

GUIDELINES AND RECOMMENDATIONS FOR THE CHILD'S BEST INTEREST ASSESSMENT IN IMMIGRATION DETENTION PROCEEDINGS CARRIED OUT BY THE POLISH AUTHORITIES

Based on the national and international laws, case-law, recommendations, and guidelines, we propose that when examining the child's best interest in immigration detention proceedings, the competent authorities and courts should take into account the circumstances mentioned in this document and undertake specific activities described below, relevant to this assessment.

The following recommendations are of a framework nature, the full content of the recommendations can be found in the part of this document that contains the description of the relevant standards, and the source texts indicated in this study.

I. Elements to be taken into account when assessing the child's best interest

1. The child's identity, including characteristics such as his/her experience, age, national and ethnic origin, country of origin and religion, and beliefs. In case of doubts as to the age of a child, it should be determined in accordance with the guidelines of international organizations. In particular, it is necessary to examine whether the child:

- comes from a region or country of military conflict or human rights violations and has been affected by them,
- belongs to a social group persecuted in the country of origin,
- has been deprived of liberty in the past, and if so, how did it affect him/her,
- will have the opportunity to practice religion in a detention centre,
- whether the detention centre arrangements are suitable for the child and its cultural background (e.g. when the unaccompanied child suffers from gynecological diseases and the medical staff are only men, which may not be accepted for cultural reasons; whether the proper diet will be provided etc.),
- how the child, due to his/her age or maturity, perceives the length of detention and how aware he/she is of his/her situation.

2. The family situation of the child.

In particular, the following elements should be examined:

- what are the family relations, i.e. whether the parents/guardians do not use violence against the child or neglect him, whether there is a conflict of interest between the child and parents/guardians, and whether the psychophysical state of the parents/guardians allows them to properly take care of the child,
- does the unaccompanied child have parents or close relatives living in Poland or in another EU Member State who could take care of him/her.

3. Vulnerabilities or belonging to the minority group.

In particular, it should be examined whether the child:

- has experienced violence (including violence inflicted by his/her family members), whether is disabled, pregnant, belonging to a sexual minority, is a victim of human trafficking, kidnapping, illegal adoption, forced labor, etc.
- whether, in connection with child's specific features, detention will not be against the child's best interest, e.g. whether it will expose the child to violence from other foreigners placed in the

detention centre (belonging to antagonistic groups or not tolerating certain features, e.g. LGBT persons),

- whether his/her privacy will be respected.

4. Physical, mental, and emotional health (whether he/she does suffer from mental disorders related to trauma or violence, chronic or rare diseases, allergies, etc.).

Such individualized assessment should be carried out often, with regular reviews. It should be carried out both before issuing a decision about placing the child in a detention centre and during further detention proceedings (to examine how the ongoing detention affected his/her mental state, whether detention does not last too long and does not cause suffering to the child, etc.). In addition, it should be assessed in particular whether a child can be provided with adequate treatment in the detention centre, whether a pediatrician and other relevant specialist doctors are available.

5. Child's access to adequate education, recreation and leisure.

In particular, the following should be examined:

- what is the child's educational level,
- availability and quality of educational services in the detention centre (how often classes are conducted there, in what language, etc.),
- whether the child will have the opportunity to rest and leisure, to engage in play and recreational activities in the detention centre.

6. Other conditions in the detention centre, e.g. whether the family will be provided with privacy and security, gender and competence of the detention centre staff to work with children, whether social workers are employed in the detention centre, whether the premises of the detention centre are adapted to children (especially small children – infants and toddlers - in need of special safety facilities), whether the staff of the detention centre having direct contact with foreigners wears uniforms, which may cause anxiety for the child.

7. Legal/migration status of the child.

Particularly it should be considered whether there are grounds for legalizing a child's stay in Poland (e.g. due to family and private life in Poland, the degree of integration of the child with Poland, length of stay in Poland, etc.).

8. It should be always taken into account that if a child is in the procedure for granting international protection, then by virtue of law, the residence, food, medical assistance, and other benefits are covered by the Office for Foreigners pursuant to Chapter 5 of the Act on granting foreigners protection.

II. Procedural safeguards to guarantee the implementation of the child's best interests in immigration detention proceedings

1. The child should have right to participate in the proceedings and his/her specific situation should be examined, regardless of the parents' situation.

a) The child's right to express his or her own views should be ensured

- the child should be informed in a child-friendly manner and in a language he/she understands about

the type of proceeding that is taking place and its possible result.

- the child, who is capable of forming his/her own views, shall be provided the opportunity to be heard, in accordance, with his/her age and level of maturity; the hearing may be conducted directly by the authority/court or by a specialist/expert (e.g. pedagogue, child psychologist).
- hearing should take place in appropriate and child-friendly environment (e.g. in so-called Friendly Hearing Rooms or premises run by local governments or NGOs),
- if the hearing is conducted directly by the authority/court, then it should take place in the presence of a child psychologist and a parent/guardian, as well as an interpreter, if necessary.

b) The child's individual situation should be examined by qualified professionals

- a team of qualified professionals should be appointed to assess the child's situation, including in particular his/her psychophysical state (including children's psychologist, pediatrician, social worker, pedagogue); they should be appointed by the court and independent of the authority which submits a motion for detention. An expert psychologist should be able to take into account other psychological opinions concerning the child. This is particularly important when private psychological opinions about the child's mental state are presented and are different than the assessment of the authorities.

c) Collecting information from other sources

- to fully assess the child's situation, also other people who have information about the child's condition and functioning should be interviewed (such as teachers, healthcare staff, etc.).
- it should be established whether other proceedings concerning the child are being conducted and whether they contain information that could be relevant in detention proceedings (e.g. application, interview report, or decisions issued as part of proceedings for granting international protection may contain information about violence and persecution suffered by a child).

2. Appropriate representation and legal assistance for the child should be provided

- a free legal assistance should be provided in detention proceedings for families as well as unaccompanied children.
- when there is doubt as to the age of the foreigner and an age assessment is carried out (and there is a possibility that he/she is an unaccompanied minor), then the foreigner should be treated as a minor during these activities and a guardian should be appointed for the duration of these activities.

3. Procedures concerning children should be prioritized

- this applies to both administrative proceedings (proceedings for granting international protection, proceedings regarding the obligation to return) and detention proceedings.
- the speediness of proceedings should not negatively affect other procedural rights, including the obligation to examine thoroughly all the circumstances of the case, etc.

4. The reasoning of the detention decision should refer to the individual situation of the child and include the result of the child's best interest assessment.

- the reasoning should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the child's best interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests; indicate how it was ensured that the best interests of the child were prioritized among all the circumstances of the case.

- Indicate what position and information were obtained from the child and how they were taken into account, as well as the opinions of the qualified professionals on the child and how they were taken into account.
- If the decision differs from the views of the child, the reason for that should be clearly stated in it. If

exceptionally, the decision issued is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. If the court decides to place a child in a detention centre, it must be indicated that this decision was taken as a measure of last resort, and that other less coercive alternative measures cannot be applied effectively. Such detention shall be applied for the shortest period of time.

5. Requirement not to deprive the child of liberty extends to the child's family

- when the child's best interests requires not to place him/her in the detention centre (or if there are other grounds for not doing so), then such requirement extends to the child's entire family,
- exemptions from this rule should only occur if the separation of the child from the parents/family members is aimed to ensure his/her best interest (e.g. in a situation where a parent uses violence against the child, then the parent should be placed in a detention centre; in the situation, when the court decides to place the whole family in a guarded centre, and one of the parents uses violence, then he/she should be placed in a different detention centre than the rest of the family).
- the need to keep the family together is a not sufficient reason to legitimize or justify the deprivation of liberty of a child; the child's best interests assessment cannot be confined to keeping the family together; detention of a family cannot be justified solely by the immigration status of parents/legal guardians.

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