**Children’s Rights and Alternative Care**

**Submissions by the AIRE Centre and AIRE Ireland to the UN Committee on the Rights of the Child Day of General Discussion on 16-17 September 2021**

**30 June 2021**

**About the Contributors**

1. This contribution to the Day of General Discussion on Alternative Care is made by the AIRE Centre and its sister organisation AIRE Ireland.[[1]](#footnote-1) Both organisations have similar remits namely to ensure that everyone is able to enjoy in practice the rights that they are guaranteed under international and European human rights instruments and in particular under the UNCRC. The AIRE Centre has operated out of London across the 47 member states of the Council of Europe for almost 30 years. AIRE Centre Ireland was born out of several years of work in Ireland, and was set up in 2019 to focus on human rights protection in Ireland and in particular the rights applicable under the UNCRC and European Law. Unlike the UK, Ireland accepted the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OP3) in 2014. The UK has not incorporated the UNCRC into its domestic law or accepted OP3. The AIRE Centre and AIRE Ireland are both members of the Child Friendly Justice - European Network (CFJ-EN). The AIRE Centre ran a project “Separated Children in Judicial Proceedings” jointly with the Irish University College Cork Child Law Clinic and other partners which promoted the cross fertilisation of knowledge from the different areas of legal practice affecting children separated from their parents – including those being placed in alternative care.
2. The London based AIRE Centre has litigated at the European Court of Human Rights (ECtHR) many landmark cases on the rights of children – and in particular on the rights of children in alternative care – both as a representative of the applicants and as a third party intervenor. A selection of these cases are discussed below. They concern :
3. the failure to take children into alternative care when this was plainly needed;
4. the taking or keeping of children in alternative care as a result of negligent assessments;
5. the complete severance of links with the birth parents and the inappropriate placing of children for non-consensual adoption;
6. the failure by the authorities to meets the needs of migrant children who are in the care of the state as a consequence of their situation as involuntary unaccompanied migrants;
7. and, more generally, the lack of remedies available to children in situations relating to alternative care.
8. In all these cases the AIRE Centre has systematically drawn the attention of the Court to the relevant provisions of the UNCRC applicable under Article 53 of the ECHR.

**The Scope of the Day of General Discussion**

1. As the concept note makes clear at paragraph 10:

*“Children are placed in alternative care in a plurality of social contexts and for multiple reasons. The care settings these children live in vary greatly in the content, quality and duration of care. Importantly, children in alternative care are not a homogenous group but are children with manifold and complex circumstances and needs as well as resilience and strengths, which call for correspondingly different strategies in* ***preventing family separation, developing appropriate care solutions and actions aimed at de-institutionalization****”.*

1. This contribution is based only on the AIRE Centres’ direct experience through their litigation at the ECtHR and/or policy work.
2. **The failure to take children into alternative care when this was plainly needed.**
3. In *Z and others v. the United Kingdom[[2]](#footnote-2)* five children under 5 were kept in appalling conditions of neglect and cruelty. The children were frequently locked outside in a dirty garden, and they were locked in their filthy bedrooms where they defecated and smeared faeces on their windows, having no access to a bathroom*.* The children’s beds were broken and A’s had a *“metal bar protruding from it”[[3]](#footnote-3)* and the children’s bedding was *“wet, smelly and soil-stained.”[[4]](#footnote-4)* The children were confined in these conditions as *“the children had described blocks of wood being placed against their bedroom doors.”[[5]](#footnote-5)* The neglect was so severe that the children did not know how to bathe, clean their teeth or use the toilet and were regularly taking food from bins. Although both social services and other state authorities were aware of the situation and had contact with the children on several occasions over a period of 5 years, only occasional “respite care” was provided and no steps were taken to remove the children from these degrading conditions and place them in alternative care until the oldest child was 10 . This was despite the mother asking several times for the children to be taken into care or adopted. The consultant psychiatrist who was eventually able to see them said “*In her opinion, social services had “leaned over backwards to avoid putting these children on the Child Protection Register and had delayed too long, leaving at least three of the children with serious psychological disturbance as a result.”[[6]](#footnote-6)*
4. For as long as social services failed to carry out their statutory responsibility to take the decision to take the children into care there was **no-one** to represent the children’s interests. In the absence of the commencement of care proceedings no *guardian ad litem* could be appointed and there was no-one to represent the children. The case of *Z and others* was a horrific but classic example of the responsible authorities erring on the side of striving to keep the children in their “home” with their mother rather than providing them with the publicly funded alternative care they needed away from the profoundly damaging environment in which they lived.
5. **Inappropriate methods of taking of children into alternative care (or retaining them in care) as a result of not listening to children, or considering their views, or of making negligent assessments.**
6. *T.P. and K.M. v. the United Kingdom*[[7]](#footnote-7) concerned a mother (TP) **who was herself still a child** at the time at which she gave birth to her own child (KM). KM suffered from frequent urinary tract infections and was (eventually) diagnosed with a kidney condition. At an interview with a psychiatrist it emerged – correctly – that she had been sexually abused by the mother’s previous boyfriend. KM clearly indicated that this boyfriend had been thrown out by her mother and was no longer in the home. The psychiatrist failed to listen to the child properly and assumed that the abuser was the mother’s current boyfriend. The authorities refused to disclose the video of the interview to the mother and the error remained undetected – and the child remained placed in foster care – for over a year.[[8]](#footnote-8) Had the child been properly listened to as required by Article 12 UNCRC this would not have occurred.
7. The next cases concern situations where there was some medical evidence justifying a further investigation of a situation. But there was no other circumstantial evidence about the family situation to suggest abuse that would have justified the removal of a child from his/her parents.
8. *M.A.K. and R.K. v. the United Kingdom*[[9]](#footnote-9) concerned a child (aged 8) who had marks resembling bruising on her legs and so was taken by her father to the doctor who sent her for tests. About the same time she had an accident on her bicycle and complained of discomfort between her legs as a result of the accident. When the father took the child for the bruising condition tests, he was publicly suspected of abusing the child who was then (illegally) kept in hospital away from her family. The child herself was never told what was going on and, crucially, *never asked* about the cause of her discomfort which others already knew about but the doctors and social workers did not. This case again raises issues under Article 12 UNCRC. The child was eventually diagnosed with Schambergs disease a condition of inflamed capillaries that causes marks comparable to bruising.
9. *R.K. and A.K. v. the United Kingdom[[10]](#footnote-10)* and *A.D. and O.D. v. the United Kingdom[[11]](#footnote-11)* are both cases where the children in question were young infants and in both cases there were accusations of non-accidental injury (NAI) leading to the children being removed from their parents when they were actually suffering from *osteogenesis imperfecta* (brittle bone disease) (OI) which consequently went undiagnosed leaving them at grave risk of sustaining further fractures. In the case of *R.K. and A.K* a fracture was found and NAI was suspected, although the child was much wanted and loved and lived in a stable happy family. The baby was taken from the parents.
10. In both *M.A.K. and R.K.* and *R.K. and A.K.* the children in question belonged to close knit Muslim communities of Pakistani ethnic origin with, in the case of *R.K. and A.K.*, minimal knowledge of English and the matters proceeded without access to interpretation.
11. In *A.D. and O.D*. healed fractures were found in an infant who had from birth needed significant support and artificial feeding in pristine conditions. There were no social or socio-psychological factors present that would have indicated a probability of NAI. The mother of OD presented obvious classic sequalae suggesting OI in the child but this was not explored. The family were taken from the clinically hygienic environment they maintained at home for the sickly infant and placed in a Family Assessment Centre far away without the opportunity to take the child’s special feeding solutions with them. The Centre which was very dirty had shared facilities and many problem families with drug and alcohol dependency issues. The wrong assessment test was carried out and the child was placed in foster care with strangers before the correct assessment could be carried out.
12. When there is a proposal to take children into alternative care it is essential that the views of a child who is old enough to form them are heard. Article 12 UNCRC makes it clear that this must happen – as a matter of course. Further, where even a young child can provide relevant evidence it is equally essential to listen – and to listen *properly* – to that child’s evidence. Suspected abuse must of course always be investigated but the responsible authorities must also always ensure that the child’s best interests remain the primary consideration and not their own protocols or procedures. They must ensure that they are not causing more harm than good by the measures which they adopt. They must give full and proportionate consideration to any measures that could be adopted that would be a less disproportionate interference with the child’s best interests when they are purportedly acting to further those interests.
13. **The severance of links with the birth parents and the placing of children for adoption or in a kafala arrangement.**
14. *P., C. and S. v. the United Kingdom[[12]](#footnote-12)* concerned a mother P her husband C and their child S. Like TP above – **P was herself still a child when she had given birth in the USA to her first child** A (not involved in these proceedings). She had been found to suffer from Munchausen’s Syndrome by Proxy in relation to her second child B – a condition where carers, usually mothers, imagine or (more seriously) even induce symptoms of ill-health. Now, in a new stable marriage she was pregnant but when social services discovered her history they sought an emergency protection order and the baby was removed from her shortly after birth and placed in foster care with strangers. All offers of a placement (with appropriate safeguards) within the father’s extended family who included a registered local authority foster carer were refused. Parental contact was permitted with excellent reports by the experts on the parent child relationship. Nevertheless the child was eventually put up for adoption, and the adoption became final although the *father* was not considered himself to pose any risk to the child. Unlike many other countries, English law only has one form of adoption – full adoption – which permanently and irrevocably severs all legal links with *both* the birth parents. The courts had no power to order ongoing contact (direct or indirect) with either of the birth parents (see UNCRC Articles 7, 18).
15. *Strand Lobben and others v. Norway*[[13]](#footnote-13)*:* This case concerned the removal of a child X from a mother with reduced cognitive skills associated with her epilepsy. At birth ,the mother and maternal grandmother moved voluntarily into a mother and baby unit supervised by child care professionals. The child failed to thrive and gain weight, attributed to the mother’s lack of commitment to feeding and nurturing . Importantly, there was no suggestion that she had in any way deliberately or negligently injured the child. After the child’s foster placement at the age of 3 weeks there was very limited permitted contact (initially weekly, then soon reduced to 2 hours 4 times a year) over the three years he was in foster care. This eventually led to X being freed for adoption primarily because of the attachment to his foster carers rather than his mother. The mother had meanwhile married and had another child. She was demonstrably successfully parenting the second child. She was nevertheless deprived of her parental responsibilities for X and he was adopted. (See UNCRC Articles 3, 9, 18, 20, 21)
16. *Abdi Ibrahim v. Norway[[14]](#footnote-14)*: this is another case of a **mother who was still a child herself when she gave birth.**  She had grown up in Somalia, became pregnant and had to leave to go and hide in Kenya with an uncle to give birth to X at the age of 16. She fled Kenya with X and eventually managed to reach Norway where she had cousins. She was recognised as a refugee. When apparently still a child herself (aged 17) she sought assistance from a parent child centre who reported that her lack of parenting skills put the baby at risk and the baby was taken from her and placed in foster care with maternal contact of only 2 hours 4 times a year. The young mother was concerned that, if the child really had to be fostered, this should be with a Somali or at least a Muslim family or family that would not make him abandon his religion. Eventually the child was placed for adoption with a devout Christian family who intended to baptise him. (See UNCRC Articles 3, 9, 18, 20, 21)
17. SM Algeria CJEU[[15]](#footnote-15): This was a case where an illegitimate child had been abandoned at birth to **institutional care** by her mother (father unknown). She was subsequently fortunate to be placed in a kafala relationship[[16]](#footnote-16) with two French citizens of Algerian ethnic origin who have since provided her with a permanent loving family. All safeguards were in place (including a period of reflection for the birth mother and full administrative and judicial procedures leading to the legal recognition of the kafala arrangement) The father had to return to work in the UK. The child was refused a visa to accompany the mother to join him.[[17]](#footnote-17) She could not be considered their child as she had not been ***adopted.***
18. Several important points for the Day of Discussion emerge from these cases: (i) the inflexible nature of non-consensual adoption in many jurisdictions which cannot adapt to the needs and best interests of individual children (ii) the failure of the systems to provide meaningful contact between children and their birth parent(s) even in situations of alternative care that is designated temporary; and lack of respect for the child’s cultural identity (iii) in the Islamic world abandoned or orphaned children in the care of the state can either remain in institutional settings or acquire new “parents” through judicial kafala arrangements. If those new parents live in Western countries it is essential that those kafala parenting arrangements are respected. Many more orphaned or abandoned children risk remaining – unnecessarily – in **institutional care** if their prospective (Muslim) parents are unable to bring them to live with them in their (non-Muslim) countries of residence.
19. **The failure by the authorities to meet the needs of migrant children who find themselves in the care of the state as a consequence of their situation as forced migrants.**
20. Children are amongst the most vulnerable individuals in society due to their young age and personal circumstances and unaccompanied child asylum seekers are even more so.[[18]](#footnote-18) When they arrive in a country they become the responsibility of that state and must be provided with alternative care. Their detention will only very exceptionally be justified and only ever as a measure of last resort.
21. *Rahimi v. Greece* concerned an orphaned Afghanistan national, aged 15, in Greece. The authorities failed to identify the applicant as an unaccompanied minor, despite the fact that he was without a guardian to act as his legal representative. The Court noted the “extreme vulnerability” of unaccompanied migrant children.[[19]](#footnote-19)
22. *H.A. and others v. Greece[[20]](#footnote-20)* concerned the detention of unaccompanied minors in overcrowded, unheated and poorly ventilated cells where they slept on the floor. The conditions were so poor that they had threatened to set themselves on fire. The applicants were not given adequate care, food, support or sufficient access to health care.
23. The Committee is very familiar with erroneous age assessments and the failure to respect and observe the presumption of minority from the many complaints it has dealt with. Unaccompanied minors being in particularly vulnerable situations, the CRC has noted that the expeditious appointment of a guardian as well as the subsequent provision of a legal representative is required in order to respect the child’s best interests.[[21]](#footnote-21)
24. Unaccompanied or accompanied minors seeking refugee status *“shall…receive appropriate protection and humanitarian assistance.”* Children should be provided with an alternative care solution. The UNHCR Best Interests Guidelines 2021 draws on the UNGA Guidelines, recognising that states have a positive obligation to protect and ensure alternative care for all children.[[22]](#footnote-22)With regard to unaccompanied children, they note that migrant children*, ‘need to be provided with temporary alternative care that is in their best interests until…a new permanent solution is identified.’[[23]](#footnote-23)* (Article 22 UNCRC)
25. *Sh. D. and others v. Greece and others[[24]](#footnote-24)* concerned the detention of unaccompanied minors in Greece who were trying to reunite with family members in Germany but placed in “protective custody” in Greece without suitable support and assistance.
26. “*Every child, at all times, has a fundamental right to liberty and freedom from immigration detention.”[[25]](#footnote-25)* Detention of a child should be a measure of last resort, for the shortest appropriate period of time and appropriate protection should be in place.[[26]](#footnote-26) It is affirmed by the CRC that the detention of unaccompanied or separated children “cannot be justified solely on the basis of the child being unaccompanied or separated”.[[27]](#footnote-27) Furthermore, the Council of Europe Guidelines on human rights protection in the context of accelerated asylum proceedings notes: “*children, including unaccompanied minors should, as a rule, not be placed in detention. In those exceptional cases where children are detained, they should be provided with special supervision and assistance*”.[[28]](#footnote-28)
27. Moreover, unaccompanied minors ‘*need to be provided with* ***temporary alternative care*** *that is in their best interests until they are reunited with their family,’*[[29]](#footnote-29)not be placed in detention.
28. **The lack of remedies available to children in alterative care situations.**
29. In *Z and Others,* if the responsible local authority failed to initiate care proceedings , there was no guardian appointed and no-one to assume responsibility for their interests. The children were then unable to sue the public authority for negligence under the domestic law.[[30]](#footnote-30) The law held that no ‘duty of care’ was owed in *M.A.K. and R.K. ,* *R.K. and A.K.*, *A.D. and O.D*.
30. In *P,C and S* once adoption placement had been decided there was no legal possibility for the courts to *order* even indirect contact with either birthparent (even if they had considered it was in the child’s best interests).
31. The asylum seeking children whose cases (above) have come before the ECtHR had no effective remedies available.
32. The Committee on the UNCRC has stated that the right to an effective remedy is implicitly required by the Convention.[[31]](#footnote-31) The Committee also laid out the obligation on states to establish mechanisms to provide remedies to ensure the principle of the best interests of the child is fully observed in implementation measures and judicial and administrative proceedings.[[32]](#footnote-32)
33. Children in alternative care are at a particular disadvantage when it comes to enforcing their rights, with a lack of resources and a reliance on others to act on their behalf. Difficulties in imposing liability for negligence on public bodies remains an obstacle in properly realising the best interests of the child. Asylum seeking children are even more particularly disadvantaged when it comes to remedies.
1. The AIRE Centre (Advice on Individual Rights Europe) and The Advice on Individual Rights In Europe (AIRE) Centre Ireland Company Limited By Guarantee. [↑](#footnote-ref-1)
2. *Z and Others v. the United Kingdom* [GC], no. 29392/95, ECHR 2001-V. [↑](#footnote-ref-2)
3. *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 20, ECHR 2001-V. [↑](#footnote-ref-3)
4. *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 22, ECHR 2001-V. [↑](#footnote-ref-4)
5. *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 19, ECHR 2001-V. [↑](#footnote-ref-5)
6. *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 40, ECHR 2001-V. [↑](#footnote-ref-6)
7. *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, ECHR 2001-V (extracts). [↑](#footnote-ref-7)
8. 13 November 1987 – 21 November 1988. [↑](#footnote-ref-8)
9. *M.A.K. and R.K. v. the United Kingdom*, nos. 45901/05 and 40146/06, 23 March

2010. [↑](#footnote-ref-9)
10. *R.K. and A.K. v. the United Kingdom*, no. 38000/05, 30 September 2008. [↑](#footnote-ref-10)
11. *A.D. and O.D. v. the United Kingdom*, no. 28680/06, 16 March 2010. [↑](#footnote-ref-11)
12. *P., C. and S. v. the United Kingdom*, no. 56547/00, ECHR 2002-VI. [↑](#footnote-ref-12)
13. *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019 (AIRE Centre intervening). [↑](#footnote-ref-13)
14. *Abdi Ibrahim v. Norway*, no. 15379/16, 17 December 2019. Referred to Grand Chamber judgment pending( AIRE Centre intervening). [↑](#footnote-ref-14)
15. Case C-129/18, SM v Entry Clearance Officer, UK Visa Section [2019], judgment of the Court (Grand Chamber) of 26 March 2019 (AIRE Centre intervening). [↑](#footnote-ref-15)
16. Islam does not permit Western style adoption. [↑](#footnote-ref-16)
17. Cf. *Y.B. and N.S. v. Belgium*, no 12/2017, UN Committee on the Rights of the Child (CRC), 27 September 2018. [↑](#footnote-ref-17)
18. *Rahimi v. Greece*, no. 8687/08, § 87, 5 April 2011; See also *Trawalli and others v. Italy,* no, 47287/17, communicated on 11 January 2018. (AIRE Centre intervening) [↑](#footnote-ref-18)
19. *Rahimi v. Greece*, § 58, no. 8687/08, 5 April 2011. [↑](#footnote-ref-19)
20. *H.A. and Others v. Greece*, no. 19951/16, 28 February 2019. (AIRE Centre intervening) [↑](#footnote-ref-20)
21. UN CRC, *General comment No. 6 (2005),* CRC/GC/2005/6, paras. 1 and 21. [↑](#footnote-ref-21)
22. UNHCR, Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child, 2021, page 137. [↑](#footnote-ref-22)
23. UNHCR, Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child, 2021, page 137. [↑](#footnote-ref-23)
24. *SH.D. and others c. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, no. 14165/16, 13 June 2019. (AIRE Centre intervening) [↑](#footnote-ref-24)
25. UN CMW, *Joint general comment No. 4 (2017) and UN CRC No. 23 (2017),* CMW/C/GC/4-CRC/C/GC/23, para 5; Cf. Manfred Nowak, ‘The United Nations Global Study on Children Deprived of Liberty’, November 2019. [↑](#footnote-ref-25)
26. UNCRC, Article 37(b); UN CRC, *General comment No. 6 (2005),* CRC/GC/2005/6, para. 61. [↑](#footnote-ref-26)
27. UN CMW, *Joint general comment No. 4 (2017) and UN CRC No. 23 (2017)* CMW/C/GC/4-CRC/C/GC/23, para. 8; UN CRC, General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, para. 61. [↑](#footnote-ref-27)
28. Council of Europe: Committee of Ministers, Guidelines on human rights protection in the context of accelerated asylum procedures, 1 July 2009, principle XI.2. [↑](#footnote-ref-28)
29. UNHCR, Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child, 2021, page 137. [↑](#footnote-ref-29)
30. *X and Others v. Bedfordshire County Council* [1995] 3 All England Law Reports 353. [↑](#footnote-ref-30)
31. UN CRC, *General comment no. 5 (2003),* CRC/GC/2003/5, para 24. [↑](#footnote-ref-31)
32. UN CRC, *General comment No. 14 (2013),* CRC /C/GC/14, para 15 (c). [↑](#footnote-ref-32)