's rights or interests.

13. Maltese law makes BIC a primary consideration.

14. In Denmark, BIC is a determinative factor in relation to the detention of children under the age of 7. For all other decisions, BIC is a non-determinative factor.

B) Are non-custodial measures or alternative detention measures considered at all for children? Is there positive or negative commentary on these measures?

15. The UK generally favours non-custodial and alternative detention measures where possible. In the case of accompanied children, as a 'last resort', families with children may be detained as a part of the Ensured Returns process. Similarly, unaccompanied children may only be detained in very exceptional circumstances, such as when necessary for their care and safety while alternative arrangements are being made. If detained, this may be for a short period with appropriate care being provided. Alternatives must be considered before detention and the reasons for not choosing an alternative must be recorded.

16. In Estonia, there are several alternative detention measures for both accompanied and unaccompanied children available, including accommodation at 'substitute care homes'. The Estonian Social Insurance Board is required to offer such accommodation to children who have applied for a temporary residence permit while waiting for the outcome of the permit. Priority is given to the rights and interests of the unaccompanied minor when residency and services are assigned. The Global Detention Project reports that unaccompanied children are detained after arrival in Estonia, and that legal advisors and support staff for children may be lacking during detention proceedings.

17. In Malta, immigrants who are deemed to belong to a vulnerable group due to their age and/or physical condition (including children) may reside in alternative accommodation to detention. Before offered such housing, minors – whether unaccompanied or accompanied – must first undergo age-assessment procedures in a detention centre. Minors are then released from detention and placed in non-custodial residential facilities.

18. In Switzerland, certain Cantons may employ non-custodial measures including the obligation to surrender passports and/or travel documents; to reside at a specific address or house arrest; and to report to the authorities on a regular basis. However, it is reported that these alternatives are not commonly used.

19. In Finland, a pre-condition for detaining a child is that non-custodial measures are inadequate. Such measures include reporting to the police, border control or reception centre periodically, submitting travel documentation and providing a security. Alternatives to detention are used infrequently and are only granted provided the non-citizen cooperates with the authorities, has a valid address and travel documents and is not subject to an entry-ban. Designated reception centres may also be used as an alternative to detention for those awaiting return. Unaccompanied children between the ages of 15 and 17 may live in such reception centres for up to two weeks. Amnesty International has voiced concerns regarding this alternative as it may in fact constitute a form of detention.

20. Denmark provides for several non-custodial and alternative detention options, including: passport confiscation; bail payments; residency at a police-determined address and reporting to the police at certain times. Unaccompanied children seeking asylum usually reside in special accommodation centres and may also be offered the option of living outside said centres, such as with a family member already living in Denmark. Although family units seeking asylum may be housed in asylum centres or private residences, Denmark continues to detain families with children in the Sjælsmark deportation camp.

21. In Sweden, supervision is prioritised over detention, with detention considered a last resort measure. Detention may thus be ordered if supervision fails, or under certain restrictive circumstances. Supervision entails reporting to the local Swedish police authority or the Swedish Migration Board at specific times, and potentially surrendering passports or other identity documents.

22. In Cyprus, non-citizens cannot be detained where other less coercive measures can be used. Non-custodial measures include reporting obligations, surrendering a passport and residing at a specific address. Alternatives to detention include: regularly appearing at the authorities of the Republic; depositing a financial guarantee as security; residing at a specific address and supervision. Specifically, unaccompanied minors must be provided with accommodation in institutions which have staff and facilities to take their special needs into account.

C) Does the jurisdiction respect a child's right to be heard, take the child's views into consideration, get the child examined by psychologists and other professionals, and take the child's vulnerabilities into consideration during immigration proceedings?

23. The responses to each sub-question are set out in brief in the table below. Fuller information is provided in the body of the Report. However, where OPBP does not have sufficient material to answer fully, the cell has been left intentionally blank.

Jurisdiction	**Does the child have the right to be heard? Are the child's views taken into consideration in decision-making?**	**Does the child get examined by psychologists and other professionals in the course of proceedings?**	**Are the child's vulnerabilities taken into consideration in decision-making?**
UK	Yes – a child's right to be heard and to have their views taken into consideration are provided wherever practicable and if the child is of sufficient maturity, when immigration authorities are assessing BIC under the Borders, Citizenship and Immigration Act 2009.	To an extent – the relevant statutory guidance requires immigration authorities to cooperate with bodies qualified to plan for children's futures, including primary and specialist health services, to make arrangements to	This is not explicitly referred to in the legislation or the statutory guidance.

		provide support for individual children as they mature and develop into adulthood.	
Finland	Yes – a child has the right to be heard before a decision is made in immigration proceedings, provided the child is aged 12 or over, and unless it is unnecessary. The child's age and level of development influence this assessment. A younger child may also be heard if they are sufficiently mature to have their views taken into account.	In some circumstances – a child's social worker must be afforded the opportunity to provide a written opinion before a decision is made.	-
Estonia	Yes – the Child Protection Act provides that 'every child has the right to independent opinion in all matters affecting the child and the right to express his or her views'. -	In some circumstances – Estonian law involves 'a person with relevant professional expertise' 'where necessary'. In addition, a child will be examined by psychologists in limited circumstances, such as when they have been subjected to rape, torture, or other forms of sexual, physical or psychological violence.	-

		The consent of the child is sought prior to examination.	
Switzerland	Yes – a child's right to be heard is provided by the Procedural Asylum Ordinance 1 and has also been emphasised by the Federal Administrative Court in its decisions. Importance to the views of the minor is further bolstered by the Article 6(3) of the Dublin III Regulations, which are provisionally applicable in Switzerland.	-	Yes – the cognitive capabilities of the minor have to be taken into account in a hearing involving a minor. Swiss law also provides for special procedures during the course of the asylum interview of minors to take into account the special nature of being a child.
Malta	In some circumstances – a child's right to be heard is respected and taken into account when a care plan is formulated. Further, in judicial proceedings the Court has to always act according to the minor's best interest so as to: (a) ensure that the minor has received all relevant information, including but not limited to information in relation to procedures which have	Yes – under Article 63 of the Minor Protection (Alternative Care) Act, children are entitled to access appropriate medical and psychological care, safety, nutritional development and to the social worker caring for them. Further, Article 14 of the Reception of Asylum Seekers Regulations 2005	In some circumstances – Article 14 of the Reception of Asylum Seekers Regulations, 2005 notes that in the implementation of provisions of 'special needs' relating to the material reception conditions and health care, including mental health, account shall be taken of the specific situation of vulnerable persons,

	been, or may be, taken with respect to the minor and the reasons therefor; (b) consult with the minor in a manner appropriate to his understanding, unless the Court deems it reasonably clear that this is contrary to the best interests of the minor; and (c) give the minor the opportunity to express his views and consider them.	provides that children who have been involved in an armed conflict are followed more closely by social workers and referred for physical and psychological assistance.	including minors and unaccompanied minors, who could have been victims of human trafficking, persons with serious illnesses, mental disorders and persons who have been subjected to torture, rape or other serious forms or psychological, physical or sexual violence, such as victims of female genital mutilation. Further, in judicial proceedings, the Court is required to consider the degree of vulnerability of the minor.
Cyprus	Yes – the law protects a child's right to have their opinion heard and taken into account in the decision-making process and in BIC assessments.	Yes – a child's vulnerabilities are also taken into consideration during immigration proceedings wherein both special needs assessment and age assessment are done by trained professionals, social workers and psychologists.	
Sweden	Yes – a child's right to be heard is compulsorily incorporated in the immigration process	-	-

	whenever a child will be affected by a decision, unless it is inappropriate due to age, maturity and/or psychological conditions.		
Denmark	Yes – under the Danish Children's Reform, all children in Denmark have a 'right to be involved from the age of 12 years in all aspects including complaints about assignment of special support, repatriation from a placement or a foster family or other angles on children's life'.	In some circumstances – under the Danish Aliens Act, a professional examination is required before housing unaccompanied minors in more restrictive settings than an asylum centre.	In some circumstances – under the Danish Aliens Act, a child's vulnerabilities are also taken into consideration before housing unaccompanied minors in more restrictive settings than an asylum centre.

Question 3: Any other observations in law or practice relating to the jurisdiction and BIC?

24. Whether the legal protections afforded to children in immigration proceedings may be improved or are even adequately enforced in practice has been subject to review in all countries discussed in this report.

25. In 2010, the UK announced its commitment to end child detention for immigration purposes, resulting in the introduction of a new procedure to manage family returns, as well as more family-friendly pre-departure accommodation housing. In 2013, the UN High Commissioner for Refugees (UNHCR) conducted an audit examining procedures facilitating the Home Office staff's ability to make asylum and immigration decisions under the statutory framework. Findings of the audit reveal that 30 of 45 claims contained some type of formal written analysis of the child's best interest in the written decision, while the BIC received primary consideration in the decision-making process in 12 of these claims. If international protection was granted, it was less likely that a BIC assessment would be

conducted. In addition, the UNHCR observed that a child's views were rarely considered in BIC assessments, as the focus remained on elements like maintaining family and close relationships. The UNHCR therefore recommended that the Home Office improve its BIC assessment to ensure that the decision-making process remains objective, independent and comprehensive, and that a child and their families may properly express their views.

26. The UNCRC Committee has voiced concerns that Estonia has increased its detention of asylum-seeking and refugee children. It has also expressed regret that the BIC principle is not adequately understood or taken into account in decisions affecting children in Finland. It urged Finland to strengthen its efforts to ensure that the BIC principle is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings as well as all policies, programmes and projects relevant to and with an impact on children.

27. Administrative obstacles stand in the way of fully enforcing the protection afforded to children under refugee law in Cyprus. It has been reported that registration delays and inadequate integration processes regarding language barriers have prevented minors from fully accessing the education system in Cyprus.

28. In Switzerland, there continues to be a staggered approach to BIC across each of the cantons. It is reported that many cantons do not consider or apply BIC to their injunctions. Moreover, in 2018, it was reported that some cantonal authorities practice the detention of children under the age of 15 despite the prohibition.

29. Despite the positive steps undertaken by the Maltese government concerning migrant children, changes in legislation notwithstanding, there still remains a gap between the practice and the law. Global Detention Project has noted that the practice is to immediately detain migrants who irregularly arrive in Malta, without taking them to the Initial Reception Centre and having them assessed for vulnerabilities. There are also issues of lack of accommodation space for unaccompanied minors.

30. In Sweden, it has been observed that the principle of BIC is being used to legitimise rejection in asylum proceedings. In 2014, the Commissioner for Human Rights expressed concern with respect to the 'BIC' in family reunification procedures in Denmark. Moreover, the Aliens Consolidation Act of 2019 places an inordinate emphasis on a child's potential to integrate into Danish society.

UNITED KINGDOM

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

1. The statutory framework for BIC in the United Kingdom consists of Section 55 of the BCI Act, the accompanying statutory guidance entitled 'Every Child Matters' and the Human Rights Act 1998, which incorporates the European Convention of Human Rights into domestic law.

A. The 'BCI' Act, 2009

2. In the United Kingdom, Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the BCI Act") governs the assessment of the BIC in immigration detention proceedings for accompanied and unaccompanied children. For the purposes of Section 55 (6), 'children' are defined as persons under the age of 18.[1]

3. Section 55 is intended to achieve the same effect as Sections 11 of the Children Act 2004 ("the 2004 Act"), which places a duty on public authorities and officials in England to discharge their functions with reference to the need to safeguard and promote the welfare of children. The 2004 Act did not extend this obligation to authorities and officials exercising immigration functions.[2]

4. Section 55 was introduced following the United Kingdom's withdrawal of its general reservation on immigration matters under the UNCRC on the 18th of November 2008.[3] This reservation permitted the United Kingdom to derogate from UNCRC rights and obligations when enacting immigration legislation and meant that the United Kingdom was under no obligation to incorporate the BIC test contained in Article 3(1) UNCRC into its immigration law.[4] However, once the United Kingdom's reservation was withdrawn, it

1 Borders, Citizenship and Immigration Act 2009, s 55(6).
2 Children Act 2004, s 11(1)(a) to (m).
3 Ayesha Christie, "The Best Interests of the Child in UK Immigration Law," Nottingham Law Journal 22 (2013) 16, 16-17; Gina Clayton and Georgina Firth, *Immigration and Asylum Law* (8th edn, Oxford University Press, 2018) 315.
4 ibid.

had an obligation to review and, where necessary, amend the domestic law to ensure that the requirement to consider the child's best interests was reflected in all national laws and regulations.[5] Consequently, the United Kingdom introduced the BCI Act to incorporate these obligations into domestic law.

5. Under Section 55 of the BCI Act, the Secretary of State is required to make arrangements to ensure that immigration, nationality, asylum and customs functions are discharged with regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.[6] The BCI Act does not distinguish between accompanied and unaccompanied minors in its definition of 'children'.[7]

6. The duty to safeguard and promote the welfare of children applies to immigration officers working on behalf of UK Visas and Immigration, designated customs officials, the Secretary of State, and any other people providing services relating to the discharge of immigration, nationality, asylum and customs functions.[8] The BCI Act applies to these officials when carrying out their relevant functions anywhere in the United Kingdom.[9]

B. Statutory Guidance

7. A person exercising immigration, nationality, asylum and customs functions must also have regard to any guidance given by the Secretary of State in relation to the need to safeguard and promote the welfare of children in the United Kingdom.[10] Relevant officials must take this statutory guidance into account when making decisions, and, if they decide to depart from the guidance, they are obliged to provide clear reasons explaining their actions.[11]

8. The Home Office has provided statutory guidance in relation to the duty to make arrangements to safeguard and promote the welfare of children under Section 55, entitled 'Every Child Matters: Change for Children'.[12] The statutory guidance relating to Section 11

5 United Nations Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), 29 May 2013, CRC /C/GC/14, para 15.
6 Borders, Citizenship and Immigration Act (n 1) s 55(1)-(2).
7 ibid s 55(6).
8 ibid s 55(1)-(2).
9 Home Office, *Every Child Matters: Change for Children*, November 2009.
10 Borders, Citizenship and Immigration Act (n 1) s 55(4).
11 *Every Child Matters* (n 9).
12 ibid.

of the 2004 Act, 'Working Together to Safeguard Children',[13] and Chapter 55 of the Home Office's Enforcement Instructions and Guidance[14] are also informative as to the content of the BIC test in relation to immigration proceedings UK law. The content of this guidance is considered under Question 2 below.

C. The Human Rights Act and the European Convention of Human Rights

9. The Human Rights Act 1998 incorporated the European Convention of Human Rights ("ECHR") into the statutory framework for assessing violations of human rights in the United Kingdom. It requires courts and tribunals to take into account the jurisprudence of the ECHR when deciding questions arising in connection with the ECHR rights.[15] It also necessitates that primary and subordinate legislation are read and given effect in a way which is compatible with the ECHR rights.[16]

10. Article 8 of the ECHR provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. ECHR jurisprudence provides that where there is an alleged violation of a child's right to family life, a BIC assessment must be undertaken in order to determine whether the interference is justified, within the framework of the proportionality test.[17] The requirement under Article 8 to conduct a BIC assessment in immigration detention proceedings for accompanied children has been articulated in *Popov v France*[18] and for unaccompanied children in *Mayeka v Belgium*.[19]

11. The statutory framework for BIC in the United Kingdom consists of Section 55 of the BCI Act, the accompanying statutory guidance entitled 'Every Child Matters',[20] and the Human Rights Act 1998, which incorporates the ECHR regime into the UK law.

13 Department of Education, *Working Together to Safeguard Children*, 2015.
14 Home Office, *Detention and Temporary Release Enforcement Instructions and Guidance,* December 2013.
15 Human Rights Act 1998, s 2.
16 ibid s 3.
17 *Nazarenko v Russia* (2008) 48 EHRR 54 [65]; *Neulinger and Shuruk v Switzerland* App no 41615/07 (ECHR 6 July 2010) [135]-[139]; *CAS and CS v Romania* App no 26692/05 (ECHR, 20 March 2012) [82]; *X v Latvia* [2012] 1 FLR 860 [96]; *Penchevi v Bulgaria* App no 77818/12 (ECHR, 10 February 2015) [75]; *Wetjen and Others v Germany* App no 68125/14 (ECHR, 22 March 2018) [78].
18 *Popov v France* (2016) 63 EHRR 8 [140].
19 *Mayeka v Belgium* (2006) 46 EHRR 23 [81].
20 *Every Child Matters* (n 9). See also UNHCR, 'Guidelines on Determining the Best Interests of the Child' (UNHCR, 2008).

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

12. The Home Office have confirmed in their 2009 Statutory Guidance that the duty to safeguard and protect children under Section 55 of the BCI Act is to be defined *inter alia* as:[21]
    a. preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
    b. undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully; and
    c. consulting children and taking their wishes and feelings of children into account wherever practicable.

13. The statutory guidance also states that UK Visas and Immigration must operate in accordance with the following principles in order to fulfil the requirement to safeguard and promote the welfare of children under their care:
    a. Ethnic identity, language, religion, faith, gender and disability are to be taken into account when working with a child and their family;
    b. Children should have their applications dealt with in a timely way that minimises the uncertainty that they may experience;
    c. When speaking to a child or dealing with a case involving their welfare, staff must be sensitive to each child's needs.[22]

14. The Guidance also provides examples as to how UK Visas and Immigration can discharge their responsibility to protect the welfare of accompanied and unaccompanied children in detention proceedings.[23] However, it recognises that it is incapable of providing for every scenario and, as such, each case must be subject to an individualised assessment on its merits, with reference to the BIC test.[24]

15. In any circumstances where the detention of children is deemed to be appropriate, the Statutory Guidance states that reasonable steps must be taken to ensure that a child may

[21] *Every Child Matters* (n 9) [1.4].
[22] ibid [2.7].
[23] ibid [2.19].
[24] ibid [2.18].

continue his or her education, maintain contact with friends, and practice his or her religion.[25] There should also be recognition that children cannot put on hold their growth or personal development until a potentially lengthy application process is resolved. Every effort must therefore be made to achieve timely decisions for them.[26]

16. The national courts have generally favoured a holistic approach to determining the BIC in a given case. In *JO and Others (section 55 duty) Nigeria*, Mr Justice McCloskey outlined two guiding principles in order to properly assess the BIC in relation to the section 55 duty:[27]
    a. The decision maker must be properly informed of the child's circumstances; and
    b. The decision marker must conduct a careful examination of *all relevant information and factors.*

17. Whilst the courts have been reluctant to develop an exhaustive list of factors that may be considered in establishing the BIC, a useful checklist was formulated in *EV (Philippines) and Others v SSHD*.[28] In this instance, Lord Justice Christopher Clarke held that any decision as to BIC will depend on a number of factors, which may include:[29]
    a. their age;
    b. the length of time that they have been in the United Kingdom;
    c. how long they have been in education;
    d. what stage their education has reached;
    e. to what extent they have become distanced from the country to which it is proposed that they return;
    f. how renewable their connection with it may be;
    g. to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and
    h. the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

[25] *Every Child Matters* (n 9) [2.19].
[26] *Every Child Matters* (n 9) [2.20].
[27] *JO and Others (section 55 duty) Nigeria* [2014] UKUT 517 IAC [11] (emphasis added).
[28] *EV (Philippines) and Others v Secretary of State for the Home Department* [2014] EWCA Civ 874 [35].
[29] ibid.

18. Considerations regarding the age of the child are of particular importance in relation to immigration proceedings, as considered in *MT and ET (child's best interests; ex tempore pilot) Nigeria*.[30] In this case, the President of the Upper Tribunal held that:

> 'Both the age of the child and the amount of time spent by the child in the United Kingdom will be relevant in determining, for the purposes of section 55/Article 8, where the best interests of the child lie.'[31]

19. The significance of age is often considered in the context of the social, cultural and educational links established by the child in the UK and the extent to which deportation proceedings would be disruptive. This disruption may be considered to be less severe in cases involving much younger children as 'the focus of their lives will be on their families'.[32]

20. The United Kingdom has generally adopted a broad approach to determining the BIC in immigration contexts, emphasizing the importance of a careful examination of all relevant information and factors.[33] The factors in question were outlined in *EV (Philippines) and Others v SSHD*, though this list is not exhaustive, and considerations may differ based on the facts of the case.[34]

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

21. The United Kingdom has adopted international law consensus that once the child's best interests have been determined they must then be given 'primary consideration' when making any decision that affects the child.[35] In *ZH (Tanzania),* Lady Hale observed that: 'it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child *as a primary consideration*'. [36]

30 *MT and ET (child's best interests; ex tempore pilot) Nigeria* [2018] UKUT 88 IAC [32].
31 ibid.
32 R *(on the application of MA (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber*) [2016] EWCA Civ 705 [46].
33 *JO and Others (section 55 duty) Nigeria* (n 27)[11].
34 *EV (Philippines)* (n 28) [35].
35 UNCRC, General comment No. 14 (n 5) [97].
36 *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4 [25] (emphasis added).

22. In the same case, Lord Kerr expanded on this by stating that:

> 'This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption, but *the primacy of this consideration needs to be made clear in emphatic terms*.'[37]

23. Whilst not going as far as to say that the BIC should be treated as an overriding and paramount factor, Lord Kerr noted that 'what is determined to be in a child's best interests should customarily dictate the outcome… and it will require considerations of substantial moment to permit a different result'.[38] It is relevant to note a contrast here between this assessment and that under the Children Act 1989 s 1, which provides that the 'child's welfare shall be the court's paramount consideration'.

24. The approach of the courts in relation to the primacy of this interest has been surmised by Lord Hodge in *Zoumbas v SSHD*.[39] Here, the legal principles established in *ZH (Tanzania), H v Lord Advocate*, and *H(H) v Deputy Prosecutor of the Italian Republic* were condensed as follows:[40]
    a. The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
    b. In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
    c. Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

[37] ibid [46] (emphasis added).
[38] ibid [46].
[39] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 [10].
[40] ibid [10]; *BH(AP) and another v The Lord Advocate and another* [2012] UKSC 24; *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25.

d. While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
e. It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
f. To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
g. A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

25. The UNCRC's General Comment No. 14, issued in 2013, offers further guidance as to the appropriate weight that is to be afforded to the BIC in immigration proceedings.[41] Lord Carnwarth has referred to this guidance as 'the most authoritative guidance now available' on the interpretation and effect of Article 3(1).[42] The Comment notes a 'strong legal obligation' on member states, and prohibits the 'exercise of discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken'.[43] The Comment goes on to clarify the meaning of 'primary consideration' as imposing a duty on states not to consider the child's best interests on the same level as all other considerations.[44]

26. The approach of the national courts of the United Kingdom when interpreting the primacy requirement in the context of immigration proceedings rests on the 'emphatic' assertion that the BIC is a factor that must rank higher than any other.[45] Whilst the BIC remains a non-determinative factor to be weighed against others, the child's best interest will customarily dictate the outcome of a case, and may only be outweighed by the cumulative effect of other considerations that possess 'substantial moment'.[46]

41 UNCRC, General Comment No. 14 (n 5).
42 R *(on the application of SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16 [105].
43 ibid [36].
44 ibid [37].
45 *ZH (Tanzania) (FC)* (n 36) [46].
46 ibid [46].

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

27. The current approach of the United Kingdom towards immigration detention proceedings generally favours non-custodial and alternative detention where possible; as there is a presumption in favour of immigration bail and, wherever possible, alternatives to detention are to be used.[47] The aversion to the use of detention in immigration proceedings is significantly stronger in cases involving children, and the use of detention in such contexts is limited.

A. Unaccompanied Children

28. In cases where a child is unaccompanied, even where statutory powers to detain would otherwise be available, the child must not be detained 'other than in very exceptional circumstances'.[48] If unaccompanied children are detained, it must be for the shortest time possible and appropriate care must be provided. Section 5 of the Immigration Act 2014 has the effect of prohibiting the detention of unaccompanied children in Immigration Removal Centres and place a maximum limit of 24 hours on the length of time an unaccompanied child may be held in a short term holding facility at any one time in the course of facilitating their removal to another country.[49]

29. The detention of unaccompanied children must occur solely in the context of unexpected circumstances where it is necessary for their care and safety pending alternative arrangements being made.[50] Examples of these arrangements may include collection by parents or relatives, by appropriate adult carers or friends, or by local authority children's services. Enforcement Guidelines make clear that detention of unaccompanied children must not be used for other purposes and 'efforts to secure alternative care arrangements in such cases should be made expeditiously'.[51]

47 Enforcement Instructions and Guidance (n 14) [55.1.1].
48 ibid [55.9.3].
49 Immigration Act 2014, s 5.
50 Enforcement Instructions and Guidance (n 14) [55.9.3A].
51 ibid [55.9.3A].

B. Accompanied Children

30. The use of detention in pre-departure accommodation in relation to families with children is only to be employed as a 'last resort' as part of the Ensured Returns process. Stays at pre-departure accommodation are limited to a maximum of 72 hours but may, in exceptional circumstances and subject to Ministerial authority, be extended up to a total of seven days.[52]

31. Families who have no right to be in this country must be encouraged to leave voluntarily and detention should be used only as a last resort and for the shortest possible time.[53] The Family Returns Process ("FRP") governs the treatment of families with children under the age of 18 who meet the criteria for deportation. The FRP is divided into three stages:[54]
    a. Assisted Return - where the family is invited to a family conference and are allowed time to consider their options before a family departure meeting then takes place.
    b. Required Return - where the family is offered the opportunity to depart on self-check in removal directions; and
    c. Ensured Return - where a return plan will be referred to the Independent Family Returns Panel (IFRP) for their consideration.

32. Generally speaking, the Ensured Return option may only be implemented when the Assisted and Required Return stages have failed or are not considered to be appropriate. This may include cases where:[55]
    a. the family has refused to cooperate with the Assisted and Required Return options;
    b. the family has, either verbally or in writing, expressed an intention not to comply with earlier stages of the FRP;
    c. exceptionally a member of the family poses a risk to themselves or others.

33. In the context of the Ensured Return Process, detention must only be used when it is necessary, and the relevant Enforcement Guidelines hold that 'consideration of every alternative to detention and why it is not suitable must be recorded'[56] The following options must always be considered before a family may face detention:

[52] ibid [55.9.4].
[53] *Every Child Matters* (n 9) 17.
[54] Home Office, *Removal Enforcement and Detention General Instructions* (2019) 6.
[55] ibid.
[56] *Enforcement Instructions and Guidance* (n 14) [45.1.1].

a. Voluntary Assisted Return and Reintegration Program (VARRP);
b. Self-check in removal directions;
c. Holding at a reporting centre; and
d. Detention of head of household.

34. The heavy focus on non-custodial and alternative detention measures has resulted in a significant decrease in the number of accompanied and unaccompanied children being detained for immigration purposes. Home Office statistics record that 1,119 children entered detention in 2009. Following a policy shift in 2010, policy shift resulted in the number of children being detained in the UK falling to 127 in 2011, before reaching its lowest levels on record in 2017 and 2018, of 63.[57] Broadly speaking, this is recognised as 'significant progress in the recognition of the rights of asylum seeking and migrant children at all levels'.[58]

C. DOES THIS JURISDICTION RESPECT A CHILD'S RIGHT TO BE HEARD, TAKE THE CHILD'S VIEWS INTO CONSIDERATION, GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS, AND TAKE THE CHILD'S VULNERABILITIES INTO CONSIDERATION DURING IMMIGRATION DETENTION PROCEEDINGS?

35. Under the Statutory Guidance for Section 55, UK Visas and Immigration are required to reflect the right of a child to be heard and to consult the child and have their views, wishes and feelings taken into consideration wherever practicable before making decisions which affect their welfare, including when conducting immigration detention proceedings.[59]

36. While expanding on the nature of this requirement, Mr. Justice McCloskey noted:

> Having regard to the nature of this instrument and the language employed, we construe this requirement as an instruction to decision makers that they should

[57] Detention tables, 'People entering detention by age, sex and place of initial detention' (Table dt_01) (Home Office Immigration Statistics, 2019).
[58] Jarvis Catriona, 'Protecting Migrant Children in the United Kingdom' in Mary Crock and Lenni B. Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar Publishing 2018) 257.
[59] *Every Child Matters* (n 9) [1.14] and [2.7]; *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223, [20].

consider the desirability of consulting affected children and ascertaining their wishes and feelings in any given case.[60]

37. The court in *JO v Secretary of State for Home Department*[61] similarly observed that it would be 'surprising' if a failure to conduct meetings or interviews with an affected child and/or its parents, or other guardians during immigration proceedings would not give rise to a violation of Section 55, as such a course of conduct was 'specifically envisaged by the statutory guidance'.[62]

38. The court has stated that the discovery of a child's own views is an important part of assessing the BIC, in reflection of the United Kingdom's obligations under Article 12 of the UNCRC.[63] Immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so.[64] While the interests of a child may be the same as their parents', this should not be taken for granted in every case.[65]

39. The statutory guidance on Section 55 does not specifically mentioned that the immigration authorities should provide for the child to be examined by psychologists and other professionals. However, it does require immigration authorities to cooperate with bodies qualified to plan for children's futures, including primary and specialist health services, to make arrangements to provide support for individual children as they mature and develop into adulthood.[66]

40. Neither the guidance nor the jurisprudence of the court mentions the need to consider a child's vulnerabilities during immigration detention proceedings.

41. Overall, the United Kingdom respects a child's right to be heard and have their views considered when assessing their best interests in immigration detention proceedings, as evidenced by the statutory guidance on Section 55 and court judgements. However, neither

60 *MK (Sierra Leone)* (n 59) [20].
61 *JO and others* (n 27) [14].
62 ibid [14].
63 *ZH (Tanzania)* (n 36) [34].
64 *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 [49]; *ZH (Tanzania)* (n 36) [34].
65 ibid.
66 *Every Child Matters* (n 9).

the statutory guidance nor the jurisprudence of the court refer to the need to account for the vulnerabilities of the child nor the duty to provide children with access to psychologists and other professionals. The UK is, nevertheless, obliged to respect these rights through its human rights obligations.

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

42. In 2010, the UK announced its commitment to end child detention for immigration purposes, resulting in the introduction of a new procedure to manage family returns, as well as more family-friendly pre-departure accommodation housing.[67]

43. In 2013, the UNHCR conducted an audit which examined how the United Kingdom's existing procedures facilitate the ability of Home Office staff to make asylum and immigration decisions under the statutory framework provided by Section 55.[68] The audit focused on the procedural and substantive aspects of the BIC assessment in the United Kingdom.[69] The audit only focused on family asylum claims and, therefore, on accompanied children.

44. The audit provides some insights as to the practice of the Home Office into the assessment of BIC in immigration proceedings in the United Kingdom. However, it must be noted that the audit was conducted seven years ago, and practice may have subsequently changed. The UNHCR has not conducted a more recent audit.

45. The audit found that, of the 45 claims that the UNHCR reviewed, 30 contained some form of formal written analysis of a child's best interests in the written decision.[70] Twelve explicitly said that the BIC had been given 'primary consideration' during the decision-making process.[71] In almost all these instances, decision-makers referenced Section 55 and included reasons for their determination. The UNHCR observed that it was less likely that a BIC assessment would be conducted in cases where international protection was granted.

67 Home Office UK Border Agency, *Review Into Ending the Detention of Children for Immigration Purposes*, December 2010.
68 UN High Commissioner for Refugees, *Considering the Best Interests of a Child within a Family Seeking Asylum* (UNHCR, 2013).
69 ibid 16.
70 ibid 16.
71 ibid 41.

46. While there was some evidence of pro-activity on the part of the Home Office in collecting information for the BIC assessment, the UNHCR believed that existing processes curtailed their ability to solicit relevant information, as it was unclear as to the type of information that should be obtained and from whom.

47. The UNHCR observed that, in many cases, the determination and analysis of the child's best interests did not reflect a holistic consideration of the various elements required and was often not individualised to the child's situation.[72] Assessments focused more heavily on certain elements of BIC, such as maintaining family and close relationships, than others and rarely considered the child's views. As noted in the audit:

> Despite the fact that 29 of the 64 children dependent on the claims reviewed (just under half) were above the age of 7, in only one instance was UNHCR able to gauge from the file a record of the views of a child.[73]

48. The audit concluded that the existing mechanisms for hearing the views of the child, either directly or indirectly, were inadequate and there was no clear safeguard in place to determine the child's views in circumstances where they may conflict with those of their parents or guardians.[74]

49. The UNHCR recommended that the Home Office strengthened its mechanisms for assessing the best interests of the child to ensure that the determination is objective, independent and accounts for all of the relevant information and introduce mechanisms for children and their families to properly express their views.[75]

50. A 2017 report by the Independent Chief Inspector of Borders and Immigration concluded *inter alia* that the Home Office had failed to demonstrate that the child's 'best interests' were a primary concern.[76]

[72] ibid 36.
[73] ibid 31.
[74] ibid 31.
[75] ibid 10.
[76] David Bolt, 'An Inspection of How the Home Office considers the 'best interests' of unaccompanied asylum-seeking children' (Independent Chief Inspector of Borders and Immigration, 2017) para 3.15.

FINLAND

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

51. In Finland, the statutory framework for assessing the BIC in immigration detention proceedings for accompanied and unaccompanied children is governed by the Aliens Act 2004, which regulates Finnish immigration and asylum policy.[77] The Finnish Constitution does not refer to the BIC principle in its Chapter on basic rights and liberties.[78]

52. Unaccompanied children under 15 years of age cannot be placed in detention.[79] However, unaccompanied children aged between 15 and 17 can be detained for up to 72 hours, which can be extended by 72 hours for special reasons.[80] For detention to be imposed: a condition for detention outlined in section 121(a) must exist – that is, risk that the child will abscond, flee or otherwise make it significantly more difficult to make a decision concerning them, or to enforce an expulsion decision[81]. This must be established on the basis of an individual assessment that other precautionary measures are insufficient; and that detention is necessary as a last resort.[82]

53. Accompanied children can be detained with their family/guardian for up to 12 months where detention is indispensable for preserving the family unit.[83]

54. Section 6(1) of the Aliens Act sets out the BIC test. It provides that, 'in any decisions issued under this Act that concern a child under eighteen years of age, special attention shall be paid to the best interest of the child and to circumstances related to the child's development and health'.[84]

77 Aliens Act 301/2004 (Ulkomaalaislaki) as amended.
78 The Constitution of Finland 731/1999 (Suomen perustuslaki) ch 2.
79 Aliens Act (n 77) s 122.
80 Aliens Act (n 77) s 122(3).
81 Section 121 (1) states that: 'an alien may be detained on the basis of an individual assessment if: (1) taking into account the personal or other circumstances of the alien, there are reasonable grounds to assume that the alien would abscond, flee or otherwise make it significantly more difficult to make a decision concerning himself or herself or to enforce a decision to expel him or her'.
82 Aliens Act (n 77) s 122(1).
83 Aliens Act (n 77) ss 122, 127.
84 Aliens Act (n 77) s 6.

55. In sum, the Finnish Aliens Act requires that in decisions concerning the detention of children special attention shall be paid to the BIC principle and circumstances related to the child's development and health.

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

56. In addition to the legislation specific to immigration and asylum seekers set out in Question 1 above, the Child Welfare Act applies to all children who live in Finland,[85] including children who have been put under alternative care as an asylum seeker. The Child Welfare Act states that when assessing the interests of the child, consideration must be given to the extent to which the alternative measures and solutions safeguard the following for the child:[86]
    a. balanced development and wellbeing, and close and continuing human relationships;
    b. the opportunity to be given understanding and affection, as well as supervision and care that accord with the child's age and level of development;
    c. an education consistent with the child's abilities and wishes;
    d. a safe environment in which to grow up, and physical and emotional freedom;
    e. a sense of responsibility in becoming independent and growing up;
    f. the opportunity to become involved in matters affecting the child and to influence them; and
    g. the need to take account of the child's linguistic, cultural and religious background.

57. Further requirements of the legislation specific to immigration and asylum seekers who do not fall within the scope of this Act are set out in Parts A) to C) below.

[85] Supreme Administrative Court decision (Korkein Hallinto-Oikeus) of 10 November 2017 - KHO:2017:172, KHO:2017:172, Finland: Supreme Administrative Court, 10 November 2017.
[86] See Child Welfare Act 417/2007 (Lastensuojelulaki) s 4(2).

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

58. Section 6 of the Aliens Act requires that 'special attention shall be paid' to the best interests of the child in any detention decision and to circumstances related to the child's development and health. This wording suggests BIC is not a determinative factor.

59. Section 6 differs, for example, from the child welfare and child custody law in Finland where the BIC is an overriding, decisive factor.[87] Under section 40(2) of the Child Welfare Act, taking a child into care and provision of substitute care, can only be resorted to if other measures would not be suitable or possible for providing care in the interests of the child concerned or if the measures have proved to be insufficient, or if substitute care is estimated to be in the child's interests in accordance with section 4 (which outlines the main principles of child welfare). Section 10 of the Custody Act provides that matters concerning child custody and right of access shall, first and foremost, be decided in accordance with the best interests of the child.

60. In looking to the preparatory works of the Aliens Act, scholars conclude that the legislator intended section 6 to be in the conformity with the Article 3 of the UNCRC, in which BIC 'shall be a primary consideration'.[88]

61. In addition to the domestic law specific to asylum seeker and refugee minors set out in Questions 1 and 2 above, the Government of Finland has explicitly said:

> 'Provisions on the rights of children are laid down in the Constitution of Finland. Furthermore, the European Convention on Human Rights and the UN Convention on the Rights of the Child are also binding on Finland. These conventions oblige the states to give priority to the best interests of the child in all actions by the authorities.'[89]

87 Child Welfare Act (n 86) s 40(2); Act on Child Custody and Right of Access 361/1983(Laki lapsen huollosta ja tapaamisoikeudesta) s 10(1); Hannele Tolonen, Sanna Koulu and Suvianna Hakalehto, 'Best Interests of the Child in Finnish Legislation and Doctrine: What Has Changed and What Remains the Same?' in Trude Haugli and others (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill, Nijhoff 2019) fn 98.

88 Tolonen, Koulu and Hakalehto (n 87) 177-178.

89 Ministry of Social Affairs and Health, 'Child Welfare' <https://stm.fi/lastensuojelu?p_p_id=56_INSTANCE_7SjjYVdYeJHp&p_p_lifecycle=0&p_p_state=normal&p_

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

62. As mentioned above, a pre-condition for detaining a child is that the non-custodial measures in sections 118-120 of the Aliens Act are insufficient.[90] These non-custodial measures include reporting to the police, border control office or reception centre periodically (section 118), handing in travel documents (section 119), and providing a security (section 120).

63. However, as the Global Detention Project outlines, alternatives to detention are infrequently utilised. To be granted an alternative, the non-citizen must be willing to cooperate with authorities, have a valid address and travel documents, and not be subject to an entry-ban. Detention is deemed by the Finnish police and border officials to be the most effective way to remove a non-citizen and the most cost-effective. Further, judicial authorities may not always assess the adequacy of detention alternatives as detention decisions made by the District Court are brief and of a summary nature.[91]

64. Both the UN Human Rights Committee and Committee against Torture have urged Finland to promote and use such alternatives to detention whenever possible.[92]

65. A 2017 amendment to the Aliens Act introduced designated reception centres as an alternative to detention for those awaiting return. Unaccompanied children aged 15-17 years old subject to an enforceable expulsion order can be ordered to live in a designated reception centre for up to one week, with the possibility of a further one week extension if necessary to ensure the implementation of the removal.[93] The child must live at the reception centre and report to the centre one to four times a day. If the child does not comply with the obligation to live there, they may be placed in detention.

p_mode=view&p_p_col_id=column-2&p_p_col_count=3&_56_INSTANCE_7SjjYVdYeJHp_languageId=en_US> accessed 1 May 2020.

90 Aliens Act (n 77) s 122(1).

91 See Global Detention Project, 'Finland Immigration Detention' (August 2018) <https://www.globaldetentionproject.org/countries/europe/finland#_ftn38> accessed 18 April 2020, sections 2.6, 2.8 and associated footnotes.

92 Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Finland' (22 August 2013) UN Doc CCPR/C/FIN/CO/6 [10]; Committee against Torture, 'Concluding Observations on the Seventh Periodic Report of Finland' (20 January 2017) UN Doc CAT/C/FIN/CO/7 [13)e)].

93 Aliens Act (n 77) s 120(b).

66. Amnesty International has expressed concerns that this so-called alternative does in fact amount to detention. The only exceptions are that:
    a. it takes place in a reception centre rather than a traditional detention centre;
    b. the length of detention is short, with a potential extension; and
    c. children have the right to judicial review within four days after the initial decision to place them in a designated centre.[94]

C. DOES THIS JURISDICTION RESPECT A CHILD'S RIGHT TO BE HEARD, TAKE THE CHILD'S VIEWS INTO CONSIDERATION, GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS, AND TAKE THE CHILD'S VULNERABILITIES INTO CONSIDERATION DURING IMMIGRATION DETENTION PROCEEDINGS?

67. Regarding the right to be heard, section 6(2) of the Aliens Act provides that before a decision is taken on a child who is aged twelve or over, the child shall be consulted, unless such consultation is manifestly unnecessary. The child's views shall be taken into account in accordance with their age and level of development. A younger child may also be heard if sufficiently mature to have their views taken into account.[95]

68. The Committee on the CRC has expressed concern that under the Aliens Act, children younger than 12 seem not to be heard as a general rule. The Committee recommends that such age limitations be abolished, ensuring all children under 18 are duly heard in judicial and administrative proceedings affecting them.[96]

69. Regarding professional assessments of the child, section 125(a) of the Aliens Act requires the official social worker appointed by the institution responsible for social welfare to provide the District Court with their written opinion on the matter. The statement must be available, at the latest, when the court hears the matter concerning the child's detention. Section 122(3) also provides that before a child is detained the official social worker must be given the opportunity to be heard.

94 Amnesty International, *Finland: Submission to the United Nations Human Rights Committee* (2019) <https://www.amnesty.org/download/Documents/EUR2096852019ENGLISH.pdf> accessed 4 May 2020, 6-7. On the right of review see Aliens Act (n 77) s 124.
95 See also Aliens Act (n 77) s 122(2).
96 Committee on the Rights of the Child 'Concluding Observations: Finland' (3 August 2011) UN Doc CRC/C/FIN/CO/4 [29]-[30].

70. In practice, social workers visit the Joutseno detention facility, where children are held with their parents, every two weeks. They assess the child's condition and deliver their statement to the District Court.[97]

71. Section 5 of the Welfare Act, which applies to children who have been taken into alternative care as an asylum seeker, provides that the opportunity for the child to present their views must be safeguarded in a manner in keeping with their age and level of development. When assessing that of the need for child welfare, a decision concerning a child or young person or the provision of child welfare, must pay special attention to the views and wishes of the child or young person.

72. Overall, the BIC principle appears to be a non-determinative factor to be taken into account in child detention cases; alternatives to detention are available in principle but appear to be either infrequently used or amount to *de facto* detention; children above 12 have the right to be heard, but not those under 12 as a general rule; and the child's social worker must have the opportunity to be heard before any decision is made.

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

73. The Committee on the Rights of the Child (CRC) has also expressed regret that the BIC principle is not adequately understood or taken into account in decisions affecting children in Finland. It urged Finland to strengthen its efforts to ensure that the BIC principle is appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings as well as all policies, programmes and projects relevant to and with an impact on children.[98] This suggests that the understanding of the BIC principle in the Finnish legal system is not equivalent to the CRC's interpretation.[99]

97 European Union Agency for Fundamental Rights, 'European Legal and Policy Framework on Immigration Detention of Children' (Report 2017) <http://fra.europa.eu/en/publication/2017/child-migrant-detention> accessed 4 May 2020, 92.
98 CRC (n 96) [27].
99 Tolonen, Koulu and Hakalehto (n 87) 160.

ESTONIA

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

74. Estonian law does not prohibit nor restrict the detention of children. A number of legal instruments in Estonia provide for how BIC determinations are to be conducted.

A. Immigration Legislation

a. Aliens Act

75. The 2009 Aliens Act (Välismaalaste Seadus)[100] is Estonia's main piece of immigration legislation which provides a definition of 'the child', a set of circumstances in which the 'BIC' should be taken into consideration, and finally, a set of provisions concerning the accommodation of unaccompanied minors and separated children. Taken together, these provisions provide the overarching framework for BIC determinations in Estonia which other legal instruments further elaborate on and expand.

76. The Aliens Act stipulates that the 'consideration of rights and interest of the child' are of utmost importance;[101] however, it does not further elaborate upon how 'the consideration of rights and interest of the child' are defined. Rather, the Aliens Act stipulates that the consideration of rights and interests of the child are paramount in a set of circumstances including: where a temporary residence permit is issued for an unaccompanied minor;[102] where a temporary residence permit is issued for a separated child who is to be reunited with their parent(s);[103] where a temporary residence permit is not issued if it would damage his or her rights and interest;[104] and if the state authorities are considering revoking a temporary residence permit.[105]

100 Aliens Act 2009 (Välismaalaste Seadus) art 4.
101 ibid art 154.
102 ibid art 154.1.
103 ibid.
104 ibid 154.2.
105 ibid 154.4.

77. In addition to these considerations, the Aliens Act provides that if a temporary residence permit is to be reviewed, the BIC shall be considered while the child waits during the 'cooling-off period' provided for in the Aliens Act.[106] While the temporary residence permit is being reviewed, the Social Insurance Board is required to provide services in keeping with the Victim Support Act[107] to any unaccompanied minor or separated child who is awaiting the review.[108]

78. In particular, the Aliens Act stipulates that 'the specific needs of minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence' shall be taken into consideration.[109]

79. After the examination of the issuance of temporary residence permit, and 'upon the assignment of the place of stay of an unaccompanied minor alien', the rights and interests of the minors are the 'priority'.[110] The Aliens Act does not explicitly specify what the 'place of stay' of an unaccompanied minor alien is nor does it define what it is meant by 'the rights and interests of the minors'.

b. Act on Granting International Protection to Aliens (AGIPA)

80. After Estonia ratified the United Nations Convention Relating to the Status of Refugees, the government adopted a Refugee Act. The Refugee Act was subsequently replaced by the 2005 Act on Granting International Protection to Aliens (AGIPA) (Välismaalasele Rahvusvahelise Kaitse Andmise Seadus)[111], which outlines refugee status determination procedures, forms of legal protection, and grounds of detention, including of children with families and unaccompanied minors.

81. According to AGIPA, an 'unaccompanied minor alien' is 'less than 18 years of age who arrives or has arrived in Estonia without a parent, guardian or other responsible adult

[106] ibid 226.1.
[107] Victim Support Act, 2003.
[108] Aliens Act (n 100) art 226.2.
[109] ibid art 226.3.
[110] ibid art 226.4.
[111] Act on Granting International Protection to Aliens (AGIPA) 2005 (Välismaalasele Rahvusvahelise Kaitse Andmise Seadus.

person or who loses a parent, guardian or other responsible person while staying in Estonia'.[112] A minor for whom a 'natural person' has been designated as a guardian by the court in Estonia is not considered to be an unaccompanied minor alien.[113]

82. According to Article 17, 'an unaccompanied minor applicant or adult applicant with restricted active legal capacity shall be allowed to enter Estonia' and to apply for asylum.[114]

83. In keeping with this, 'an applicant for or person enjoying international protection who is an unaccompanied minor shall be placed in the accommodation centre for asylum seekers or referred to substitute home service or foster care'.[115]

B. Detention Legislation

a. Obligation to Leave and Prohibition of Entry Act (OLPEA)

84. The Obligation to Leave and Prohibition of Entry Act (OLPEA) (Väljasõidukohustuse Ja Sissesõidukeelu Seadus) outlines the general pre-removal and detention procedures in Estonia.

85. The OLPEA, however, does not cite the 'best interests of the child' and only refers to the 'specific needs' of children, including unaccompanied children. According to Article 6.7 of the OLPEA establishes that 'the administrative authority that is conducting the procedural acts in the proceedings provided for in this Act is required to take into account the specific needs of minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'.[116]

86. According to Article 26.5(7)-(8), any children who are detained in Estonia, must be afforded 'age-appropriate activities' and 'access to education in accordance with the Basic Schools and Upper Secondary Schools Act 2010.[117]

112 ibid 6.1.
113 ibid art 6.3.
114 ibid art 17.2.
115 ibid art 6.2.2.
116 The Obligation to Leave and Prohibition of Entry Act (OLPEA) (Väljasõidukohustuse Ja Sissesõidukeelu Seadus) art 6.7.
117 ibid art 26.5(7), art 26.5(8).

87. In this way, the OLPEA does not prohibit the detention of children, including unaccompanied minors. Rather, the provisions in OLPEA stipulate that a child must be 'detained separately from adults, unless this is contrary to the child's interests.'[118]

88. Article 12 of the OLPEA states that 'if an alien to whom a precept [removal order] is issued is accompanied in Estonia by an alien who is a minor, or with restricted active legal capacity, and who has no basis for stay in Estonia, an obligation to organise compliance with the precept [removal order] also with respect to an alien who is minor or person with restricted active legal capacity shall be imposed by the same precept [removal order] on the parent, guardian or other adult person responsible for the minor'.[119]

89. With regard to removal, Article 12.3 stipulates that the removal order 'shall be issued to an unaccompanied minor alien if upon the issue of the precept [removal order] to leave the representation of the unaccompanied minor alien is ensured and his or her interests are taken into account'. Finally, Article 12.4 stipulates that 'the obligation to leave of an unaccompanied minor alien shall be complied with taking account of the interests of the unaccompanied minor alien and if the guardian is convinced that the unaccompanied minor alien shall be sent back to his or her family member or appointed guardian or to the reception centre of the receiving state'. The OLPEA does not further specify how the 'best interests of the child' are determined.

C. Legislation Pertaining to Children

a. Child Protection Act

90. The Child Protection Act 2014 establishes a set of provisions that are in keeping with the UNCRC for the well-being of children.[120] Importantly, the Child Protection Act establishes a definition of the 'best interests of the child' and how they should be ascertained by designated authorities.

91. According to Article 21.2.3 of the Child Protection Act, 'the best interests of a child differs from the child's opinion or if a decision which does not coincide with the child's opinion

118 ibid art 26.5.4.
119 ibid art 12.1.
120 Child Protection Act 2014 (Lastekaitseseadus).

is made on other grounds, the reasons for not taking the child's opinion into account must be explained to the child'.[121]

92. The Child Protection Act establishes in Estonian law the core tenets of the definition of 'the best interests of the child' and how those 'best interests' should be ascertained by a designated authority.

b. Social Welfare Act

93. The Social Welfare Act[122], passed in 2015, outlines the specific kinds of accommodation that children, including unaccompanied minors, can be afforded in Estonia.

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

94. The Aliens Act stipulates that the 'consideration of rights and interest of the child' are of utmost importance (see also Part A below),[123] however, it does not further elaborate upon how 'the consideration of rights and interest of the child' are defined.

95. Article 6 of Aliens Act also stipulates that 'upon the assignment of a place of stay of the applicant for or person enjoying international protection who is an unaccompanied minor and the provision of services for him or her the priority shall be given to the rights and interests of the minor. Unaccompanied minors who are siblings shall not be separated from one another where possible'.[124]

96. Article 21.2 of the Child Protection Act outlines how a designated authority is to ascertain 'the bests interest of the child' and establishes that it is necessary for the designated authority:[125]
    a. to ascertain all the relevant circumstances concerning the situation and person of the child and other information which is necessary to evaluate the effect of the decision on the child's rights and well-being;

121 ibid art 21.2.3.
122 Social Welfare Act 2015.
123 Aliens Act (n 100) art 154.
124 ibid art 6.2.3.
125 Child Protection Act (n 120) art 21.2.

b. to explain the content and reasons of the planned decision to the child, to hear the child in a manner taking account of his or her age and development and to account for his or her opinion based on the child's age and development as one of the circumstances upon ascertaining the best interests of the child; and
c. [to] assess all the relevant circumstances in aggregate, to form a reasoned opinion concerning the best interests of the child with regard to the planned decision.

97. According to Article 21.2.3 of the Child Protection Act, where 'the best interests of a child differ from the child's opinion or if a decision which does not coincide with the child's opinion is made on other grounds, the reasons for not taking the child's opinion into account must be explained to the child'.[126] This is also relevant to Part C below.

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

98. According to the European Commission, 'one of the underlying principles in Estonian legislation is that every decision needs to be made based on the "child's best interest" and there is a need to always take the child's opinion into account'.[127] Numerous domestic legal instruments, including the aforementioned Aliens Act, AGIPA, the Child Protection Act, and the OLPEA reaffirm this general principle in their provisions.

99. According to Article 5.3 of the Child Protection Act, 'in all action concerning children, the best interests of the child shall be a primary consideration'.[128]

100. The Child Protection Act further establishes 'the bests interests of the child' as a principle of 'primary consideration'.[129] According to Article 21.1, when a designated authority is to render a decision that affects a child and when deliberating between different options that can be adopted, 'the best interests of the child shall be ascertained and they shall be based on as the primary consideration upon the making of decisions'.[130]

126 ibid art 21.2.3.
127 European Commission, 'Country Profiles - Estonia: Policies and Progress Towards Investing in Children' (2020) <https://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3639> accessed 20 April 2020.
128 Child Protection Act (n 120) art 5.3.
129 ibid art 21.
130 Ibid.

101. Article 17 of AGIPA also establishes that in 'asylum proceedings involving an unaccompanied minor, the rights and interests of the minor shall be taken into consideration above all'.[131]

102. The Aliens Act stipulates that the rights and interests of the child 'shall be taken into consideration in particular' upon the issue of a temporary residence permit to a minor child to settle with his or her parents.[132] In addition, a temporary residence permit shall not be issued if the settling of the child in Estonia 'damages his or her rights or interests and if the legal, financial or social status of him or her may deteriorate as a result of settling'.[133] Further, a residence permit will not be cancelled or refused an extension 'if this does not correspond to the rights and interests of the child'.[134] This suggests that the rights or interests of the child are paramount in these limited, but highly significant, circumstances.

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

103. A number of provisions in Estonian law provide for alternative detention measures for children, including unaccompanied minors. These alternative detention measures include 'substitute homes' that are maintained by the Social Insurance Board and managed by SOS Children's Villages in Estonia.

104. The Social Welfare Act outlines the specific kinds of accommodation that children, including unaccompanied minors, can be afforded in Estonia. According to the Social Welfare Act, a substitute home service 'means ensuring family-like living conditions to a child for meeting his or her basic needs, the creation of a secure physical and social environment promoting his or her development and preparation of the child for coping in accordance with his or her abilities as an adult'.[135]

105. In particular, according to Article 117 of the Social Welfare Act, 'the substitute home service is provided to a child entitled to receive the substitute home service:

131 AGIPA (n 111) art 17.6.
132 Aliens Act (n 100) art 154.1.
133 ibid art 154.2.
134 ibid art 154.4.
135 Social Welfare Act (n 122) art 116.

a. until he or she attains 18 years of age;
b. until the beginning of the following school year in daytime or, for medical reasons, in another form of study at a basic school, upper secondary school or vocational educational institution in case of acquiring basic or secondary education; or
c. until the end of the initial standard period of study established by the corresponding curriculum at a vocational educational institution, institution of professional higher education or in Bachelor's study or Master's study or integrated Bachelor's and Master's studies at a university, if the child staying at the substitute home continues studying at a vocational educational institution, institution of professional higher education or in Bachelor's study or Master's study or integrated Bachelor's and Master's studies at a university during the 12 months he or she acquired basic, secondary, vocational or higher education.

106. Prior to 'referral to a substitute home or foster care…the local authority performing the duties of or appointed as the guardian of the child or, the Social Insurance Board shall prepare a case plan for each child'.[136] After referral of a child to a substitute home, the local authority performing the duties of or appointed as the guardian or…the Social Insurance Board 'shall supplement the case plan of the child in accordance with the proposals of the provider of substitute home service'.[137]

107. In these ways, the Social Welfare Act provides the main alternative to detention to children, including unaccompanied minors, staying in Estonia. It establishes that children and unaccompanied minors can be accommodated in substitute homes where designated authorities have to establish a care plan for the duration of their stay.

108. According to the Obligation to Leave and Prohibition of Entry Act (OLPEA), 'an unaccompanied minor alien shall be provided substitute care service by the Social Insurance Board during his or her stay in Estonia'.[138] In keeping with the OLPEA, the Social Welfare Act provides that unaccompanied children are accommodated in 'substitute homes' which are managed by SOS Children's Villages.[139]

136 ibid art 10.2.
137 ibid art 10.3.
138 OLPEA (n 116) art 12.9.
139 Social Welfare Act (n 122) art 125.

109. According the Aliens Act, if a temporary residence permit is to be reviewed for the child or unaccompanied minor, 'the best interests of the child' shall be considered while the child waits during the 'cooling-off period' provided for in the Aliens Act.[140] While the temporary residence permit is being reviewed, the Social Insurance Board is required to provide services in keeping with the Victim Support Act to any 'alien' awaiting the review.[141] These services include providing accommodation in one of the 'substitute care homes' that are managed by SOS Children's Villages. According to Article 226.3 of the Aliens Act, the specific needs of minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence is prioritised. This is further clarified in Article 226.4 of the Aliens Act which categorically states that priority is given to the assignment of the place of stay of an unaccompanied minor alien and to the provision of services, in accordance to the rights and interests of the minor'.

C. DOES THIS JURISDICTION RESPECT A CHILD'S RIGHT TO BE HEARD, TAKE THE CHILD'S VIEWS INTO CONSIDERATION, GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS, AND TAKE THE CHILD'S VULNERABILITIES INTO CONSIDERATION DURING IMMIGRATION DETENTION PROCEEDINGS?

110. None of the domestic legal instruments in Estonia explicitly provide for examinations by psychologists to determine the BIC. The only provisions that provide for professional support services for children are found in the OLPEA. According to Article 226.2 of OLPEA, 'the Social Insurance Board shall provide the services specified… in the Victim Support Act to an alien with his or her consent'.

111. Article 226.3 of the OLPEA establishes that services shall be provided to 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents

[140] Aliens Act (n 100) art 226.1. Section 205 of the Aliens Act defines a 'cooling-off period' of 30 to 60 calendar days that is granted to an alien from the moment when he or she is notified of the possibilities and conditions provided for under Section 204 of the Act, so that an alien could make a decision whether he or she wishes to cooperate with the investigative authority or the prosecutor's office.
[141] ibid art 226.2.

with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence'.

112. Under AGIPA, in asylum proceedings, according to Article 17, 'where necessary, a person with relevant professional expertise shall be involved in the performance of procedural acts involving minors'.[142]

113. Article 5.4 of the Child Protection Act also establishes that 'every child has the right to independent opinion in all matters affecting the child and the right to express his or her views'.

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

114. As was reported by the Global Detention Project, in 2017, the UNCRC expressed concern in response to reports that it had received that the detention of asylum-seeking and refugee children had increased in Estonia.[143] The Committee urged the Estonian Government to further amend the AGIPA 'to prohibit the detention of refugee and asylum-seeking children and to adopt alternatives to detention so that children can remain with family members or guardians in non-custodial, community-based contexts, consistent with their best interests and with their rights to liberty and family life'.[144]

115. The Global Detention Project also reported that interviews conducted by the Ombudsman for Children during inspection visits in 2015 revealed that unaccompanied children are frequently detained after their arrival in Estonia.[145] Although unaccompanied children were later placed in 'substitute homes', the transfer to these facilities was delayed in some cases. Further, unaccompanied children were found to be 'confined for short periods of time in other locations, such as border guard stations and detention houses'. Lastly, as it was reported by the Global Detention Project, the Ombudsman for Children

142 AGIPA (n 111) art 17.5.
143 United Nations Committee on the Rights of the Child (CRC) (2016) 'List of issues in relation to the combined second to fourth periodic reports of Estonia', <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/049/34/PDF/G1604934.pdf?OpenElement> accessed 20 April 2020.
144 ibid.
145 Global Detention Project, 'Estonia' (2020) <https://www.globaldetentionproject.org/countries/europe/estonia> accessed 20 April 2020.

found additional gaps in the care of detained children, 'notably a lack of legal advisers during detention proceedings and a failure to provide specific staff members to be responsible for taking care of individual children'.[146]

[146] ibid.

SWITZERLAND

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

116. Switzerland is a party to the UNCRC.[147] It has a monistic system and the CRC takes priority over national norms.[148] In accordance with this treaty, Switzerland has a duty to treat BIC as a primary consideration in all actions concerning children.[149] Switzerland is also party to the European Convention on Human Rights, which takes priority over national law.[150]

117. Article 11 of the Swiss constitution categorically states that children and adolescents are entitled to special protection of their integrity and to the promotion of their development.[151] Children are permitted to exercise their rights dependent on and in accordance to their capacity to make judgments.[152]

118. The Federal Act on Foreign Nationals and Integration, 2005 prohibits the incarceration of children younger than 15.[153] However, the legal framework pertaining to immigration detention in Switzerland is applicable to minors above the age of 15 – accompanied and unaccompanied.[154] The prohibition of detention of children is applied differently in the different cantons of Switzerland, with some cantons practicing detention of children under the age of 15 despite the prohibition.[155]

147 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).
148 Federal Department of Foreign Affairs, 'The Relationship between National and International Law' (*FDFA Directorate of International Law* 19 September 2019) <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/respect-promotion/national-international-law.html> accessed 3 May 2020.
149 Convention on the Rights of the Child (n 147) art 3.
150 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).
151 Bundesverfassung der Schweizerischen Eidgenossenschaft 1999 (CH) (BSE) art 11(1).
152 ibid art 11(2).
153 Foreign Nationals and Integration Act 2005 (FNIA) art 80(a)(5).
154 Aliens and Immigration Act AIG, 2005, arts 73-8. See also Terre des hommes, 'Illegal detention of migrant children in Switzerland: A Status Report' (Terre de Hommes, 2016).
155 Terre des Hommes, 'Bestandsaufnahme zur Administrativhaft von Minderjährigen MigrantInnen in der Schweiz' (Terre des Hommes, 7 December 2018) 90.

119. The Aliens and Immigration Act, 2005 safeguards the interests of unaccompanied minors seeking asylum are safeguarded for the duration of the asylum procedure, in the airport and federal government centres by assigned legal representatives as confidential advisors, and after the case has entered the courts by a confidential advisor appointed by the cantonal authorities.[156] Article 81 (3) of the Act further notes that the needs of the vulnerable, unaccompanied minors and families with minors must be taken into account when structuring detention.[157]

120. The EU Dublin III Regulations[158], which are provisionally applicable in Switzerland, also give central importance to BIC. The preamble to the Regulations observes that BIC should be a primary consideration of Member States when applying the Regulations.

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

121. Article 17(2) of the Asylum Act, 1998 empowers the Federal Council to issue additional provisions 'to do justice to the special situation of women and minors in the procedure'.[159] In this, applications from unaccompanied minors are given priority.[160] Article 17(3) of the Act further states that the interests of unaccompanied minor asylum seekers are safeguarded for the duration of the procedure with the assignment of a legal representative and confidant as a person of trust.

122. The Dublin III Regulations state that: 'in assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background.[161] Given the vulnerabilities of the minors, it mandates that Member States should ensure that specific procedural guarantees for unaccompanied minors are laid down.[162]

156 Aliens and Immigration Act (n 154) art 17(3).
157 ibid art 81(3).
158 EU Dublin III Regulation (Regulation (EU) No 604/2013).
159 Asylum Act, 1998, art 17(2).
160 ibid art 17 2bis.
161 Dublin III Regulations (n 158) para 13.
162 ibid.

123. Further, Article 6 also enlists that Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation.[163] This is also relevant to Part C below.

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

124. While BIC is foregrounded in accordance with the CRC in Switzerland, it is not a determinative factor.[164] As per Article 6 of the Dublin III Regulations, BIC has to be a primary consideration of the Member States. Article 6 states that: 'the best interest of the child shall be a primary consideration for Member States with respect to all procedures provided for under the Regulation.

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

125. Non-custodial measures are considered in some cantons, although international children's rights organisation Terre des Hommes has observed that cantons need to work together more closely so that cantons that do not currently consider alternatives for detention could find solutions and examples from those that do.[165]

126. For example, in Aargau, unaccompanied minors are not detained, but are accommodated separately from adults, in special facilities managed by cantonal social services.[166] When accompanied children are apprehended, authorities detain only the father or mother, while the child is accommodated in a non-prison setting.[167] In Basel-Land, minors are accommodated in 'non-prison accommodation' during asylum or migration-

163 Dublin III Regulations (n 158) art 6(2).
164 Asgeir Falch-Eriksen and Elisabeth Backe-Hansen (eds), *Human Rights in Child Protection: Implications for Professional Practice and Policy* (Cham, Palgrave MacMillan, 2018) 79.
165 Terre des Hommes 2018 (n 155) 90.
166 Terre des Hommes 2016 (n 154) 25.
167 ibid.

related proceedings.[168] In Basel-Stadt, administrative detention of minors is used only as a last resort and alternatives are sought as a priority. Alternative detention measures of Basel-Stadt includes assigning a caregiver to the child, imposing reporting requirements, placing accompanied children together with their family in apartments or in civil protection infrastructures, placing unaccompanied minors in specialised structures (such as specified residence for unaccompanied minor asylum seekers or a home for children and youth) or in foster care.[169] Unaccompanied children over 16 years old are hosted in specialised infrastructures where they are partially supervised with some independence and children without residential permits are hosted in accommodation for children and youth.[170] Additionally, legal guardians are appointed for children and youth. In Bern, children cannot be detained under asylum proceedings. Children between 14 and 18 years old are accommodated in specialised and adapted structures, whereas children below 14 years old are taken care into by a childcare group or placed in foster care.[171]

127. Alternative measures available under domestic law includes:[172]

i. Obligation to hand over travel documents and/or passport to authorities;[173]
ii. Obligation to live at a specific address or house arrest;[174]
iii. Option for a person to report to the authorities on a regular basis and/or to provide a financial deposit;[175]
iv. Assistance with a voluntary return and escort to the airport when departing from Switzerland. This would likely be preceded by house arrest and/or detention.

128. Terre des Hommes reports that alternative measures are not commonly applied even when available.[176] Terre des Hommes has made the following suggestions for the

168 ibid.
169 ibid.
170 ibid.
171 ibid 26.
172 ibid 61.
173 Bundesgesetz über die Ausländerinnen und Ausländer (CH) (AuG), art 64e(c).
174 ibid art 74.
175 ibid art 64e(a)(b). This option is not currently applied in any Canton but is considered a legally valid alternative to detention in Switzerland, Terre des Hommes 2018 (n 155) 88.
176 Terre des Hommes 2018 (n 155) 61.

implementation of other alternative measures, and recommend their implementation for all Cantons:[177]

b. Appropriate care for unaccompanied minors seeking asylum;
c. Open or half-open asylum centres without prison character;
d. Homes or centres for person awaiting return;
e. Accommodation in care facilities;
f. Accommodation in a family-like structure;
g. Surveillance measures.

129. Non-custodial measures and alternative detention measures are considered and practiced by some Cantons. Reports on these measures suggest that they exist more in theory than in practice and should be applied and considered more widespread.

130. The incarceration of children under the age of 15 appears to have been practiced with regards to children in the company of their families, and justified by reasoning that it was preferable to detain than to separate children from their families.[178] The incarceration of these children was justified as 'incarceration in the interest of the child' ('Inhaftierung zum Kindswohl').[179]

C. DOES THIS JURISDICTION RESPECT A CHILD'S RIGHT TO BE HEARD, TAKE THE CHILD'S VIEWS INTO CONSIDERATION, GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS, AND TAKE THE CHILD'S VULNERABILITIES INTO CONSIDERATION DURING IMMIGRATION PROCEEDINGS?

131. Article 7 of the Procedural Asylum Ordinance 1 lays down the guidance to be followed during the hearing involving a minor.[180] This has also been emphasised by the Federal Administrative Court in July 2014[181]. Consideration must be given to:

d. the minor's age;

177 ibid 90-92.
178 'Die ausländerrechtliche Inhaftierung von Kindern und Jugendlichen in der Schweiz bleibt auch 2019 aktuell' (humanrights.ch, 18 April 2019) <https://www.humanrights.ch/de/menschenrechte-schweiz/inneres/gruppen/kinder/administrativhaft-jugendliche-schweiz> accessed 3 May 2020.
179 Curdin Vincenz, 'Umstrittene Ausschaffungshaft: Dutzende Jugendliche in Schweizer Gefängnissen', *Schweizer Radio und Fernsehen* (Zürich, 2018).
180 Asylum Ordinance 1, OA 1, art 7.
181 Federal Administrative Court, Decision E-1928/2014 issued 24 July 2014.

e. their level of maturity;
f. their capacity to understand questions, to remember and to express themselves;
g. their ability to understand the complexity of the matter and the procedure; and
h. their ability to recognise how compelling a statement may be as evidence.

132. Article 6(3) of the Dublin III Regulations state that in assessing BIC, the following factors have to be accounted for:
i. Family reunification possibilities;
j. The minor's well-being and social development;
k. Safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; and
l. The views of the minor, in accordance with his or her age and maturity.

133. Swiss law also provides for special guarantees to be in place during the course of the asylum interview for minors, especially unaccompanied children. In several cases, the Federal Administrative Court has ruled that interviewers have to take into account the special nature of being a child; the atmosphere should be welcoming and benevolent, the officials must be sensitive, open and empathetic to the minor being interviewed; and the procedure should be explained to the minor in a transparent, child friendly manner.[182] The Court has also elaborated on the specific details of the interview process, for instance: the pace of the interview with minors should be slower, breaks should be granted every 30 minutes, the questioning should be open and any change in discussion should be announced to the minor.[183] The officials attitude must remain neutral throughout the process[184].

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

134. Switzerland has been given multiple recommendations regarding the Swiss policy to prioritise public interest over BIC.[185] It is reported that many Cantons do not consider

182 Federal Administrative Court, Decision E-1928/2014, 24 July 2014.
183 ibid.
184 ibid. See also Asylum Information Database, 'Country Report: Switzerland' (Swiss Refugee Council, 2019) 54.
185 Philip D. Jaffé et al, *Umsetzung der Menschenrechte in der Schweiz Eine Bestandesaufnahme im Bereich Kinderund Jugendpolitik* (Bern, Schweizerisches Kompetenzzentrum für Menschenrechte, 2014) [64].

or apply BIC to their injunctions.[186] Moreover, in 2018, it was reported that some cantonal authorities practice the detention of children under the age of 15 despite the prohibition.[187]

135. Following a report by a parliamentary committee on detention in immigration proceedings,[188] the Canton of Wallis and the Canton of Zürich announced that they would no longer detain minors.[189] There has not yet been an evaluation of these intentions. It is unclear how many children are being detained with their family in immigration proceedings.[190]

136. It was reported in 2014 that the right of the child to be heard is not always respected in civil procedures.[191] In non-immigration cases at least six children under the age of three live in prison with their mothers on a permanent basis.[192]

186 ibid [72].
187 Netzwerk Kinderrechte, 'Die Administrativhaft von Migrierenden Kindern in der Schweiz ist Nie in ihrem Besten Interessen' (*Netzwerk Kinderrechte Schweiz*, 14 December 2018) <https://www.netzwerk-kinderrechte.ch/aktuell/2018/die-administrativhaft-von-migrierenden-kindern-in-der-schweiz-ist-nie-in-ihrem-besten-interessen> accessed 3 May 2020.
188 Geschäftsprüfungskommissionen der Eidgenössischen Räte, 'Administrativhaft im Asylbereich Bericht der Geschäftsprüfungskommission des Nationalrates' (*Schweizerische Eidgenossenschaft* 26 June 2018).
189 Barbara Heuberger, 'Kinder und Jugendliche gehören nicht ins Gefängnis', *Die Wochenzeitung* (Zürich 31 January 2019).
190 Lukas Mäder, 'Niemand weiss, wie viele Kinder in Ausschaffungshaft kommen – das soll sich ändern', *Neue Zürcher Zeitung* (Bern, 3 July 2018).
191 'Kindeswohl - Empfehlungen an die Schweiz' (humanrights.ch, 18 March 2014) <https://www.humanrights.ch/de/menschenrechte-schweiz/empfehlungen/kindeswohl/> accessed 3 May 2020.
192 Anita Zulauf, 'Kinder hinter Gitter' (Aargauer Zeitung, 2018).

MALTA

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

137. Malta has ratified the UNCRC and is bound by Article 3 of the same with respect to BIC.[193]

138. The Minor Protection (Alternative Care) Act, 2019 is the principal legislation that pertains to children in immigration detention proceedings, including both accompanied and unaccompanied minors. The Act treats minor Maltese and non-Maltese minors at par.[194]Article 62 (3) (k) of the Act guarantees to all minors in Malta the rights of children mentioned in the UNCRC.[195]

139. The Act also creates the office of Director (Protection of Minors) which acts in a manner that is in best interest of the child during administrative proceedings.[196] It also requires Maltese courts to uphold the best interests of the child in judicial proceedings.[197]

140. The Agency for the Welfare of Asylum Seekers (AWAS)[198] is the agency that is responsible for the implementation of national legislation and policy that concerns the welfare of refugees, including accompanied or unaccompanied minors, persons enjoying international protection and asylum seekers. It manages reception facilities, housing, health, welfare and education.

141. The Reception of Asylum Seekers Regulations, 2005 is also a pertinent legislation that seeks to establish the minimum standards for the reception of asylum seekers, including accompanied and unaccompanied minors.[199]

193 Convention on the Rights of the Child (n 147) art 3.
194 Ministry for Justice and Home Affairs and Ministry for the Family and Social Solidarity, *Malta: Irregular Immigrants, Refugees and Integration* (Policy Document, 2005) <https://www.refworld.org/docid/51b197484.html> accessed 19 April 2020.
195 Minor Protection (Alternative Care) Act 2019, art 63 (3)(k).
196 ibid art 4.
197 ibid art 16.
198 AWAS, 'Mission and Function', <https://homeaffairs.gov.mt/en/MHAS-Departments/awas/Pages/Mission-and-Function.aspx> accessed on 26 April 2020.
199 Reception of Asylum Seekers Regulation, 2005 (Subsidiary Legislation 420.06).

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

142. While the 2019 Act does not define BIC, it identifies factors that have to be taken into consideration by any official or the Juvenile Court in matters that concern migrant children. Collectively, these factors are to be applied in a manner that keeps the minor's best interests at the forefront. The Act states that in *any* proceedings before the Court, the Court has to consider, *inter alia*:[200] (a) The views of the minor, if the minor is considered to have sufficient understanding; (b) The physical, emotional and educational needs of the minor and the capability of the parents, or of the other appropriate persons, to contribute towards those needs; (c) The effect that any change in circumstances may have on the minor; (c) The age, background and characteristics of the minor that the Court deems relevant; (d) The harm the minor has suffered or may suffer; and (e) any other relevant matter.

143. Article 19(2) of the Act further states that before giving its decision, the Court shall consider:[201] (a) the views of the minor, when deemed to have sufficient understanding; (b) the views of the parents; (c) the views of the tutor and, or curator; (d) the capability of the parents to safeguard the well-being and harmonious development of the minor; (e) the nature and quality of the attachment between the minor and his family; (f) the harm that was suffered, that is being suffered or which may be suffered by the minor; (g) the length of time during which the family of the minor has been receiving support and treatment services; (h) the degree of vulnerability of the minor; (i) the cultural, linguistic and religious background of the minor; and (j) the relationships of the minor with his siblings. In all cases where provision is made for the assignment of any parental responsibilities to any person other than the parents of the minor, the Court shall give preference to the family of the minor, unless it is reasonably clear that it would be against the best interests of the minor.[202]

144. The Act also mandates that the Director (Protection of Minors) register unaccompanied minor, issue an identification document for such minor,[203] and provide for

200 Minor Protection Act (n 195) art 17(6) (emphasis added).
201 ibid art 19(2).
202 ibid art 19(4).
203 ibid art 21(1).

tutorship and, or curatorship of the minor in accordance with the circumstances of the case and in the best interests of the minor.[204]

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

145. The BIC is a primary factor in all decisions concerning the child. As can be inferred from Article 17(1) of the Act, before taking a decision in proceedings affecting a minor, and if the Court considers the minor to be of sufficient understanding, it shall, 'always acting according to his best interests, take into consideration the wishes and views of the minor, as well as the circumstances of the case'.[205]

146. Article 1(2) of the Act categorically states that the Act is to 'give priority to the best interest of minors and to ensure, in the least possible time, the permanence of the care given to the minors'.[206] In this regard, the Act specifically requires the Court to ensure that BIC is a primary factor in all proceedings.[207]

147. All decisions taken by an appointed tutor or curator for an unaccompanied minor must be taken in their best interests.[208] Even for the purposes of revoking a protection order,[209] the court has to consider the decision in light of the best interests of the minor as provided under Article 22 of the Act. Additionally, any investigation to trace an unaccompanied minor's family to his country of origin or in any other jurisdiction has to be considered in light of the best interests of the minor.[210]

148. Further, Article 5(2)(a) of the 2019 Act also states that the Director (Protection of Minors) shall act 'in the best interests of the minor at risk, even if such minor is not a citizen of Malta'.

[204] ibid art 21(2).
[205] ibid art 17(1).
[206] ibid art 1(2). See also art 5 (2)(a), art 12 (3)(j), art 12(4), art 12(9), art 13(5), art 20(11), art 21(2), art 21(4)(e), art 21(5) and art 23(1).
[207] ibid art 17, art 19(4), art 21(3), art 16, art 24(5)(e).
[208] ibid art 21(4)(e).
[209] Minor Protection Act (n 195) art 19. Protection orders can be in the form of a care order, a supervision order, a treatment order (by which the parents of the minor are ordered to receive treatment for the abuse of substances or for domestic violence, or receive psychiatric or psychological care or any other treatment or assistance which the Court deems appropriate after having heard experts in the fields); or a removal order (against the author of significant harm to the minor from the place of residence of the minor).
[210] ibid art 21(5).

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

149. Accommodation of irregular immigrants who belong to vulnerable groups due to their age and/or physical condition (such as children)[211] in 'alternative centres' has been provided.[212] The Act further provides for alternative care for minors through protection orders. Article 19 states that in cases where the Director (Protection of Minors) acts for the issuing of a protection order for a minor, the Court may make any one or more of the following orders:

a. A care order entrusting the care and custody of the minor to such person or entity that operates in social welfare which the Court deems appropriate;
b. A supervision order placing the minor under the supervision of the entity identified by the Director (Protection of Minors) for a period specified by the order and according to those conditions which the Court deems appropriate to impose, including the granting of parental responsibility or aspects thereof to such persons as the Court deems appropriate;

150. However, minors who arrive in Malta (accompanied or unaccompanied) are first subjected to age-assessment procedures by the AWAS (Agency for the Welfare of Asylum Seekers) in a detention centre.[213] If the individual concerned is found to be a minor, a care order[214] is issued, the individual is released from detention and placed in an appropriate non-custodial residential facility, and a legal guardian is appointed to represent the minor.[215]

C. DOES THIS JURISDICTION RESPECT A CHILD'S RIGHT TO BE HEARD, TAKE THE CHILD'S VIEWS INTO CONSIDERATION, GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS, AND

211 Ministry for Justice and Home Affairs (n 194) 13.
212 See Minor Protection Act (n 195) art 18.
213 ibid art 21.
214 ibid art 19(1)(a).
215 ibid art 25.

TAKE THE CHILD'S VULNERABILITIES INTO CONSIDERATION DURING IMMIGRATION DETENTION PROCEEDINGS?

151. Malta respects a child's right to be heard. The Director (Protection of Minors) is obliged to ascertain the views and wishes of the minor at risk while drawing up a care plan for those children whose minority has been confirmed.[216] The methodology used to establish the wishes of the minor must also be indicated in the care plan.[217]

152. The Act further states that the Court has to always act according to the minor's best interest so as to:[218] (a) ensure that the minor has received all relevant information, including but not limited to information in relation to procedures which have been, or may be, taken with respect to the minor and the reasons therefor; (b) consult with the minor in a manner appropriate to his understanding, unless the Court deems it reasonably clear that this is contrary to the best interests of the minor; and (c) give the minor the opportunity to express his views and consider them. The views of the minor have to be determined with sensitivity and in a manner, which does not cause harm to the minor.[219]

153. Article 19(2) of the Act also requires the Court to consider the views of the minor, when deemed to have sufficient understanding; the harm that was suffered, that is being suffered or which may be suffered by the minor; the degree of vulnerability of the minor; the cultural, linguistic and religious background of the minor. [220]

154. Article 12(3)(i) of the Act empowers the Director (Protection of Minors) to resolve a matter concerning a minor's need for care and protection through a 'social contract', provided, where necessary, it includes terms on the 'provision of support and therapeutic interventions for the minor', 'therapeutic interventions or treatment of a psychological nature or any other form of medical treatment', 'involvement and obligation of professionals in preparing the care plan' as well as the involvement of the extended family or other important persons in the life of the minor' as would be in the best interests of the minor.

216 ibid art 13.
217 ibid.
218 ibid art 17.
219 ibid art 17 (5).
220 ibid art 19(2).

155. Article 14 of the Reception of Asylum Seekers Regulations, 2005 further notes that in the implementation of provisions of 'special needs' relating to the material reception conditions and health care, including mental health, account shall be taken of the specific situation of vulnerable persons, including minors and unaccompanied minors, who could have been victims of human trafficking, persons with serious illnesses, mental disorders and persons who have been subjected to torture, rape or other serious forms or psychological, physical or sexual violence, such as victims of female genital mutilation.[221] It further provides that minors who have been victims, in any form, of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment or who have suffered from armed conflicts shall be given access to pertinent rehabilitation services in terms of the Victims of Crime Act, further to being provided with the relevant and requisite mental health care.

156. The evaluation under Article 14 of the Asylum Seekers Regulations is carried out by the AWAS. This Act again clarifies that asylum applicants identifies as minors shall not be detained, except as a measure of last result.[222]

157. The National Children's Policy (2017-2024) is guided by the UNCRC in promoting holistic development and well-being of children, including migrant children by focusing on psychological and socioeconomic aspects in the life of the child.[223]

158. Access to appropriate medical and psychological care, safety, nutritional development, access to the social worker taking care of him or her are enlisted as 'Rights of Minors in Alternative Care' in Article 63 of the Act. The same article guarantees to minors in alternative care to be consulted on any decision affecting him in a manner appropriate to his age.[224] The Act also establishes a 'Therapeutic and Secure Centre' to hold minors with serious behavioural difficulties in a safe and adequate place so that they can be given the required therapy and assistance.[225]

221 Reception of Asylum Seekers Regulations (n 199) art 14(1).
222 ibid.
223 Ministry for the Family, Children's Rights and Social Solidarity, 'National Children's Policy' (2017) 53.
224 Minor Protection Act (n 195) art 63.
225 ibid art 26.

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

159. Despite the positive steps undertaken by the Maltese government concerning migrant children, and changes in legislation notwithstanding, there still remains a gap between the practice and the law. Global Detention Project notes that the practice is to immediately detain migrants who irregularly arrive in Malta, without taking them to the Initial Reception Centre and having them assessed for vulnerabilities.[226]

160. It has also been reported that unaccompanied minors are still being detained pending age assessments due to lack of space for accommodation in any the open centres.[227]

[226] Aditus and Jesuit Refugee Service (JRS), "Country Profile: Malta," *European Council for Refugees and Exiles (ECRE) and Asylum Information Database (AIDA)* (2019). See also Global Detention Project, 'Country Report: Immigration Detention in Malta – "Betraying" European Values? (Global Detention Project, 2019) 14.
[227] ibid.

CYPRUS

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

161. The main legislation pertaining to the status of unaccompanied and accompanied minors in Cyprus is the Aliens and Immigration Law ('AIL') 2003. Although Cyprus has transposed the EU Returns Directive 2011 (which prescribes the maximum length of detention and procedural safeguards), the AIL has not been suitably amended to align with the Directive. Consequently, there is no solid framework in Cypriot law as to the implementation of the Directives provisions[228] and immigration authorities continue to use the erstwhile law to detain migrants despite the Directive's provisions.[229] For instance, while the Directive categorically states that the best interests of the child should be a *primary consideration* of Member States when implementing this Directive,[230] the AIL merely states that the best interests of the child 'shall be taken into account'.[231]

162. The Refugee Law 2000 is the other key piece of legislation that regulates the status of unaccompanied and accompanied minors in Cyprus.

A. Alien and Immigration Law, 2003

163. The AIL 2003 does not contain provisions which relate to the detention of children, except for Article 18PH which contains provisions of the transposed EU Returns Directive. It does not prohibit such detention. This Article states that unaccompanied minors are only to be detained as a last resort and for the minimum time required.[232] It further states that the best interests of the child shall be taken into account when detaining minors pending approval.[233]

228 KISA, *Detention conditions and Juridical overview on detention & deportation mechanisms in Cyprus* (EACEA, January 2014).
229 ibid.
230 EU Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals ('Returns Directive') (2008/115/EC) para 22, art 5(a), art 10 and art 17.
231 The Law on Foreigners and Immigration, 2003 (KEF.105) ('Aliens and Immigration Law' (AIL)) art 18OZ and art 18PH.
232 ibid art 18PH.
233 ibid art 18PH(5).

B. Refugee Law, 2000

164. Under Article 9ST of the Refugee Law, it is forbidden to detain a minor applicant. No differentiation is made between accompanied and unaccompanied minors.[234] Article 10(1A) specifically provides that the best interests of an unaccompanied minor are a primary consideration in the application of the Refugee Law.

165. The Refugee Law also makes provision for the preservation of family unity.[235] Article 20I(4) on Family Reunification requires the Head of the Asylum Service to take into account the best interests of the child when making decisions in relation to family reunification.[236]

166. While both the AIL and the Refugee Law refer to BIC, the Refugee Law sets out criteria to be taken into account in a BIC assessment in the context of Social Welfare Services.[237]

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

167. To ensure that minors are provided with a standard of living appropriate to their physical, mental, moral and social development, Article 9KE(3) of the Refugee Law sets out the following factors to be taken into account in making any assessment of BIC: (a) the possibility of family reunification, (b) the quality of life and social development of the minor, (c) safety and security issues with particular regard to risk of trafficking, (d) the views of the minor, depending on his age and maturity.[238] The Article further states that the minor children must reside with their parents, unmarried siblings or adult liable for them in law or practice if it is in their best interests.[239]

234 Refugee Law 2000 (6 (I) / 2000), art 9ST.
235 ibid art 20TH.
236 ibid art 20TH(4).
237 ibid art 9KE.
238 ibid.
239 ibid.

168. In the framework of protecting the BIC, various provisions of the Refugee Law emphasise on family reunification possibilities. For instance, the legislation requires the Director to locate the minor's family members as soon as possible where relevant.[240]

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

169. Although the AIL states that 'the best interests of the child shall be taken into account,'[241] it is not specified that their interests shall be a 'paramount or overriding factor'. Rather, it appears to be a non-determinative factor to be considered in any determination made by a Minister or Director.

170. The Refugee Law, in its provisions regarding Social Welfare Services,[242] states that the BIC shall be a primary consideration with regard to the application of the provisions of the law on minors, suggesting it is the first factor to be accounted for in this context, although it may not necessarily be 'paramount'.[243] This is repeated in Article 10(1A) on unaccompanied minors.[244]

171. Article 18A(7) of the AIL on applications for the exercise of the right to family reunification provides that during the examination of any application, the Director shall duly take account of the best interests of the minor children.[245] This indicates that BIC may take priority over family reunification. The 'primary interest of minor children' is to be taken into account even under the Family Reunification provisions of Article 25(11). Articles 25A(2) and 10(2C) of the Refugee Law also hold that siblings shall remain together where possible, taking into account the best interests of the minor concerned.[246]

172. In any event, Cyprus is a party to the UNCRC and is bound by Article 3 which requires it to promote the best interests of the child as the primary consideration in all actions concerning them. Article 169 of the Constitution of the Republic of Cyprus

240 ibid art 25A(3), art 10(2D).
241 AIL (n 231) art 18PH(5).
242 Refugee Law (n 234) art 9KE.
243 It has been noted that Article 3 of the CRC places slightly less weight on children's interests than the paramountcy requirement of s1 of the Children Act 1989 (Jonathan Herring, *Family Law*, (9th edn, Pearson 2019).
244 Refugee Law (n 234) art 10(1A).
245 AIL (n 231) art 18A(7).
246 Refugee Law (n 234) art 25A(2), art 10(2C).

provides that all international legal instruments are directly enforceable upon ratification and applicable before Cypriot Courts with superior force over domestic legislation.[247]

173. In conclusion, BIC is treated as a primary factor under the Refugee Law and a non-determinative factor to be taken into account under the AIL. Regardless, evidence suggests it may not be sufficiently promoted in practice.

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

174. As a general matter, under Article 18ΠΣΤ of the AIL, the interior ministry can order the detention of a non-citizen only if other less coercive measures are unavailable. The Global Detention Project reports that non-custodial measures used in return procedures may include reporting obligations; the obligation to surrender a passport and the obligation to reside at a specified address.[248]

175. Provisions on non-custodial measures were inserted into the Refugee Law when the EU Reception Conditions Directive was transposed. Under Article 9ST, the Minister may impose measures as an alternative to detention such as: (a) regular appearances before authorities of the Republic, (b) the deposit of a financial guarantee as security, (c) the obligation to reside at a specified address and (d) supervision by a supervisor.[249]

176. Article 18PH(4) of the AIL states that unaccompanied minors shall be provided with accommodation, as far as possible, in institutions which have staff and facilities that take into account the needs of persons their age.[250] Article 20I of the Refugee Law further states that pursuant to Article 10, during temporary protection, the Director of Social Welfare Services may entrust the care of the unaccompanied minor to a consenting adult

247 Nikita Akasereh, 'Voice of Unaccompanied Minor Asylum Seekers on Guardianship' (UNCRC Policy Centre, 2011).
248 Global Detention Project, 'Immigration Detention in Cyprus: Reception Challenges in Europe's New Gateway' (Global Detention Project, 2019).
249 Refugee Law (n 234) art 9ST(3).
250 AIL (n 231) art 18PH(2)

relative, host family, special reception centre for minors or to the person who cared for the child during the escape.[251]

177. While detention for unaccompanied minors and families with minors is a measure of last resort and for minimum time, in the case of accompanied minors, families will be kept in remand in separate accommodation to ensure adequate privacy.[252]

178. KISA has reported that the principle does not seem to apply in practice, and that unaccompanied minors who are not believed by the state to be underage often face deportation.[253] It has been reported that the Civil Registry and Migration Department issues deportations orders alongside detention orders without individual assessments taking place to examine whether non-custodial measures may be possible.[254] However, the Cyprus Refugee Council has reported two decisions of the International Protection Administrative Court where on the basis of the Refugee Law, detention decisions were annulled for not considering alternative measures to detention.[255]

C. DOES THIS JURISDICTION RESPECT A CHILD'S RIGHT TO BE HEARD, TAKE THE CHILD'S VIEWS INTO CONSIDERATION, GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS, AND TAKE THE CHILD'S VULNERABILITIES INTO CONSIDERATION DURING IMMIGRATION PROCEEDINGS?

A. Right to be Heard & Child's Views:

179. Cyprus is a party to the UNCRC, which enshrines protection of the child's right to be heard. Under Article 12, children have the right to express their views in all matters affecting them, and their opinions are to be given weight in accordance with their age and maturity.[256]

251 Refugee Law (n 234) art 20I.
252 AIL (n 231) art 18PH(2).
253 KISA (n 228).
254 Global Detention Project, 'Immigration Detention in Cyprus: Reception Challenges in Europe's New Gateway' (Global Detention Project, 2019).
255 Cyprus Refugee Council, 'Country Report: Cyprus' (March 2019) <https://www.asylumineurope.org/reports/country/cyprus/overview-main-changes-previous-report-update> accessed 15 April 2020.
256 Convention on the Rights of the Child (n 147) art 12.

180. The minor's opinion is to be taken into account by the Director under Article 20I of the Refugee Law, where the Director is making a decision to entrust the care of the unaccompanied minor to an adult, host family or reception centre.[257] Where an unaccompanied minor is recognised as a refugee or granted supplementary protection status, the Director has to ensure that, where necessary, the opinion of the minor has to be taken into account, depending on his age and maturity.[258]

181. The views of the minor are to be accounted for under the best interest assessment.[259] The Guardian appointed pursuant to Article 10 of the Refugee Law appears to be one of the primary ways by which the unaccompanied minor's best interests are protected.[260]

182. Pursuant to Article 10 of the Refugee Law, unaccompanied minors are to be placed under the care of Director of Social Welfare services who acts as guardian and representative of the minor to safeguard their rights and best interests.[261] The appointment of a competent guardian is vital for the protection of unaccompanied minors' interests. The Commissioner of the Rights of the Child acts as the legal representative in the asylum process for unaccompanied minors. The legal representative must inform the child about the personal interview.[262]

183. Reports have suggested that Social Welfare Services have not carried out their guardianship duties effectively, neglecting in some cases to provide accommodation and care.[263] Some unaccompanied minors have sought unofficial guardians from NGOs as they were not made aware of Social Welfare Services. The Committee on the Rights of the Child stated in their 2012 report that the ambiguous nature of Article 10 has led many unaccompanied minors to remain without representation.[264] There have also been reports

257 Refugee Law (n 234) art 20I.
258 ibid art 25(11).
259 ibid art 9KE (3).
260 ibid art 10.
261 ibid art 10. See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Report on a Visit to Cyprus Carried Out the 2 to 9 February 2017' (CPT, 2018) 16.
262 Refugee Law (n 234) art 10.
263 Akasereh (n 247).
264 Committee on the Rights of the Child, 'Consideration of Reports Submitted by State Parties under Article 44 of the Convention' (CRC, 2012).

of no legal advice or assistance being provided to unaccompanied minors,[265] suggesting that the right to information under Article 13 of the CRC is not being complied with. Overall, it is submitted that an unaccompanied minor's best interests cannot be truly safeguarded where a guardian does not adequately protect and promote them. Therefore, the best interests of the minor may not always be a paramount factor in practice, where decisions are made by their state-appointed guardian. This may also depend on the extent to which the child's opinion is accounted for in practice.

B. Vulnerable Status & Psychological Assessment:

184. Article 13A(9e) provides that personal interviews of minors shall be conducted in an appropriate manner.[266] Article 18(6) on principles governing the Asylum Service proceedings again note that account must be taken of the special situation of vulnerable persons such as minors and unaccompanied minors.[267]

185. Article 9KG of the Refugee Law explicitly acknowledges the vulnerable status of children. It compels the authorities to take account of the special situation of vulnerable persons, such as 'minors' and 'unaccompanied minors.'[268]

186. Under the Detention of Applicants provision, the police and other competent authorities are required to ensure that vulnerable applicants in detention are regularly monitored and given adequate support.[269] Their health, including 'mental health', is to be a primary concern for authorities.[270]

187. Medical examinations may be used to determine the age of the child where there are doubts, but any examination is to be performed in full respect of the unaccompanied child's dignity and by trained healthcare professionals.[271] The child and/or their representative must consent to the examination.[272] A best interest determination does not seem to be required before carrying out an age assessment.

265 ibid.
266 Refugee Law (n 234) art 13A (9e).
267 ibid art 18(6).
268 ibid art 9KG.
269 ibid art 9ST (14).
270 ibid art 9ST (14)(a).
271 ibid art 10(1C)(a).
272 ibid art 10(1H)(b).

188. Article 9CC on 'Evaluation of specific reception and procedural needs of vulnerable persons' requires that an individual assessment be carried out to determine whether a particular person is an applicant with special reception needs, and special procedural guarantees.[273] This assessment may involve a range of persons according to the different provisions, such as social workers, psychologists and physicians. The findings are then submitted to The Asylum Service who may refer them to an application under Article 9CC(6), which will in turn lead to specific support being provided regarding their 'special reception/procedural needs'. Given that minors have been defined as 'vulnerable persons' in Article 9KG, they should qualify for these individualised assessments which may involve psychologists in accordance with the medical examination.[274]

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

189. There are strong protections for accompanied and unaccompanied minors under the Refugee Law. Consistent reference is made to the need for consideration of the minor's interests. Children's rights appear to be preserved, such as the right to education[275] and the right for the child not to be separated from parents against the child's will.[276]

190. Although these protections exist in the provisions of the Refugee Law, they are not adequately enforced in practice. It has been suggested that the Article 9 rights of children have been violated.[277] Administrative obstacles may also prevent unaccompanied minors from accessing their economic, social and cultural rights.[278] It has been reported that registration delays and inadequate integration processes regarding language barriers have prevented children from accessing the education system.[279]

191. The KISA report of 2014 stated that unaccompanied minors were being detained at Paphos District Police Division alongside persons charged with criminal offences.[280]

273 ibid art 9CC.
274 Applicants are referred for medical examinations under Article 9ZT and may also be referred for a psychological examination in accordance with Article 15.
275 Refugee Law (n 234) art 9H.
276 ibid.
277Akasereh (n 247).
278 ibid.
279 ibid.
280 KISA (n 228) 6.

While the minors resided in a special wing, they still had contact with criminals in common spaces.[281] It was also reported that a high security detention centre of Lakatamia in the Nicosia district had a special cell for minors.[282] The presence of special wings for detaining minors suggest that it is possible that minors are being detained, in violation of their best interests.[283]

192. It was reported that unaccompanied minors were being routinely detained as 'prohibited immigrants' where they were found to have illegally entered the country or attempted to travel abroad using false documents which stated that they were over eighteen.[284]

193. The UN Human Rights Committee has also expressed concern over the detention of women who were being separated from their children.[285] KISA has also reported that families have been separated from their children through detention of parents, leaving the child to be put in the care of welfare services.[286]

194. Since 2017, however, it is reported that children were released when they stated that they are younger than 18 years.[287] Official sources now suggest that in practice, Cyprus does not detain children, single parents of minors or parents who are sole supporters of a family. The Cyprus Refugee Council has also stated that asylum seeking children are not detained in practice.[288] The European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also confirmed that mothers with children and unaccompanied children were not being detained[289] in their 2017 report.

195. The Committee on the Rights of the Child also noted in their 2012 report that section 8 of the Refugee Law limited asylum seekers' right to remain to the administrative stage of their claims.[290] This meant that applicants did not receive access to reception

281 ibid.
282 ibid.
283 ibid.
284 ibid 12.
285 UN Human Rights Committee (HRC), 'Concluding Observations on the Fourth Periodic Report of Cyprus, CCPR/C/CYP/CO/4' (30 April 2015).
286 KISA (n 228).
287 Global Detention Project (n 254).
288 ibid.
289 ibid.
290 Committee on the Rights of the Child 2012 (n 264).

conditions such as welfare and medical assistance; and increasing the risk of detention and deportation. The level of health care available to nationals was not found to be available to refugees, particularly those with special needs. Finally, the State's policy of issuing a certificate of refugee status instead of a refugee identity card also limited the housing schemes which internally displaced persons and their children were eligible for.[291]

196. The Cyprus Refugee Council has reported that the Civil Registry and Migration Department (CRMD) has ceased issuing residence permits for family members, leaving children without status or full access to their rights. The CRMD has also frustrated the provisions on family reunification, by requesting evidence from applications that they have resources to maintain family members without recourse to the Republic's social assistance system. Although complaints have been made, it is unclear whether this practice has been stopped.[292]

197. It is recognised that children's rights and interests on the one hand, and asylum policies and migration management on the other, do not always exist in harmony, leading to the best interests of minors being overlooked in practice. This is reflected in the conflict of interest that arises where a guardian is appointed to act in the best interests of the child and also on behalf of the national authority they represent.[293] The positive role of NGOs and their assistance to unaccompanied minors in the form of unofficial guardians is noted.[294]

198. It is concluded that although the law is satisfactory with regards to protection of unaccompanied minors and children's best interests, the protections are not necessarily given full implementation in practice.

[291] ibid.
[292] Cyprus Refugee Council (n 255).
[293] ibid.
[294] Akasereh (n 247).

SWEDEN

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

199. Sweden allows the detention of minors accompanied and unaccompanied under certain conditions. The legal framework for asylum proceedings is laid down in the Aliens Act 2005 ('The Act').[295] Section 2 of chapter 10 of the Act lists the cumulative conditions under which a child may be detained. This is the case if:

(1) it is probable that the child will be refused entry with immediate enforcement;

(2) there is an obvious risk that the child will otherwise go into hiding and thereby jeopardise an enforcement that should not be delayed; and

(3) it is not sufficient to place the child under supervision.

200. According to sub-paragraph 2 of the provision, child-detention is further allowed where supervision has previously proven to be insufficient and the detention serves the purpose of enforcing a refusal of entry or expulsion order.[296]

201. The Act provides that the 'child may not be separated from *both* its custodians' (emphasis added) neither by detaining the child nor by detaining the custodian.[297] The wording suggests that it is possible to separate the child from one of its custodians, where it is accompanied by more than one custodian. If the child has no custodian in Sweden, they may not be detained except for exceptional grounds.[298] The latter constitutes the main difference between accompanied and unaccompanied children in relation to detention.

202. Section 5 of chapter 10 of the Aliens Act sets a maximum time limit of 72 hours for the detention of children, which can be extended for a further 72 hours in exceptional grounds.[299] Thus, the maximum time allowed is six days in total.

295 Aliens Act 2005:716 (Utlänningslag).
296 ibid ch 10 s 2(2).
297 ibid ch 10 s 3.
298 ibid.
299 ibid ch 10 s 5.

203. The best interest principle is not detailed in any specific provisions for detention of children but appears as a general provision in the Act. Section 10 of chapter 1 states that 'in cases involving a child, particular attention must be given to what is required with regard to the child´s health and development and the best interest of the child in general'.[300] This principle applies to the whole asylum process.[301]

204. The Swedish Migration Agency ('Agency') is the central migration administration in Sweden that is tasked with protecting the best interests of a child throughout the asylum process.[302] The Agency is responsible for investigating a minor's right to asylum; appointing a public counsel to the minor; providing financial support to the minor; and assigning the minor to a municipality for accommodation during the process.[303]

205. Sweden ratified the UNCRC without any reservation. Since January 2020, articles 1-42 of the Convention are also part of Sweden's national law. In 2018, the Swedish Parliament had enacted the original text of Convention as domestic legislation.[304] Due to the recent entry into force it is not yet clear whether this will have further implications on Sweden's migration law.[305]

206. Children's rights and the best interest principle are not explicitly recognised in Swedish constitutional law. In 2011, the Instrument of Government (Regeringsformen), one of the four parts of Swedish constitutional law, was amended so as to include the safeguard of the rights of the child as one aim of public institutions.[306] This provision is however goal-oriented and of non-enforceable nature.[307]

300 ibid ch 1 s 10.
301 Swedish Migration Board, *Årsredovisning* 2015 Migrationsverket (Migrationsverket, 2015) 111.
302 Migrationsverket, 'Children in the Asylum Process' <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Applying-for-asylum/Children-in-the-asylum-process.html> accessed 26 April 2020. See also Anna Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights' [2011] Journal of Human Rights Practice 1, 5.
303 Migrationsverket, 'How to apply for asylum: for children who are applying for asylum without a parent or other guardian' <https://www.migrationsverket.se/download/18.4a5a58d51602d141cf4194a/1516357864308/Barnbroschyr_utan_foralder_eng.pdf> accessed 26 April 2020.
304 Act 2018:1197 on the Convention on the Rights of the Child (Förenta nationernas convention om rättigheter) <http://rkrattsbaser.gov.se/sfst?bet=2018:1197> accessed 3 May 2020.
305 For an overview see Anna Lundberg and Jacob Lind, 'Technologies of Displacement and Children's Right to Asylum in Sweden' (2017) 18 Human Rights Review 189, 191.
306 Instrument of Government 1974:152 (Kungörelse om beslutad ny regeringsform) ch 1 s 2 subs 4.
307 Titti Mattsson, 'Constitutional Rights for Children in Sweden' in Trude Haugli, Anna Nylund, Randi Sigurdsen and Lena RL Bendiksen (eds) *Children´s Constitutional Rights in the Nordic Countries* (Brill, 2019) 110.

207. Thus, Swedish migration law allows detention for children, but child-detention is only permissible where several cumulative conditions are fulfilled. Authorities are required to pay particular attention to the best interest of the child in all decisions concerning the child, including those that are made in detention proceedings.

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

208. Government guidance on the rights that children seeking asylum in Sweden has clarified what can be construed to be BIC for the minor, both accompanied and unaccompanied. Collectively, the different factors that are taken into consideration in assessing BIC are:

a. All minors have the right to have their say and be listened to;
b. All minors have the same right to attend school and pre-school as other children living in Sweden; and
c. All minors seeking asylum have the right to the same health care and dental care as other children living in Sweden.

209. Further, the fact that the Aliens Act provides that the child may not be separated from both its custodians[308] indicates that Sweden considers that it is in the child's best interest to maintain contact with at least one parent.

210. The Swedish Migration Board requires all Swedish authorities to consider the best interests of the child when making decisions. If the parents are unable to look after the best interests of the child seeking asylum or if they hurt the child, then social services in the municipality are responsible for taking care of the child.[309]

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

211. Chapter 1, section 10 of the Aliens Act requires migration authorities to give 'particular attention' to the health, development, and the best interest of the child in

[308] Aliens Act (n 295) ch 10 s 3.
[309] Children in the Asylum Process (n 302).

general. There is no uniform interpretation of what the child's best interest requires in Swedish law, instead the construction varies among legal areas.[310] The 'particular attention' required by the Aliens Act is a less forceful formulation than the 'primary consideration' demanded by Article 3 UNCRC[311] and the similarly worded Swedish national provision.[312]

212. Consequently, the weight attached to the best interest of the child in migration proceedings is somewhere between general consideration of a factor and the primary consideration demanded by the UNCRC.

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

213. The Aliens Act 2005 regards detention for children as an *ultima ratio* measure. The conditions for detention set out in section 2 of chapter 10 make clear that detention is regarded subsidiary to the less constraining measure of 'supervision'.[313] Generally, authorities must first attempt to secure enforcement by supervision. Where supervision fails, detention can be ordered. Without a previous supervision order, detention can only be ordered under the restrictive circumstances listed under Question 1.

214. A child may not be detained for longer than 72 hours or, if there are exceptional grounds, for an additional 72 hours.[314] Per the Swedish Migration Board's alternatives to detention policies, children may never be transferred to a correctional institution, remand centre or police arrest facility.[315] When it comes to minors, unaccompanied or in families, detention is used only as a last resort and it is rare for minors to be put in detention.[316]

310 Johanna Schiratzki, 'The Elusive Best Interest of the Child and the Swedish Constitution' in Trude Haugli, Anna Nylund, Randi Sigurdsen and Lena RL Bendiksen (eds) *Children's Constitutional Rights in the Nordic Countries* (Brill 2019) 193.
311 Convention on the Rights of the Child (n 147) art 3.
312 Marita Eastmond and Henry Ascher, 'In the Best Interest of the Child? The Politics of Vulnerability and Negotiations for Asylum in Sweden' [2011] Journal of Ethics and Migration Studies 1185, 1188.
313 Aliens Act (n 295) ch 10 s 2.
314 Aliens Act (n 295) ch 10, s 5. See Migrationsverket, 'The use of detention and alternatives to detention in the context of immigration policies in Sweden' (Swedish Migration Board, 2014) 13.
315 ibid.
316 ibid.

215. Supervision is defined in section 8 of chapter 10 as the obligation to report to the local police authority or the Swedish Migration Board at certain times.[317] It might also require that the alien surrenders his or her passport or other identity document.[318] Section 9 provides for a re-examination of the supervision order on a six-month basis.

216. According to the Swedish Migration Board, supervision is more favourable than detention, both for the alien and the authorities, as it is less costly to administrate and less restraining for the personal freedom of the person in question.[319] This is, however, a general statement not particularly referring to children.

217. The Swedish Migration Board has to designate a municipality, which in turn, has to arrange the accommodation for unaccompanied minor, during the asylum proceeding.[320]

C. DOES THIS JURISDICTION RESPECT A CHILD´S RIGHT TO BE HEARD, TAKE THE CHILD´S VIEW INTO CONSIDERATION; GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS; AND TAKE THE CHILD´S VULNERABILITY INTO CONSIDERATION DURING THE IMMIGRATION DETENTION PROCEEDINGS?

218. Section 11 of the first Chapter of the Aliens Act requires a hearing of children in the decision-making process for decisions under the Act that affect them, unless this is inappropriate. It provides for children to be heard in the immigration process wherever 'a child will be affected by a decision in the case'.[321] It further states that 'account must be taken of what the child has said to the extent warranted by the age and maturity of the child'.[322] The location of this rule in the general provisions part of the Act suggests that it also applies for decisions concerning detention.

219. The hearing is compulsory, 'unless it is inappropriate' to hear the child. Whether it is appropriate to hear the child depends on factors like the child's age, maturity, and

317 Aliens Act (n 295) ch 10 s 8.
318 ibid.
319 Migrationsverket (n 314) 23.
320 Law on the reception of asylum seekers and others, 1994, s 3.
321 Aliens Act (n 295) ch 1 s 11.
322 ibid ch 1 s 11.

psychological condition.[323] The conversation with the child does take place only after custodians or an appointed guardian have given their consent.[324] If there are reasons to not interview the child directly, the Migration Board regards parental interviews with focus on the child as a suitable alternative.[325]

220. Consequently, the Swedish jurisdiction does respect the child's right to be heard in detention proceedings and the right to give appropriate weight to his or her views. However, both is subject to the child's age, maturity, and condition.

221. For both, accompanied and unaccompanied minors, while there is no specific provision to account for the general well-being of the minor, the municipality in charge of the minor is responsible for seeing to the needs of the minor with regard to accommodation and general welfare.[326] The municipality is responsible for: (a) investigating the minor's needs and making decisions on initiatives regarding placement in suitable accommodation; (b) the minor's education; (c) assigning a guardian to the minor; and (c) access to social services under the Social Services Act.[327] The Social Services Act also emphasises that 'when dealing with children, the best interests of the child must be taken into account. When making decisions or other measures concerning childcare or treatment efforts, what is best for the child should be decisive'.[328] The medical services are responsible for providing health and dental care for the minor.

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

222. The official approach of the Swedish Migration Board towards children's rights in 2015 started with the following statement:

> 'All child cases are reviewed individually, and the best interests of the child is considered in all parts of the process. Child Rights Impact Assessments is the method the Agency uses for decision-making and all actions concerning children. This means

323 Swedish Migration Board (n 301).
324 ibid.
325 ibid.
326 Migrationsverket, 'The organization of reception facilities for asylum seekers in Sweden' (EMN Sweden, 2013).
327 Migrationsverket (n 303) 5.
328 Social Service Act, 2001, ch 1 s 2.

that the Migration Agency investigates and assesses children's own grounds for asylum, including an oral conversation with children and/or their representatives.'[329]

223. Thus, the Swedish authorities had taken up the 'Child Rights Impact Assessment' introduced by the UN Committee on the Rights of the Child[330] and stressed the importance of an individual assessment of the asylum application of the child. In respect of unaccompanied minors, the Agency's approach equally requires officials to investigate, assess and report the child's asylum reasons.[331] In the 2019 report the Migration Board elaborates how this is safeguarded in practice.[332] The 2015 report further states that children and their representatives should be heard in cases that result in deportation decisions that are immediately enforceable. The hearing is stated to become a way of taking the best interest of the child into account.[333]

224. In the 2019 report the Swedish Migration Board gives an overview of the measures and methods implemented to protect children's rights in the migration process.[334] This includes a digital tool for the best interest assessment and training for officials dealing with cases concerning children.[335] Whether the legal framework and instructions given by the Migration Board were transferred into good practice was investigated by several empirical and mixed methodical studies in recent years.[336]

225. However, it has also been observed that despite clear instructions in policy documents, not all children are heard individually in asylum proceedings.[337] Lundberg notes that, from the officers' perspective, the lack of individual hearing stemmed from a need to protect the best interests of the child and prevent the child from facing difficult, painful and unpleasant interviews. Lundberg also notes how 'best interests of the child' in the legislations are used to legitimise rejection in asylum proceedings.[338]

329 Swedish Migration Board (n 301) 111: translation from Anna Lundberg (n 305) 196.
330 Committee on the Rights of the Child, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para 1), CRC/C/GC/14, paras 35 and 99.
331 Swedish Migration Board (n 301).
332 Swedish Migration Board, Årsredovisning 2019 Migrationsverket (Migrationsverket, 2019) 37.
333 Swedish Migration Board (n 301) 111.
334 Swedish Migration Board (n 332) 41f.
335 ibid.
336 Anna Lundberg (n 305); Anna Lundberg (n 302).
337 Anna Lundberg (n 302) 13.
338 ibid 15.

DENMARK

QUESTION 1: WHAT IS THE STATUTORY FRAMEWORK FOR ASSESSING BIC IN IMMIGRATION DETENTION PROCEEDINGS FOR ACCOMPANIED CHILDREN AND UNACCOMPANIED CHILDREN?

226. Article 9c of the Danish Aliens Act[339] indicates that the Danish Immigration Service must grant residence permits to aliens under the age of 18 if regard for the BIC makes it appropriate. No differentiation is made between accompanied and unaccompanied minors.

227. However, the Act permits the detention of children, although according to Article 37(10), unaccompanied minors can be detained only in special immigration facilities and not in prisons.[340] All non-citizens deprived of liberty under the Act must be brought before a court of justice within three days in order for the court to 'rule on the lawfulness of the deprivation of liberty and its continuance'.[341]

228. Previously, some accompanied and unaccompanied children were detained at Denmark's Ellebaek Institution for Detained Asylum-Seekers ("Ellebaek"). However, in 2014 the European Committee for the Prevention of Torture reported that Ellebaek was not an appropriate environment for holding children and did not offer adequate support.[342] The Committee therefore recommended that Denmark stop detaining children there entirely.[343] Although the Danish Refugee Council notified the Global Detention Project in 2018 that Denmark no longer detained unaccompanied minors and children in families under the rules on detention in the Aliens Act,[344] it is a fact that Denmark continues to detain in its Sjælsmark deportation camp families with children whose asylum claims were rejected.

339 Aliens Consolidation Act No 239 of 10 March 2019 ("Aliens Act") art 9c.
340 ibid art 37(10).
341 ibid, art 37(1).
342 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Report to the Danish Government on the Visit to Denmark Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 13 February 2014* (Council of Europe, 2014) 47.
343 ibid.
344 Global Detention Project, "Denmark Immigration Detention Profile" (*Global Detention Project*, May 2018), s 2.4 <https://www.globaldetentionproject.org/countries/europe/denmark#_ftn14> accessed 18 April 2020.

229. While the Aliens Act does not provide an explicit framework for assessing BIC in detention proceedings, the Danish government stated in 2014 that it had both a 'strategy' for the use of detention under the Aliens Act, as well as 'in-house instructions' regarding the detention of certain children at Ellebaek.[345] These informal frameworks are summarised below.

230. According to the Danish government, the Danish National Police 'has set out a strategy for the use of detention under the Danish Aliens Act', which provides, *inter alia*, that detention must always be: (1) 'used with consideration and only if and as long as it is necessary to reach the objective aim';[346](2) 'based on a specific assessment in each individual case';[347] (3) 'only effected if less coercive measures are insufficient'; and (4) 'proportional and as short as possible'.[348] Moreover, the Danish government highlighted that '[i]f an alien is being deprived of his liberty, the case must be prioritised and expedited as quickly as possible, and *special consideration must be taken in cases concerning vulnerable aliens*', *specifically including minors*.[349] The Danish government did not, however, define or further describe 'special consideration', nor reference any BIC assessment.

231. As for the separate in-house instructions developed by the Ellebaek facility, they were applied in relation to 'the detention of parents accompanied by children under 7 years of age'.[350] According to the government, these instructions 'describe the various conditions and requirements to be satisfied to safeguard the best interests of a child when its parent is committed to the Institution'.[351] While these instructions do not appear to have been made publicly available, the government describes them as follows:

> 'If the best interests of a child cannot be safeguarded while it is committed to the Institution, the local authorities will be requested to assume responsibility for the care of such child. The Institution always endeavours to limit the period of committal imposed on this group of people as much as

345 Comments from the Danish Government to the report by the Commissioner for Human Rights of the Council of Europe following his visit to Denmark from 19 to 21 November 2013 (2014) ("Comments from the Danish Government") 12, 14.
346 ibid.
347 ibid.
348 ibid 14.
349 ibid (emphasis added).
350 ibid 12.
351 ibid.

possible. Accordingly, the instructions stipulate that parents accompanied by one or more children may not be committed to the Institution for more than 72 hours. The period of detention is usually less than 24 hours.'[352]

232. It is unclear if the Sjælsmark camp has similar in-house instructions for child detentions, although the Danish National Police's 'strategy' outlined above presumably applies to child detentions at the Sjælsmark camp.

QUESTION 2: WHAT IS THE CONTENT OF BIC IN THIS JURISDICTION?

233. Although it is unclear if Denmark has any formal rules or informal practices regarding the detention of all children over the age of 7, in its comments on the report of the Commissioner for Human Rights of the Council of Europe, the Danish government stated that Ellebaek had additional 'in-house instructions' regarding the 'detention of foreigners aged 15-17'.[353] These instructions are not publicly available, but according to the government they provide as follows:

> '[I]t must be checked whether there are other detainees in the Institution with the same nationality as the relevant young person and, if so, whether it would be in the best interests of the young person to associate with such person. Moreover, young detainees must be offered a wider choice of leisure time activities, educational offers and similar activities. Weekly entries must also be made jointly by all staff groups in the personal file of all young detainees, and the head of the relevant prison unit must call Danish Red Cross to establish contact to the person appointed as the young person's appropriate adult. Young persons aged 15-17 are not committed to a special unit at the Institution, but to an ordinary unit based on a specific assessment of the needs and best interests of the individual young person. It should be noted in this respect that in reality very few foreigners aged 15-17 are committed to the Institution, for which reason no separate unit has been set up for this specific age group.'[354]

352 ibid.
353 ibid 13.
354 ibid.

A. WHAT IS THE WEIGHT OF THE BIC ASSESSMENT IN THIS JURISDICTION?

234. The fact that Danish law does not provide for the consideration of the BIC with respect to detention suggests that this is not a paramount or overriding factor in detention decisions. Nonetheless, Elleback's informal 'in-house instructions' do suggest that, at least with respect to children under 7, detention would not be permitted if not deemed to be in the child's best interests.[355] With respect to children between the age of 15 and 17, however, the BIC was characterised more as a non-determinative factor to be considered with respect to the conditions of detention, rather than detention itself.[356]

235. It is also notable that, in his 2014 report, the Commissioner for Human Rights of the Council of Europe commented that 'civil society organisations have raised concerns regarding the extent to which the authorities treat the best interests of the child as a primary consideration in their decisions to detain [minors held in the detention centre of Elleback] and whether they use detention as a measure of last resort, as required by international standards'.[357] The Commissioner also noted that such organisations also 'consistently reported…that considerations relating to immigration control tend to have clear primacy in such actions and decisions in Denmark'.[358] Similarly, the Danish Parliamentary Ombudsman's report on the living conditions for children detained at Sjælsmark[359] suggests that BIC is not an overriding consideration.

236. In short, Denmark has never had a formal framework for assessing BIC in immigration detention proceedings, but its past informal guidelines have treated BIC as a non-determinative factor, for which the government has received criticism.

237. At the same time, the Aliens Act specifically requires an assessment of the BIC in certain limited, yet significant, contexts, such as (1) granting residence permits to

355 ibid 12.
356 ibid 13.
357 Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following his visit to Denmark from 19 to 21 November 2013 (CommDH(2014)4) ("Commissioner for Human Rights Report") para 41.
358 ibid para 7.
359 Danish Parliamentary Ombudsman, *Children in Exit Center Sjælsmark live in difficult conditions* (20 December 2018) <http://www.ombudsmanden.dk/find/nyheder/alle/boern_i_udrejsecenter_sjaelsmark/> accessed 3 May 2020 ("Ombudsman Report").

unaccompanied minors;[360] (2) family reunification procedures;[361] (3) permitting minors to live in private accommodation and undertake employment;[362] and modification of a decision appointing a special representative to safeguard the interests of unaccompanied minors who stay in Denmark.[363] In all these instances, the assessment involves an exercise of checking whether the 'regard for the BIC makes it appropriate' to take a certain decision, indicating that it is not a paramount consideration.

B. ARE NON-CUSTODIAL MEASURES OR ALTERNATIVE DETENTION MEASURES CONSIDERED AT ALL? IS THERE POSITIVE OR NEGATIVE COMMENTARY ON THESE MEASURES?

238. As a general matter, the Aliens Act provides a number of non-custodial alternatives to detention, including confiscation of passports, the payment of a bail, residence at 'an address determined by the police', and reporting to the police at specified times.[364] According to the European Database of Asylum Law, '[t]hese alternatives are used in practice, but in the majority of cases the Courts tend to approve the extension of detention.'[365]

239. As noted above, children under the age of 7 detained with their families could be taken into the care of 'local authorities' if it were determined not in their best interests to be detained at Ellebaek.[366] Today, however, children are reportedly not detained at Ellebaek anymore. Instead, family units seeking asylum may be housed in asylum centres or private residences, subject to the potential restrictions described above.[367] The Ombudsman Report also indicates that it may be in the best interests of the children detained at Sjælsmark to be allowed to live in the ordinary community.[368]

360 Aliens Act (n 339) art 9(c).
361 ibid.
362 ibid arts 14(a), 42(l).
363 ibid art 56(a).
364 ibid art 34.
365 "Country Profile – Denmark" (*European Database of Asylum Law*, 1 Feb 2018) <https://www.asylumlawdatabase.eu/en/content/country-profile-denmark#UAM> accessed 18 April 2020.
366 Comments from the Danish Government (n 345) 12.
367 See Aliens Act (n 339) art 34.
368 Ombudsman Report (n 359).

240. Unaccompanied children seeking asylum are typically housed in special accommodation centres with specially trained staff.[369] When children pose a risk to themselves or others, they may also be placed in 'partly locked, secure, or specially secure' facilities.[370] Note that, while the Act requires a detailed set of considerations to be made before any such transfer, they do not explicitly refer to an assessment of the BIC.

241. Unaccompanied minors seeking asylum are also offered the opportunity for housing outside a centre (e.g. with family members already residing in Denmark), as well as for seeking ordinary employment while their case is processing, if they have stayed in Denmark for six months and are deemed to have the necessary maturity to undertake a job and provide for themselves.[371]

C. DOES THIS JURISDICTION RESPECT A CHILD'S RIGHT TO BE HEARD, TAKE THE CHILD'S VIEWS INTO CONSIDERATION, GET THE CHILD EXAMINED BY PSYCHOLOGISTS AND OTHER PROFESSIONALS, AND TAKE THE CHILD'S VULNERABILITIES INTO CONSIDERATION DURING IMMIGRATION DETENTION PROCEEDINGS?

242. As noted above, Denmark does not have a specific framework for assessing BIC in immigration detention proceedings.

243. However, Denmark does have a framework for assessing whether unaccompanied minor asylum seeker should be placed in 'partly locked, secure, or specially secure' facilities. While this framework does not explicitly call for an assessment of the BIC, it does provide that any recommendation to place an unaccompanied minor in these facilities must include: (1) a professional examination showing, *inter alia*, that the placement is 'imperative for socio-educational treatment' and there is an 'obvious risk that the child's health or development will suffer serious harm' due to criminal behaviour, misuse problems, or other behaviour or adjustment problems on the part of the child; (2) a plan for placement, including support and intended initiatives, and (3) the views of the unaccompanied minor concerning the intended placement.[372]

369 Aliens Act (n 339) arts 42(a)(5), 62(b)-(k).
370 ibid arts 62(l)-(o).
371 ibid arts 14(a), 42(l). See also Comments from the Danish Government (n 345) 4.
372 Aliens Act (n 339) arts 62(m), (p).

244. Under the Danish Children's Reform, all children in Denmark have a 'right to be involved from the age of 12 years in all aspects including complaints about assignment of special support, repatriation from a placement or a foster family or other angles on children's life'. The Consolidation Act on Social Services 2013 states that this opportunity 'may be dispensed with if the child has not attained the age of 12, or where it is deemed to be harmful to the child'.[373]

QUESTION 3: ANY OTHER OBSERVATIONS IN LAW OR PRACTICE RELATING TO THIS JURISDICTION AND BIC?

245. In 2014, the Commissioner for Human Rights expressed concern with respect to the BIC in family reunification procedures in Denmark.[374] As a general matter, only children 14 and under have a statutory right to reunification, though the Aliens Act does allow for some exceptions when the best interests of the child require family reunification to be granted (e.g. when a child older than 14 has no other family residing in his/her country of origin, has a serious disease or disability for which there is no treatment available in his/her country of origin, or if one or both parents in Denmark are refugees).[375] Moreover, the Aliens Act places a great deal of emphasis on a child's potential to integrate into Danish society.

246. The Commissioner expressed 'regrets' that the BIC is 'only considered as a determining factor in exceptions to the prevailing principle' and emphasised that 'according to the UNCRC, a child means every human being below the age of 18 years, which is also the age retained by the Council of Europe Committee of Ministers in its Recommendation on the legal status of persons admitted for family reunification'.[376] He also noted concern that 'the importance granted to the assessment of the integration potential can in practice result in insufficient consideration for the best interests of the child.'[377]

373 Consolidation Act on Social Services 2013, art 74(2).
374 Commissioner for Human Rights Report (n 357) paras 11-13.
375 Aliens Act (n 339) art 9(c).
376 Commissioner for Human Rights Report (n 357) para 11.
377 ibid para 13.

247. According to the Danish government, however, 'ensuring a more balanced set of rules on family reunification involving children has been a priority matter' for the government, with new legislation adopted in 2012 'placing further emphasis on the best interests of the child'.[378] Under the new legislation, 'the integration potential of a child is considered only if the child has reached the age of 8, has a parent in a country other than Denmark and a parent in Denmark, and if the parents have decided that the child should not apply for family reunification in Denmark within the first 2 years after the conditions for family reunification were fulfilled.'[379] According to the Danish government, this rule encourages parents to apply for family reunification for the child as soon as possible, 'which must be considered to be in the best interest of the child, if the child is going to live in Denmark'.[380] Moreover, the government noted that it "does not accept the premise that the child's integration potential and the best interest of the child are opposite to each other. Often it will be in the best interest of the child to stay with the parent in the country where the child has grown up and is already integrated in society."[381]

[378] Comments from the Danish Government (n 345) 1.
[379] ibid. See also Aliens Act (n 339) art 9(c).
[380] ibid.
[381] Comments from the Danish Government (n 345) 1.